Passage of the

Sexual Offences (Scotland) Bill 2008

SPPB 134
Passage of the
Sexual Offences (Scotland) Bill 2008
SP Bill 11 (Session 3), subsequently 2009 asp 9

SPPB 134

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Foreword

Purpose of the series

The aim of this series is to bring together in a single place all the official Parliamentary documents relating to the passage of the Bill that becomes an Act of the Scottish Parliament (ASP). The list of documents included in any particular volume will depend on the nature of the Bill and the circumstances of its passage, but a typical volume will include:

- every print of the Bill (usually three – “As Introduced”, “As Amended at Stage 2” and “As Passed”);
- the accompanying documents published with the “As Introduced” print of the Bill (and any revised versions published at later Stages);
- every Marshalled List of amendments from Stages 2 and 3;
- every Groupings list from Stages 2 and 3;
- the lead Committee’s “Stage 1 report” (which itself includes reports of other committees involved in the Stage 1 process, relevant committee Minutes and extracts from the Official Report of Stage 1 proceedings);
- the Official Report of the Stage 1 and Stage 3 debates in the Parliament;
- the Official Report of Stage 2 committee consideration;
- the Minutes (or relevant extracts) of relevant Committee meetings and of the Parliament for Stages 1 and 3.

All documents included are re-printed in the original layout and format, but with minor typographical and layout errors corrected. An exception is the groupings of amendments for Stage 2 and Stage 3 (a list of amendments in debating order was included in the original documents to assist members during actual proceedings but is omitted here as the text of amendments is already contained in the relevant marshalled list).

Where documents in the volume include web-links to external sources or to documents not incorporated in this volume, these links have been checked and are correct at the time of publishing this volume. The Scottish Parliament is not responsible for the content of external Internet sites. The links in this volume will not be monitored after publication, and no guarantee can be given that all links will continue to be effective.

Documents in each volume are arranged in the order in which they relate to the passage of the Bill through its various stages, from introduction to passing. The Act itself is not included on the grounds that it is already generally available and is, in any case, not a Parliamentary publication.

Outline of the legislative process

Bills in the Scottish Parliament follow a three-stage process. The fundamentals of the process are laid down by section 36(1) of the Scotland Act 1998, and amplified by Chapter 9 of the Parliament’s Standing Orders. In outline, the process is as follows:
• Introduction, followed by publication of the Bill and its accompanying documents;
• Stage 1: the Bill is first referred to a relevant committee, which produces a report informed by evidence from interested parties, then the Parliament debates the Bill and decides whether to agree to its general principles;
• Stage 2: the Bill returns to a committee for detailed consideration of amendments;
• Stage 3: the Bill is considered by the Parliament, with consideration of further amendments followed by a debate and a decision on whether to pass the Bill.

After a Bill is passed, three law officers and the Secretary of State have a period of four weeks within which they may challenge the Bill under sections 33 and 35 of the Scotland Act respectively. The Bill may then be submitted for Royal Assent, at which point it becomes an Act.

Standing Orders allow for some variations from the above pattern in some cases. For example, Bills may be referred back to a committee during Stage 3 for further Stage 2 consideration. In addition, the procedures vary for certain categories of Bills, such as Committee Bills or Emergency Bills. For some volumes in the series, relevant proceedings prior to introduction (such as pre-legislative scrutiny of a draft Bill) may be included.

The reader who is unfamiliar with Bill procedures, or with the terminology of legislation more generally, is advised to consult in the first instance the Guidance on Public Bills published by the Parliament. That Guidance, and the Standing Orders, are available for sale from Stationery Office bookshops or free of charge on the Parliament’s website (www.scottish.parliament.uk).

The series is produced by the Legislation Team within the Parliament’s Chamber Office. Comments on this volume or on the series as a whole may be sent to the Legislation Team at the Scottish Parliament, Edinburgh EH99 1SP.

Notes on this volume

The Bill to which this volume relates followed the standard 3 stage process described above.

Written evidence and supplementary written evidence received by the Justice Committee was originally published on the web only. This material is included in this volume after the Stage 1 Report.

The report of the Subordinate Legislation Committee at Stage 1 is included in the Justice Committee’s Stage 1 Report at Annexe A. Extracts from the minutes and the Official Report of the meeting on 28 October 2008 at which the Committee took evidence on the delegated powers in the Bill are included in this volume.

Before Stage 2, the Subordinate Legislation Committee considered the Scottish Government’s response to its Stage 1 report. The Committee noted the response without discussion at its meeting on 3 March 2009, and so extracts from the minutes and Official Report of that meeting are not included in this volume. The Scottish Government’s response is, however, included.
At its meeting on 10 March 2009, the Justice Committee agreed without debate to a motion in the name of the Convener to consider the sections of the Bill at Stage 2 in a different order from the order in which they arise in the Bill. An extract of the minutes of that meeting is included in this volume.
Sexual Offences (Scotland) Bill
[AS INTRODUCED]

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Sexual Offences (Scotland) Bill

[AS INTRODUCED]

An Act of the Scottish Parliament to make new provision about sexual offences, and for connected purposes.

**PART 1**

**RAPE ETC.**

**Rape**

1 **Rape**

(1) If a person (“A”), with A’s penis—

(a) without another person (“B”) consenting, and

(b) without any reasonable belief that B consents,

penetrates to any extent, either intending to do so or reckless as to whether there is penetration, the vagina, anus or mouth of B then A commits an offence, to be known as the offence of rape.

(2) For the purposes of this section, penetration is a continuing act from entry until withdrawal of the penis; but this subsection is subject to subsection (3).

(3) In a case where penetration is initially consented to but at some point of time the consent is withdrawn, subsection (2) is to be construed as if the reference in it to a continuing act from entry were a reference to a continuing act from that point of time.

(4) In this Act—

“penis” includes an artificial penis if it forms part of A, having been created in the course of surgical treatment, and

“vagina” includes—

(a) the vulva, and

(b) an artificial vagina (together with any artificial vulva), if it forms part of B, having been created in the course of such treatment.
Sexual assault and other sexual offences

2 Sexual assault

(1) If a person (“A”)—
   (a) without another person (“B”) consenting, and
   (b) without any reasonable belief that B consents,

does any of the things mentioned in subsection (2), then A commits an offence, to be known as the offence of sexual assault.

(2) Those things are, that A—
   (a) penetrates sexually, by any means and to any extent, either intending to do so or reckless as to whether there is penetration, the vagina, anus or mouth of B,
   (b) intentionally or recklessly touches B sexually,
   (c) engages in any other form of sexual activity in which A, intentionally or recklessly, has physical contact (whether bodily contact or contact by means of an implement and whether or not through clothing) with B,
   (d) intentionally or recklessly ejaculates semen onto B.

(3) For the purposes of—
   (a) paragraph (a) of subsection (2), penetration is sexual,
   (b) paragraph (b) of that subsection, touching is sexual,
   (c) paragraph (c) of that subsection, an activity is sexual,

in any case if a reasonable person would, in all the circumstances of the case, consider the penetration, or as the case may be the touching or the activity, to be sexual.

(4) For the purposes of paragraph (a) of subsection (2), penetration is a continuing act from entry until withdrawal of whatever is intruded; but this subsection is subject to subsection (5).

(5) In a case where penetration is initially consented to but at some point of time the consent is withdrawn, subsection (4) is to be construed as if the reference in it to a continuing act from entry were a reference to a continuing act from that point of time.

(6) Without prejudice to the generality of paragraph (a) of subsection (2), the reference in the paragraph to penetration by any means is to be construed as including a reference to penetration with A’s penis.

3 Sexual coercion

(1) If a person (“A”)—
   (a) without another person (“B”) consenting to participate in a sexual activity, and
   (b) without any reasonable belief that B consents to participating in that activity,

intentionally causes B to participate in that activity, then A commits an offence, to be known as the offence of sexual coercion.

(2) For the purposes of subsection (1), an activity is sexual in any case if a reasonable person would, in all the circumstances of the case, consider the activity to be sexual.
Coercing a person into being present during a sexual activity

(1) If a person (“A”)—
   (a) without another person (“B”) consenting, and
   (b) without any reasonable belief that B consents,

either intentionally engages in a sexual activity and for a purpose mentioned in subsection (2) does so in the presence of B or intentionally and for a purpose mentioned in that subsection causes B to be present while a third person engages in such an activity, then A commits an offence, to be known as the offence of coercing a person into being present during a sexual activity.

(2) The purposes are—
   (a) obtaining sexual gratification,
   (b) humiliating, distressing or alarming B.

(3) For the purposes of subsection (1), an activity is sexual in any case if a reasonable person would, in all the circumstances of the case, consider the activity to be sexual.

(4) Without prejudice to the generality of subsection (1), the reference in that subsection—
   (a) to A engaging in a sexual activity in the presence of B, includes a reference to A engaging in it in a place in which A can be observed by B other than by B looking at an image, and
   (b) to B being present while a third person engages in such an activity, includes a reference to B being in a place from which the third person can be so observed by B.

Coercing a person into looking at an image of a sexual activity

(1) If a person (“A”) intentionally and for a purpose mentioned in subsection (2) causes another person (“B”)—
   (a) without B consenting, and
   (b) without any reasonable belief that B consents,

   to look at an image (produced by whatever means and whether or not a moving image) of A engaging in a sexual activity or of a third person or imaginary person so engaging, then A commits an offence, to be known as the offence of coercing a person into looking at an image of a sexual activity.

(2) The purposes are—
   (a) obtaining sexual gratification,
   (b) humiliating, distressing or alarming B.

(3) For the purposes of subsection (1), an activity is sexual in any case if a reasonable person would, in all the circumstances of the case, consider the activity to be sexual.

Communicating indecently etc.

(1) If a person (“A”), intentionally and for a purpose mentioned in subsection (3), sends, by whatever means, a sexual written communication to or directs, by whatever means, a sexual verbal communication at, another person (“B”)—
(a) without B consenting to its being so sent or directed, and
(b) without any reasonable belief that B consents to its being so sent or directed,
then A commits an offence, to be known as the offence of communicating indecently.

(2) If, in circumstances other than as are mentioned in subsection (1), a person (“A”), intentionally and for a purpose mentioned in subsection (3), causes another person (“B”) to see or hear, by whatever means, a sexual written communication or sexual verbal communication—
(a) without B consenting to seeing or as the case may be hearing it, and
(b) without any reasonable belief that B consents to seeing or as the case may be hearing it,
then A commits an offence, to be known as the offence of causing a person to see or hear an indecent communication.

(3) The purposes are—
(a) obtaining sexual gratification,
(b) humiliating, distressing or alarming B.

(4) In this section—
“written communication” means a communication in whatever written form, and without prejudice to that generality includes a communication which comprises writings of a person other than A (as for example a passage in a book or magazine), and
“verbal communication” means a communication in whatever verbal form, and without prejudice to that generality includes—
(a) a communication which comprises sounds of sexual activity (whether actual or simulated), and
(b) a communication by means of sign language.

(5) For the purposes of this section, a communication or activity is sexual in any case if a reasonable person would, in all the circumstances of the case, consider it to be sexual.

7 Sexual exposure

(1) If a person (“A”) intentionally exposes A’s genitals in a sexual manner to another person (“B”) with the intention that B will see them and A either—
(a) intends that B will be caused alarm or distress by the exposure, or
(b) is reckless as to whether B will be caused alarm or distress by it,
then A commits an offence, to be known as the offence of sexual exposure.

(2) For the purposes of subsection (1), a manner of exposure is sexual in any case if a reasonable person would, in all the circumstances of the case, consider the manner of exposure to be sexual.

(3) It is a defence to a charge under subsection (1) that what A did—
(a) was done in the course of a performance of a play, and
(b) conformed to the directions of the presenter or director of that performance.
8 Administering a substance for sexual purposes

(1) If a person (“A”) intentionally administers a substance to, or causes a substance to be taken by, another person (“B”)—

(a) without B knowing, and

(b) without any reasonable belief that B knows,

and does so for the purpose of stupefying or overpowering B, so as to enable A to engage in a sexual activity which involves B, then A commits an offence, to be known as the offence of administering a substance for sexual purposes.

(2) For the purposes of subsection (1)—

(a) an activity is sexual in any case if a reasonable person would, in all the circumstances of the case, consider the activity to be sexual, and

(b) if A, whether by act or omission, induces in B a reasonable belief that the substance administered or taken is (either or both)—

(i) of a substantially lesser strength, or

(ii) in a substantially lesser quantity,

then it is, any knowledge which B has (or belief as to knowledge which B has) that it is being administered or taken is to be disregarded.

PART 2
CONSENT AND REASONABLE BELIEF

Consent

9 Meaning of “consent” and related expressions

In Parts 1 and 3, “consent” means free agreement (and related expressions are to be construed accordingly).

10 Circumstances in which conduct takes place without free agreement

(1) For the purposes of section 9, but without prejudice to the generality of that section, free agreement to conduct is absent in the circumstances set out in subsection (2).

(2) Those circumstances are—

(a) where the only indication or expression of consent by B to the conduct occurs at a time when B is incapable, because of the effect of alcohol or any other substance, of consenting to it,

(b) where, at the time of the conduct, B is asleep or unconscious, in circumstances where B has not, prior to becoming asleep or unconscious, consented to the conduct taking place while B is in that condition,

(c) where B agrees or submits to the conduct because of violence used against B or any other person, or because of threats of violence made against B or any other person,
(d) where B agrees or submits to the conduct because B is unlawfully detained by A,
(e) where B agrees or submits to the conduct because B is mistaken, as a result of
deception by A, as to the nature or purpose of the conduct,
(f) where B agrees or submits to the conduct because A induces B to agree or submit
to the conduct by impersonating a person known personally to B, or
(g) where the only expression or indication of agreement to the conduct is from a
person other than B.
(3) References in this section to A and to B are to be construed in accordance with sections
1 to 6.

11 Consent: scope and withdrawal
(1) This section applies in relation to sections 1 to 6.
(2) Consent to conduct does not of itself imply consent to any other conduct.
(3) Consent to conduct may be withdrawn at any time before, or in the case of continuing
conduct, during, the conduct.
(4) If the conduct takes place, or continues to take place, after consent has been withdrawn,
it takes place, or continues to take place, without consent.

Reasonable belief

12 Reasonable belief
In determining, for the purposes of Part 1, whether a person’s belief as to consent or
knowledge was reasonable, regard is to be had to whether the person took any steps to
ascertain whether there was consent or, as the case may be, knowledge; and if so, to
what those steps were.

PART 3
MENTALLY DISORDERED PERSONS

13 Capacity to consent
(1) This section applies in relation to sections 1 to 6.
(2) A mentally disordered person is incapable of consenting to conduct where, by reason of
mental disorder, the person is unable to do one or more of the following—
(a) understand what the conduct is,
(b) form a decision as to whether to engage in the conduct (or as to whether the
conduct should take place),
(c) communicate any such decision.
(3) In this Act, “mental disorder” has the same meaning as in section 328 of the Mental
Health (Care and Treatment) (Scotland) Act 2003 (asp 13) (and related expressions are
to be construed accordingly).
PART 4
CHILDREN

14 Rape of a young child

If a person (“A”), with A’s penis, penetrates to any extent, either intending to do so or reckless as to whether there is penetration, the vagina, anus or mouth of a child (“B”) who has not attained the age of 13 years, then A commits an offence, to be known as the offence of rape of a young child.

15 Sexual assault on a young child

(1) If a person (“A”) does any of the things mentioned in subsection (2) (“B” being in each case a child who has not attained the age of 13 years), then A commits an offence, to be known as the offence of sexual assault on a young child.

(2) Those things are, that A—

(a) penetrates sexually, by any means and to any extent, either intending to do so or reckless as to whether there is penetration, the vagina, anus or mouth of B,

(b) intentionally or recklessly touches B sexually,

(c) engages in any other form of sexual activity in which A, intentionally or recklessly, has physical contact (whether bodily contact or contact by means of an implement and whether or not through clothing) with B,

(d) intentionally or recklessly ejaculates semen onto B.

(3) For the purposes of—

(a) paragraph (a) of subsection (2), penetration is sexual,

(b) paragraph (b) of that subsection, touching is sexual,

(c) paragraph (c) of that subsection, an activity is sexual,

in any case if a reasonable person would, in all the circumstances of the case, consider the penetration, or as the case may be the touching or the activity, to be sexual.

(4) Without prejudice to the generality of paragraph (a) of subsection (2), the reference in the paragraph to penetration by any means is to be construed as including a reference to penetration with A’s penis.

16 Causing a young child to participate in a sexual activity

(1) If a person (“A”) intentionally causes a child (“B”) who has not attained the age of 13 years to participate in a sexual activity, then A commits an offence, to be known as the offence of causing a young child to participate in a sexual activity.

(2) For the purposes of subsection (1), an activity is sexual in any case if a reasonable person would, in all the circumstances of the case, consider the activity to be sexual.
17 Causing a young child to be present during a sexual activity

(1) If a person (“A”) either—

(a) intentionally engages in a sexual activity and for a purpose mentioned in subsection (2) does so in the presence of a child (“B”) who has not attained the age of 13 years, or

(b) intentionally and for a purpose mentioned in subsection (2) causes B to be present while a third person engages in such an activity,

then A commits an offence, to be known as the offence of causing a young child to be present during a sexual activity.

(2) The purposes are—

(a) obtaining sexual gratification,

(b) humiliating, distressing or alarming B.

(3) For the purposes of subsection (1), an activity is sexual in any case if a reasonable person would, in all the circumstances of the case, consider the activity to be sexual.

(4) Without prejudice to the generality of subsection (1), the reference—

(a) in paragraph (a) of that subsection to A engaging in a sexual activity in the presence of B, includes a reference to A engaging in it in a place in which A can be observed by B other than by B looking at an image, and

(b) in paragraph (b) of that subsection to B being present while a third person engages in such an activity, includes a reference to B being in a place from which the third person can be so observed by B.

18 Causing a young child to look at an image of a sexual activity

(1) If a person (“A”) intentionally and for a purpose mentioned in subsection (2) causes a child (“B”) who has not attained the age of 13 years to look at an image (produced by whatever means and whether or not a moving image) of A engaging in a sexual activity or of a third person or imaginary person so engaging, then A commits an offence, to be known as the offence of causing a young child to look at an image of a sexual activity.

(2) The purposes are—

(a) obtaining sexual gratification,

(b) humiliating, distressing or alarming B.

(3) For the purposes of subsection (1), an activity is sexual in any case if a reasonable person would, in all the circumstances of the case, consider the activity to be sexual.

19 Communicating indecently with a young child etc.

(1) If a person (“A”), intentionally and for a purpose mentioned in subsection (3)—

(a) sends, by whatever means, a sexual written communication to, or

(b) directs, by whatever means, a sexual verbal communication at,

a child (“B”) who has not attained the age of 13 years, then A commits an offence, to be known as the offence of communicating indecently with a young child.
(2) If, in circumstances other than are as mentioned in subsection (1), a person (“A”), intentionally and for a purpose mentioned in subsection (3) causes a child (“B”) who has not attained the age of 13 years to see or hear, by whatever means, a sexual written communication or sexual verbal communication, then A commits an offence, to be known as the offence of causing a young child to see or hear an indecent communication.

(3) The purposes are—
   (a) obtaining sexual gratification,
   (b) humiliating, distressing or alarming B.

(4) In this section—
   “written communication” means a communication in whatever written form, and without prejudice to that generality includes a communication which comprises writings of a person other than A (as for example a passage in a book or magazine), and
   “verbal communication” means a communication in whatever verbal form, and without prejudice to that generality includes—
   (a) a communication which comprises sounds of sexual activity (whether actual or simulated), and
   (b) a communication by means of sign language.

(5) For the purposes of this section, a communication or activity is sexual in any case if a reasonable person would, in all the circumstances of the case, consider it to be sexual.

Belief that child had attained the age of 13 years

It is not a defence to a charge in proceedings under any of sections 14 to 19 that A believed that B had attained the age of 13 years.

Older children

21 Having intercourse with an older child

If a person (“A”), who has attained the age of 16 years, with A’s penis, penetrates to any extent, either intending to do so or reckless as to whether there is penetration, the vagina, anus or mouth of a child (“B”), who—

(a) has attained (or under section 30(1) is deemed to have attained) the age of 13 years, but

(b) has not attained the age of 16 years,

then A commits an offence, to be known as the offence of having intercourse with an older child.

22 Engaging in sexual activity with or towards an older child

(1) If a person (“A”), who has attained the age of 16 years, does any of the things mentioned in subsection (2), “B” being in each case a child who—

(a) has attained (or under section 30(1) is deemed to have attained) the age of 13 years, but
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(b) has not attained the age of 16 years,
then A commits an offence, to be known as the offence of engaging in sexual activity with or towards an older child.

(2) Those things are, that A—

(a) penetrates sexually, by any means and to any extent, either intending to do so or recklessly as to whether there is penetration, the vagina, anus or mouth of B,
(b) intentionally or recklessly touches B sexually,
(c) engages in any other form of sexual activity in which A, intentionally or recklessly, has physical contact (whether bodily contact or contact by means of an implement and whether or not through clothing) with B,
(d) intentionally or recklessly ejaculates semen onto B.

(3) For the purposes of—

(a) paragraph (a) of subsection (2), penetration is sexual,
(b) paragraph (b) of that subsection, touching is sexual,
(c) paragraph (c) of that subsection, an activity is sexual,

in any case if a reasonable person would, in all the circumstances of the case, consider the penetration, or as the case may be the touching or the activity, to be sexual.

(4) Without prejudice to the generality of paragraph (a) of subsection (2), the reference in the paragraph to penetration by any means is to be construed as including a reference to penetration with A’s penis.

23 Causing an older child to participate in a sexual activity

(1) If a person (“A”), who has attained the age of 16 years, intentionally causes a child (“B”), who—

(a) has attained (or under section 30(1) is deemed to have attained) the age of 13 years, but
(b) has not attained the age of 16 years,
to participate in a sexual activity, then A commits an offence, to be known as the offence of causing an older child to participate in a sexual activity.

(2) For the purposes of subsection (1), an activity is sexual in any case if a reasonable person would, in all the circumstances of the case, consider the activity to be sexual.

24 Causing an older child to be present during a sexual activity

(1) If a person (“A”), who has attained the age of 16 years either—

(a) intentionally engages in a sexual activity and for a purpose mentioned in subsection (2) does so in the presence of a child (“B”), who—

(i) has attained (or under section 30(1) is deemed to have attained) the age of 13 years, but
(ii) has not attained the age of 16 years, or
(b) intentionally, and for a purpose mentioned in subsection (2) causes B to be present while a third person engages in such an activity,
then A commits an offence, to be known as the offence of causing an older child to be present during a sexual activity.

(2) The purposes are—
(a) obtaining sexual gratification,
(b) humiliating, distressing or alarming B.

(3) For the purposes of subsection (1), an activity is sexual in any case if a reasonable person would, in all the circumstances of the case, consider the activity to be sexual.

(4) Without prejudice to the generality of subsection (1), the reference—
(a) in paragraph (a) of that subsection to A engaging in a sexual activity in the presence of B, includes a reference to A engaging in it in a place in which A can be observed by B other than by B looking at an image, and
(b) in paragraph (b) of that subsection to B being present while a third person engages in such an activity, includes a reference to B being in a place from which the third person can be so observed by B.

Causing an older child to look at an image of a sexual activity

(1) If a person (“A”), who has attained the age of 16 years, intentionally and for a purpose mentioned in subsection (2) causes a child (“B”), who—
(a) has attained (or under section 30(1) is deemed to have attained) the age of 13 years, but
(b) has not attained the age of 16 years,
to look at an image (produced by whatever means and whether or not a moving image) of A engaging in a sexual activity or of a third person or imaginary person so engaging, then A commits an offence, to be known as the offence of causing an older child to look at an image of a sexual activity.

(2) The purposes are—
(a) obtaining sexual gratification,
(b) humiliating, distressing or alarming B.

(3) For the purposes of subsection (1), an activity is sexual in any case if a reasonable person would, in all the circumstances of the case, consider the activity to be sexual.

Communicating indecently with an older child etc.

(1) If a person (“A”), who has attained the age of 16 years, intentionally and for a purpose mentioned in subsection (3), sends, by whatever means, a sexual written communication to or directs, by whatever means, a sexual verbal communication at, a child (“B”) who—
(a) has attained (or under section 30(1) is deemed to have attained) the age of 13 years, but
(b) has not attained the age of 16 years,
then A commits an offence, to be known as the offence of communicating indecently with an older child.

(2) If, in circumstances other than are as mentioned in subsection (1), a person ("A"), who has attained the age of 16 years, intentionally and for a purpose mentioned in subsection (3), causes another person ("B") who is a child described in paragraphs (a) and (b) of subsection (1) to see or hear, by whatever means, a sexual written communication or sexual verbal communication, then A commits an offence, to be known as the offence of causing an older child to see or hear an indecent communication.

(3) The purposes are—

(a) obtaining sexual gratification,
(b) humiliating, distressing or alarming B.

(4) In this section—

"written communication" means a communication in whatever written form, and without prejudice to that generality includes a communication which comprises writings of a person other than A (as for example a passage in a book or magazine), and

"verbal communication" means a communication in whatever verbal form, and without prejudice to that generality includes—

(a) a communication which comprises sounds of sexual activity (whether actual or simulated), and
(b) a communication by means of sign language.

(5) For the purposes of this section, a communication or activity is sexual in any case if a reasonable person would, in all the circumstances of the case, consider it to be sexual.

27 Older children engaging in penetrative sexual conduct with each other

(1) If a child ("A"), being a child mentioned in subsection (2), does a thing mentioned in subsection (3), "B" being in each case a child mentioned in subsection (2), then A commits an offence, to be known as the offence of engaging while an older child in penetrative sexual conduct with or towards another older child.

(2) The child is a child who—

(a) has attained the age of 13 years, but
(b) has not attained the age of 16 years,

(3) The thing is that A penetrates sexually, by any means (other than A’s mouth) and to any extent, either intending to do so or reckless as to whether there is penetration, the vagina or anus of B.

(4) In the circumstances specified in subsection (1), if B engages by consent in the conduct in question, then B commits an offence, to be known as the offence of engaging while an older child in consensual penetrative sexual conduct with another older child.

(5) Without prejudice to the generality of subsection (3), the reference in the subsection to penetration by any means is to be construed as including a reference to penetration with A’s penis.

(6) In subsection (3), the reference to A’s mouth is to be construed as including a reference to A’s tongue or teeth.
(7) The Lord Advocate may issue instructions to chief constables in relation to the reporting, for consideration of the question of prosecution, of offences alleged to have been committed under this section; and chief constables must secure compliance with any such instructions issued to them.

(8) Subsection (7) is without prejudice to any other powers of the Lord Advocate to issue instructions in relation to the reporting or prosecution of offences.

28 Penetration and consent for the purposes of section 27

(1) This section applies for the purposes of section 27.

(2) Penetration is sexual in any case if a reasonable person would, in all the circumstances of the case, consider the penetration to be sexual.

(3) Penetration is a continuing act from entry until withdrawal of whatever is intruded.

(4) “Consent” means free agreement (and related expressions are to be construed accordingly).

(5) Without prejudice to the generality of subsection (4), free agreement to conduct is absent in the circumstances set out in section 10(2) (references in that section to A and B being construed in accordance with section 27).

(6) Consent to conduct does not of itself imply consent to any other conduct.

(7) Consent to conduct may be withdrawn at any time before, or in the case of continuing conduct, during, the conduct.

(8) If the conduct takes place, or continues to take place, after consent has been withdrawn, it takes place, or continues to take place, without consent.

29 Defences in relation to offences against older children

(1) It is a defence to a charge in proceedings—

(a) against A under any of sections 21 to 27(1) that A reasonably believed that B had attained the age of 16 years,

(b) against B under section 27(4) that B reasonably believed that A had attained the age of 16 years.

(2) But—

(a) the defence under subsection (1)(a) is not available to A if A has previously been charged by the police with a relevant offence,

(b) the defence under subsection (1)(b) is not available to B if B has previously been charged by the police with a relevant offence.

(3) It is a defence to a charge in proceedings under any of the sections mentioned in subsection (4) that at the time when the conduct to which the charge relates took place, the difference between A’s age and B’s age did not exceed 2 years.

(4) Those sections are—

(a) section 21 in so far as the charge is founded on penetration of B’s mouth,

(b) section 22 in so far as the charge is founded on—

(i) subsection (2)(a) of that section and penetration was of B’s mouth, or by A’s mouth, tongue or teeth,
(ii) subsection (2)(b), (c) or (d) of that section,
(c) any of sections 23 to 26.

(5) In paragraphs (a) and (b) of subsection (2), “a relevant offence” means such offence, or an offence of such description, as may be specified in an order made by the Scottish Ministers.

(6) It is not a defence to a charge in—
(a) proceedings under any of sections 21 to 27(1) against A that A believed that B had not attained the age of 13 years,
(b) proceedings under section 27(4) against B that B believed that A had not attained the age of 13 years.

General

Special provision as regards failure to establish whether child has or has not attained age of 13 years

(1) If in a trial where A is charged with an offence under any of sections 21 to 26 there is a failure to establish beyond reasonable doubt that B was a person who had attained the age of 13 years when the conduct to which the proceedings relate occurred, B is to be deemed for the purposes of the proceedings to be such a person.

(2) If in a trial where A is charged with an offence under any of sections 14 to 19 there is a failure to establish beyond reasonable doubt that B was a person who had not attained the age of 13 years when the conduct to which the proceedings relate occurred, but the court (or, in the case of a trial of an indictment, the jury) is satisfied—
(a) in every other respect that A committed the offence charged, and
(b) that it is established beyond reasonable doubt that B was a person who had not attained the age of 16 years when that conduct occurred,

A may be dealt with as mentioned in subsection (3).

(3) A may be acquitted of the charge but found guilty of an offence against B under—
(a) section 21 (having intercourse with an older child) where A is charged with an offence under section 14 (rape of a young child),
(b) section 22 (engaging in sexual activity with or towards an older child) where A is charged with an offence under section 15 (sexual assault on a young child),
(c) section 23 (causing an older child to participate in a sexual activity) where A is charged with an offence under section 16 (causing a young child to participate in a sexual activity),
(d) section 24 (causing an older child to be present during a sexual activity) where A is charged with an offence under section 17 (causing a young child to be present during a sexual activity),
(e) section 25 (causing an older child to look at an image of sexual activity) where A is charged with an offence under section 18 (causing a young child to look at an image of sexual activity),
(f) section 26(1) (communicating indecently with an older child) where A is charged with an offence under section 19(1) (communicating indecently with a young child), or
(g) section 26(2) (causing an older child to see or hear an indecent communication) where A is charged with an offence under section 19(2) (causing a young child to see or hear an indecent communication),

(A then being liable to be punished accordingly).

(4) If, but for a failure to establish beyond reasonable doubt that B had not attained the age of 13 years, a court or jury would, by virtue of section 38(1), find that A committed an offence mentioned in the third column of schedule 2, it may, provided that—

(a) the condition in section 38(2) has been fulfilled, and

(b) it is satisfied that B was a person who had not attained the age of 16 years when the conduct to which the proceedings relate occurred,

deal with A as mentioned in subsection (5).

(5) A may be acquitted of the charge but found guilty of an offence against B under—

(a) section 22 (engaging in sexual activity with or towards an older child) where the offence mentioned in the third column of schedule 2 is an offence under section 15 (sexual assault on a young child),

(b) section 23 (causing an older child to participate in a sexual activity) where the offence so mentioned is an offence under section 16 (causing a young child to participate in a sexual activity),

(c) section 24 (causing an older child to be present during a sexual activity) where the offence so mentioned is an offence under section 17 (causing a young child to be present during a sexual activity),

(d) section 25 (causing an older child to look at an image of sexual activity) where the offence so mentioned is an offence under section 18 (causing a young child to look at an image of sexual activity),

(e) section 26(1) (communicating indecently with an older child) where the offence so mentioned is an offence under section 19(1) (communicating indecently with a young child), or

(f) section 26(2) (causing an older child to see or hear an indecent communication) where the offence so mentioned is an offence under section 19(2) (causing a young child to see or hear an indecent communication),

(A then being liable to be punished accordingly).

(6) Subsections (3) and (4) of section 38 apply for the purposes of this section as they apply for the purposes of that section.

(7) A reference in this section to an offence includes a reference to—

(a) an attempt to commit,

(b) incitement to commit,

(c) counselling or procuring the commission of, and

(d) involvement art and part in,

an offence.
PART 5
ABUSE OF POSITION OF TRUST

31  Sexual abuse of trust

Children

(1) If a person ("A") who has attained the age of 18 years—
   (a) intentionally engages in a sexual activity with or directed towards another person ("B") who is under 18, and
   (b) is in a position of trust in relation to B,
then A commits an offence, to be known as the offence of sexual abuse of trust.

(2) For the purposes of subsection (1), an activity is sexual in any case if a reasonable person would, in all the circumstances of the case, consider the activity to be sexual.

32  Positions of trust

(1) For the purposes of section 31, a person ("A") is in a position of trust in relation to another person ("B") if any of the five conditions set out below, or any condition specified in an order made by the Scottish Ministers, is fulfilled.

(2) The first condition is that B is detained by virtue of an order of court or under an enactment in an institution and A looks after B in that institution.

(3) The second condition is that B is resident in a home or other place in which accommodation is provided by a local authority under section 26(1) of the Children (Scotland) Act 1995 (c.36) and A looks after B in that place.

(4) The third condition is that B is accommodated and cared for in—
   (a) a hospital,
   (b) accommodation provided by an independent health care service,
   (c) accommodation provided by a care home service,
   (d) a residential establishment, or
   (e) accommodation provided by a school care accommodation service or a secure accommodation service,
and A looks after B in that place.

(5) The fourth condition is that B is receiving education at an educational establishment, and A looks after B in that establishment.

(6) The fifth condition is that A—
   (a) has any parental responsibilities or parental rights in respect of B,
   (b) fulfils any such responsibilities or exercises any such rights under arrangement with a person who has such responsibilities or rights,
   (c) had any such responsibilities or rights but no longer has such responsibilities or rights,
   (d) treats B as a child of A’s family,
and B is a member of the same household as A.
(7) A looks after B for the purposes of this section if A regularly cares for, trains, supervises, or is in sole charge of B.

33 Interpretation of section 32

In section 32—

5 “care home service” has the meaning given by section 2(3) of the Regulation of Care (Scotland) Act 2001 (asp 8) (“the 2001 Act”),

“educational establishment” has the same meaning as in section 135(1) of the Education (Scotland) Act 1980 (c.44) except that it includes—

(a) a university,

(b) a theological college,

“hospital” means a health service hospital (as defined in section 108(1) of the National Health Service (Scotland) Act 1978 (c.29)),

“independent health care service” has the meaning given by section 2(5) of the 2001 Act,

“local authority” means a council constituted under section 2 of the Local Government etc. (Scotland) Act 1994 (c.39),

“parental responsibilities” and “parental rights” have the same meanings as in the Children (Scotland) Act 1995 (c.36),

“residential establishment” has the meaning given by section 93(1)(a) of that Act of 1995,

“school care accommodation service” has the meaning given by section 2(4) of the 2001 Act, and

“secure accommodation service” has the meaning given by section 2(9) of the 2001 Act.

34 Sexual abuse of trust: defences

(1) It is a defence to a charge in proceedings under section 31 that A reasonably believed—

(a) that B had attained the age of 18, or

(b) that B was not a person in relation to whom A was in a position of trust.

(2) It is a defence to a charge in proceedings under section 31—

(a) that B was A’s spouse or civil partner, or

(b) that immediately before the position of trust came into being, a sexual relationship existed between A and B.

(3) Subsection (2) does not apply if A was in a position of trust in relation to B by virtue of section 32(6).

(4) For the purposes of subsection (2), a relationship is sexual in any case if a reasonable person would, in all the circumstances of the case, consider the relationship to be sexual.
Mentally disordered persons

35 Sexual abuse of trust of a mentally disordered person

(1) If a person (“A”)—
   (a) intentionally engages in a sexual activity with or directed towards a mentally disordered person (“B”), and
   (b) is a person mentioned in subsection (2),
then A commits an offence, to be known as sexual abuse of trust of a mentally disordered person.

(2) Those persons are—
   (a) a person providing care services to B,
   (b) a person who—
      (i) is an individual employed in, or contracted to provide services in or to, or not being the Scottish Ministers, is a manager of,
      (ii) a hospital, independent health care service or state hospital in which B is being given medical treatment.

(3) For the purposes of subsection (1), an activity is sexual in any case if a reasonable person would, in all the circumstances of the case, consider the activity to be sexual.

(4) References in this section to the provision of care services are references to anything done by way of such services—
   (a) by,
   (b) by an employee of, or
   (c) in the course of a service provided or supplied by,
   a care service, whether by virtue of a contract of employment or any other contract or in such other circumstances as may be specified in an order made by the Scottish Ministers.

(5) In this section—
   “care service” has the meaning given by subsection (1)(a), (b), (e), (g), (h), (k) and (n) as read with subsections (2), (3), (6), (9), (10), (16) and (27) of section 2 of the Regulation of Care (Scotland) Act 2001 (asp 8),
   “hospital” and “independent health care service” have the meanings given in section 33, and
   “state hospital” means a hospital provided under section 102(1) of the National Health Service (Scotland) Act 1978 (c. 29).

36 Sexual abuse of trust of a mentally disordered person: defences

(1) It is a defence to a charge in proceedings under section 35 that A reasonably believed—
   (a) that B did not have a mental disorder, or
   (b) that A was not a person specified in section 35(2).

(2) It is a defence to a charge in proceedings under section 35—
   (a) that B was A’s spouse or civil partner, or
(b) in a case where A was—

(i) a person specified in section 35(2)(a), that immediately before A began to provide care services to B, a sexual relationship existed between A and B,

(ii) a person specified in section 35(2)(b), that immediately before B was admitted to the hospital (or other establishment) referred to in that provision or (where B has been admitted to that establishment more than once) was last admitted to it, such a relationship existed.

(3) For the purposes of subsection (2)(b), a relationship is sexual in any case if a reasonable person would, in all the circumstances of the case, consider the relationship to be sexual.

PART 6

Penalties

Penalties

A person guilty of an offence mentioned in the first column of schedule 1 is liable—

(a) on summary conviction, to the penalty mentioned in the third column,

(b) on conviction on indictment, to the penalty mentioned in the fourth column.

PART 7

Miscellaneous and General

Miscellaneous

38 Power to convict for offence other than that charged

(1) If, in a trial—

(a) on an indictment for an offence mentioned in the first column of schedule 2 the jury are not satisfied that the accused committed the offence charged but are satisfied that the accused committed the alternative offence (or as the case may be one of the alternative offences) mentioned in the third column, they may, or

(b) in summary proceedings for an offence mentioned in the first column of that schedule the court is not satisfied that the accused committed the offence charged but is satisfied that the accused committed the alternative offence (or as the case may be one of the alternative offences) mentioned in the third column, it may, provided that the condition in subsection (2) has been fulfilled, acquit the accused of the charge but find the accused guilty of the alternative offence in respect of which so satisfied (the accused then being liable to be punished accordingly).

(2) The condition is that the accused was given fair notice of the effect which subsection (1) might have in the accused’s case.

(3) Without prejudice to the generality of subsection (2), the condition mentioned in that subsection is to be taken to be satisfied where a notice, in a prescribed form, of the alternative verdicts which would be available in the accused’s case in the circumstances mentioned in subsection (1) is appended to the indictment or as the case may be to the complaint.

(5) A reference in this section to an offence includes a reference to—
   (a) an attempt to commit,
   (b) incitement to commit,
   (c) counselling or procuring the commission of, and
   (d) involvement art and part in,
   an offence.

39 Exceptions to inciting or being involved art and part in offences under Part 4 or 5
A person (“X”) is not guilty of inciting, or being involved art and part in, an offence
under Part 4 or 5 if, as regards another person (“Y”), X acts—
   (a) for the purpose of—
       (i) protecting Y from sexually transmitted infection,
       (ii) protecting the physical safety of Y,
       (iii) preventing Y from becoming pregnant, or
       (iv) promoting Y’s emotional well-being by the giving of advice, and
   (b) not for the purpose of—
       (i) obtaining sexual gratification,
       (ii) humiliating, distressing or alarming Y, or
       (iii) causing or encouraging the activity constituting the offence or Y’s
            participation in it.

40 Common law offences
For all purposes not relating to offences committed before the coming into force of this
section—
   (a) the common law offences of—
       (i) rape,
       (ii) clandestine injury to women,
       (iii) lewd, indecent or libidinous practice or behaviour, and
       (iv) sodomy,
       are abolished, and
   (b) without prejudice to paragraph (a), in so far as the provisions of this Act regulate
       any conduct they replace any rule of law regulating that conduct.

41 Continuity of law on sexual offences
(1) This section applies where, in any trial—
   (a) the accused is charged in respect of the same conduct both with an offence under
       this Act (“the new offence”) and with an offence specified in subsection (2) (“the
       existing offence”),
(b) there is a failure to establish beyond reasonable doubt that—

(i) the time when the conduct took place was after the coming into force of the provision providing for the new offence, and

(ii) the time when the conduct took place was before the abolition or replacement of or, as the case may be, the coming into force of the repeal of the enactment providing for, the existing offence, and

(c) the court (or, in the case of a trial of an indictment, the jury) is satisfied in every other respect that the accused committed the offences charged.

(2) The offences referred to in subsection (1)(a) are—

(a) rape (at common law),

(b) clandestine injury to women,

(c) lewd, indecent or libidinous practice or behaviour,

(d) any other common law offence which is replaced by an offence under this Act,

(e) an offence under section 3 of the Criminal Law (Consolidation) (Scotland) Act 1995 (c.39) (intercourse of person in position of trust with child under 16),

(f) an offence under section 5(1), (2) or (3) (intercourse with girl under 16) or 6 (indecent behaviour towards girl between 12 and 16) of that Act,

(g) an offence under section 3 of the Sexual Offences (Amendment) Act 2000 (c.44) (abuse of position of trust).

(3) Where this section applies, the accused may be found guilty—

(a) if the maximum penalty for the existing offence is less than the maximum penalty for the new offence, of the existing offence,

(b) in any other case, of the new offence.

(4) In subsection (3) the reference, in relation to an offence, to the maximum penalty is a reference to the maximum penalty by way of imprisonment or other detention that could be imposed on the accused on conviction of the offence in the proceedings in question.

(5) A reference in this section to an offence includes a reference to—

(a) an attempt to commit an offence,

(b) incitement to commit an offence,

(c) counselling or procuring the commission of an offence,

(d) involvement art and part in an offence, and

(e) an offence as modified by section 16A or 16B of the Criminal Law (Consolidation) (Scotland) Act 1995 (c.39).

Incitement to commit certain sexual acts outside the United Kingdom

(1) If a person does an act in Scotland which would amount to the offence of incitement to commit a listed offence but for the fact that what the person had in view (referred to in this section as “the relevant conduct”) is intended to occur in a country outside the United Kingdom, then—

(a) the relevant conduct is to be treated as the listed offence, and
(b) the person accordingly commits the offence of incitement to commit the listed
offence.

(2) However, a person who is not a UK national commits an offence by virtue of subsection
(1) only if the relevant conduct would also involve the commission of an offence under
the law in force in the country where the whole or any part of it was intended to take
place.

(3) Conduct punishable under the law in force in the country is an offence under that law for
the purposes of subsection (2) however it is described in that law.

(4) The condition specified in subsection (2) is to be taken as satisfied unless, not later than
such time as may be prescribed by Act of Adjournal, the accused serves on the
prosecutor a notice—

(a) stating that, on the facts as alleged with respect to the relevant conduct, the
condition is not in the accused’s opinion satisfied,

(b) setting out the grounds for the accused’s opinion, and

(c) requiring the prosecutor to prove that the condition is satisfied.

(5) But the court, if it thinks fit, may permit the accused to require the prosecutor to prove
that the condition is satisfied without the prior service of a notice under that subsection.

(6) In proceedings on indictment, the question whether the condition is satisfied is to be
determined by the judge alone.

(7) Any act of incitement by means of a message (however communicated) is to be treated
as done in Scotland if the message is sent or received in Scotland.

(8) In this section—

“country” includes territory,

“listed offence” means an offence listed in Part 1 of schedule 3,

“UK national” means an individual who was at the time the act mentioned in
subsection (1) took place, or who has subsequently become—

(a) a British citizen, a British overseas territories citizen, a British National
(Overseas) or a British Overseas citizen,

(b) a person who under the British Nationality Act 1981 is a British subject, or

(c) a British protected person within the meaning of that Act.

43 Offences committed outside the United Kingdom

(1) If a UK national does an act in a country outside the United Kingdom which would, if it
had been done in Scotland, constitute a listed offence then the UK national commits that
offence.

(2) If—

(a) a UK resident does an act in a country outside the United Kingdom which would,
if it had been done in Scotland, constitute a listed offence, and

(b) the act constitutes an offence under the law in force in that country,
then the UK resident commits the listed offence.

(3) For the purposes of subsection (2)(b), conduct punishable under the law in force in the
country is an offence under that law however it is described in that law.
(4) The condition specified in subsection (2)(b) is to be taken as satisfied unless, not later than such time as may be prescribed by Act of Adjournal, the accused serves on the prosecutor a notice—

(a) stating that, on the facts as alleged with respect to the act in question, the condition is not in the accused’s opinion satisfied,

(b) setting out the grounds for the accused’s opinion, and

(c) requiring the prosecutor to prove that the condition is satisfied.

(5) But the court, if it thinks fit, may permit the accused to require the prosecutor to prove that the condition is satisfied without the prior service of a notice under that subsection.

(6) In proceedings on indictment, the question whether the condition is satisfied is to be determined by the judge alone.

(7) A person may be proceeded against, indicted, tried and punished for any offence to which this section applies—

(a) in any sheriff court district in Scotland in which the person is apprehended or is in custody, or

(b) in such sheriff court district as the Lord Advocate may determine,

as if the offence had been committed in that district; and the offence is, for all purposes incidental to or consequential on trial or punishment, to be deemed to have been committed in that district.

(8) In this section—

“country” includes territory,

“listed offence” means an offence listed in Part 2 of schedule 3,

“sheriff court district” is to be construed in accordance with section 307(1) (interpretation) of the Criminal Procedure (Scotland) Act 1995 (c.46),

“UK national” has the meaning given in section 42,

“UK resident” means an individual who was at the time the act mentioned in subsection (2) took place, or who has subsequently become, resident in the United Kingdom.

44 Continuity of law on sexual offences committed outside the United Kingdom

(1) This section applies where, in any trial—

(a) the accused is charged in respect of the same conduct both—

(i) with an offence mentioned in subsection (2) as modified by section 16B of the Criminal Law (Consolidation) (Scotland) Act 1995 (commission of certain sexual acts outside the United Kingdom), and

(ii) with that offence as modified by section 43,

(b) there is a failure to establish beyond reasonable doubt that—

(i) the time when the conduct took place was after the coming into force of section 43, and

(ii) the time when the conduct took place was before the coming into force of the repeal of section 16B of the Criminal Law (Consolidation) (Scotland) Act 1995, and
(c) the court (or, in the case of a trial of an indictment, the jury) is satisfied in every other respect that the accused committed the offences charged.

(2) The offences referred to in subsection (1)(a) are—

(a) an offence under section 52 of the Civic Government (Scotland) Act 1982 (c.45) (taking and distribution of indecent images of children),

(b) an offence under section 52A of that Act (possession of indecent images of children),

(c) an offence under section 9 of the Protection of Children and Prevention of Sexual Offences (Scotland) Act 2005 (asp 9) (paying for sexual services of a child),

(d) an offence under section 10 of that Act (causing or inciting provision by child of sexual services or pornography),

(e) an offence under section 11 of that Act (controlling a child providing sexual services or involved in pornography),

(f) an offence under section 12 of that Act (arranging or facilitating provision by child of sexual services or pornography).

(3) Where this section applies, the accused may be found guilty of the offence mentioned in subsection (2) as modified by section 16B of the Criminal Law (Consolidation) (Scotland) Act 1995.

(4) A reference in this section to an offence includes a reference to—

(a) an attempt to commit,

(b) incitement to commit,

(c) counselling or procuring the commission of, and

(d) involvement art and part in,

an offence.

General provisions

45 Ancillary provision

(1) The Scottish Ministers may by order make such incidental, supplemental, consequential, transitional, transitory or saving provision as they consider necessary or expedient for the purposes of, or in consequence of, or for giving full effect to, this Act or any provision of it.

(2) An order under this section may modify any enactment, instrument or document.

46 Orders

(1) Any power of the Scottish Ministers to make orders under this Act—

(a) must be exercised by statutory instrument,

(b) may be exercised so as to make different provision for different purposes,

(c) includes power to make incidental, supplemental, consequential, transitional, transitory or saving provision.
(2) A statutory instrument containing an order made under this Act (except an order made under section 49(2)) is, subject to subsection (3), subject to annulment in pursuance of a resolution of the Parliament.

(3) A statutory instrument containing an order under section 45 containing provisions which add to, replace or omit any part of the text of an Act, is not to be made unless a draft of the instrument has been laid before, and approved by resolution of, the Parliament.

47 Interpretation

In this Act—

“mental disorder” has the meaning given by section 13(3),

“penis” and “vagina” have the meanings given by section 1(4).

48 Modification of enactments

(1) Schedule 4 (which contains modifications of enactments) has effect.

(2) The enactments mentioned in the first column of schedule 5 are repealed to the extent specified in the second column of that schedule.

49 Short title and commencement

(1) This Act may be cited as the Sexual Offences (Scotland) Act 2008.

(2) This Act (other than sections 1(4), 13(3), 45 to 47 and this section) comes into force in accordance with provision made by the Scottish Ministers by order.
### SCHEDULE 1
*(introduced by section 37)*

**PENALTIES**

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<thead>
<tr>
<th>Offence</th>
<th>Section introducing offence</th>
<th>Maximum penalty on summary conviction</th>
<th>Maximum penalty on conviction on indictment</th>
</tr>
</thead>
<tbody>
<tr>
<td>Rape</td>
<td>Section 1</td>
<td>Imprisonment for a term not exceeding 12 months or a fine not exceeding the statutory maximum (or both)</td>
<td>Life imprisonment or a fine (or both)</td>
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<tr>
<td>Sexual assault</td>
<td>Section 2</td>
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<tr>
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<td>Section 3</td>
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<tr>
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<td>Section 4</td>
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<td>Imprisonment for a term not exceeding 10 years or a fine (or both)</td>
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<td>Coercing a person into looking at an image of a sexual activity</td>
<td>Section 5</td>
<td>Imprisonment for a term not exceeding 12 months or a fine not exceeding the statutory maximum (or both)</td>
<td>Imprisonment for a term not exceeding 10 years or a fine (or both)</td>
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<tr>
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<td>Section 6(1)</td>
<td>Imprisonment for a term not exceeding 12 months or a fine not exceeding the statutory maximum (or both)</td>
<td>Imprisonment for a term not exceeding 10 years or a fine (or both)</td>
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<tr>
<td>Causing a person to see or hear an indecent communication</td>
<td>Section 6(2)</td>
<td>Imprisonment for a term not exceeding 12 months or a fine not exceeding the statutory maximum (or both)</td>
<td>Imprisonment for a term not exceeding 10 years or a fine (or both)</td>
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<td>Rape of a young child</td>
<td>Section 14</td>
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<td>Life imprisonment or a fine (or both)</td>
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<td>Causing a young child to see or hear an indecent communication</td>
<td>Section 19(2)</td>
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<td>Having intercourse with an older child</td>
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<td>Engaging in sexual activity with or towards an older child</td>
<td>Section 22</td>
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<td>Engaging while an older child in penetrative sexual conduct with or towards another older child</td>
<td>Section 27(1)</td>
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### SCHEDULE 2
*(introduced by section 38)*

**ALTERNATIVE VERDICTS**

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<td>Causing an older child to look at an image of a sexual activity</td>
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<td>Communicating indecently with an older child</td>
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SCHEDULE 3
(introduced by section 42)

LISTED OFFENCES

PART 1

INCITEMENT TO COMMIT CERTAIN SEXUAL ACTS OUTSIDE UK

1. An offence under Part 1 of this Act against a person under the age of 18.
2. An offence under Part 4 of this Act.
3. Sexual abuse of trust (section 31 of this Act).
4. Sexual abuse of trust of a mentally disordered person (section 35 of this Act) where the mentally disordered person is under the age of 18.
5. Indecent assault of a person under the age of 18.

PART 2

OFFENCES COMMITTED OUTSIDE UK

6. An offence under Part 1 of this Act against a person under the age of 18.
7. An offence under Part 4 of this Act.
8. Sexual abuse of trust (section 31 of this Act).
9. Sexual abuse of trust of a mentally disordered person (section 35 of this Act) where the mentally disordered person is under the age of 18.
10. Indecent assault of a person under the age of 18.
12. An offence under section 52A of that Act (possession of indecent images of children).
14. An offence under section 10 of that Act (causing or inciting provision by child of sexual services or pornography).
15. An offence under section 11 of that Act (controlling a child providing sexual services or involved in pornography).
16. An offence under section 12 of that Act (arranging or facilitating provision by child of sexual services or pornography).
17. Conspiracy or incitement to commit any offence specified in paragraphs 6 to 16.
18. An offence under section 293(2) of the Criminal Procedure (Scotland) Act 1995 (c.46) (aiding and abetting etc. the commission of a statutory offence) relating to any offence mentioned in paragraphs 6 to 9 or 11 to 16.
SCHEDULE 4
(introduced by section 48)

MINOR AND CONSEQUENTIAL AMENDMENTS

The Criminal Law (Consolidation) (Scotland) Act 1995 (c.39)

1 (1) The Criminal Law (Consolidation) (Scotland) Act 1995 is amended as follows.

(2) In section 4 (proceedings and penalties for offences under sections 1 to 3), in each of subsections (1) and (5), for the words “, 2 or 3” there is substituted “or 2”.

(3) In the section title of that section, for the words “to 3” there is substituted “and 2”.

(4) In section 9 (permitting girl under 16 years to use premises for intercourse)—

(a) in subsection (2), for the words “man under the age of 24 years” there is substituted “person”,

(b) in subsection (3)(b), for paragraph (b) there is substituted—

“(b) section 21 of the Sexual Offences (Scotland) Act 2008 (asp 00) (having intercourse with an older child);”;

(ba) section 27(1) of that Act (engaging while an older child in penetrative sexual conduct with or towards another older child);”;

(bb) section 27(4) of that Act (engaging while an older child in consensual penetrative sexual conduct with another older child);”;

(c) in subsection (3)(c)—

(i) at the beginning there is inserted “section 5(3) of this Act,”,

(ii) for the words “paragraphs (a) and (b)” there is substituted “paragraph (a), (b) or, as the case may be, (ba)”.

(5) In section 10(3) (application of provisions of section 10 to offence of indecent behaviour towards girl under 16), for “section 6 of this Act” there is substituted “sections 16 to 19 and 22 to 26 of the Sexual Offences (Scotland) Act 2008 (asp 00) (certain sexual offences relating to children)”.

The Criminal Procedure (Scotland) Act 1995 (c.46)

1 (1) The Criminal Procedure (Scotland) Act 1995 is amended as follows.

(2) In section 3(6) (jurisdiction and powers of solemn courts), after the word “rape” there is inserted “(whether at common law or under section 1(1) of the Sexual Offences (Scotland) Act 2008 (asp 00)), rape of a young child (under section 14 of that Act)”.

(3) In section 7(8)(b)(i) (district court: jurisdiction and powers), after the word “rape” there is inserted “(whether at common law or under section 1(1) of the Sexual Offences (Scotland) Act 2008 (asp 00)), rape of a young child (under section 14 of that Act)”.

(4) In section 19A (samples etc. from persons convicted of sexual and violent crimes)—

(a) in subsection (6), in the definition of “relevant sexual offence”—

(i) in paragraph (a), after the word “rape” there is inserted “at common law”,

(ii) the word “and” which immediately follows paragraph (h) is repealed, and
(iii) after paragraph (i) there is inserted “and

(j) any offence which consists of a contravention of any of the following provisions of the Sexual Offences (Scotland) Act 2008 (asp 00)—

(i) section 1 (rape),

(ii) section 2 (sexual assault),

(iii) section 3 (sexual coercion),

(iv) section 4 (coercing a person into being present during a sexual activity),

(v) section 5 (coercing a person into looking at an image of a sexual activity),

(vi) section 6(1) (communicating indecently),

(vii) section 6(2) (causing a person to see or hear an indecent communication),

(viii) section 7 (sexual exposure),

(ix) section 14 (rape of a young child),

(x) section 15 (sexual assault on a young child),

(xi) section 16 (causing a young child to participate in a sexual activity),

(xii) section 17 (causing a young child to be present during a sexual activity),

(xiii) section 18 (causing a young child to look at an image of a sexual activity),

(xiv) section 19(1) (communicating indecently with a young child),

(xv) section 19(2) (causing a young child to see or hear an indecent communication),

(xvi) section 21 (having intercourse with an older child),

(xvii) section 22 (engaging in sexual activity with or towards an older child),

(xviii) section 23 (causing an older child to participate in a sexual activity),

(xix) section 24 (causing an older child to be present during a sexual activity),

(xx) section 25 (causing an older child to look at an image of a sexual activity),

(xxi) section 26(1) (communicating indecently with an older child),

(xxii) section 26(2) (causing an older child to see or hear an indecent communication),

(xxiii) section 27(1) (engaging while an older child in penetrative sexual conduct with or towards another older child),

(xxiv) section 27(4) (engaging while an older child in consensual penetrative sexual conduct with another older child),
Sexual Offences (Scotland) Bill

Schedule 4—Minor and consequential amendments

(xxv)section 31 (sexual abuse of trust) but only if the condition set out in section 32(6) of that Act is fulfilled,

(xxvi)section 35 (sexual abuse of trust of a mentally disordered person);”.

(b) in subsection (7), in paragraph (b)(i) after the words “paragraph (i)” there is inserted “or (j)”.

(5) In section 24A (bail conditions: remote monitoring of restrictions on movements), in each of subsections (2)(a), (3) and (5)(a), for the words “or rape” there is substituted “, rape (whether at common law or under section 1(1) of the Sexual Offences (Scotland) Act 2008 (asp 00)) or rape of a young child (under section 14 of that Act)”.

(6) In section 78(2) (notice of special defences), for the words from “coercion” to “consent” there is substituted “or coercion”.

(7) In section 210A(10) (extended sentences for sex and violent offenders), in the definition of “sexual offence”—

(a) in paragraph (i), after the word “rape” there is inserted “at common law”, and

(b) after paragraph (xxvi) there is inserted “and

(xxvii) an offence which consists of a contravention of any of the following provisions of the Sexual Offences (Scotland) Act 2008 (asp 00)—

(A) section 1 (rape),
(B) section 2 (sexual assault),
(C) section 3 (sexual coercion),
(D) section 4 (coercing a person into being present during a sexual activity),
(E) section 5 (coercing a person into looking at an image of a sexual activity),
(F) section 6(1) (communicating indecently),
(G) section 6(2) (causing a person to see or hear an indecent communication),
(H) section 7 (sexual exposure),
(I) section 8 (administering a substance for sexual purposes),
(J) section 14 (rape of a young child),
(K) section 15 (sexual assault on a young child),
(L) section 16 (causing a young child to participate in a sexual activity),
(M) section 17 (causing a young child to be present during a sexual activity)
(N) section 18 (causing a young child to look at an image of a sexual activity),
(O) section 19(1) (communicating indecently with a young child),
(P) section 19(2) (causing a young child to see or hear an indecent communication),
(Q) section 21 (having intercourse with an older child),
(R) section 22 (engaging in sexual activity with or towards an older child),
(S) section 23 (causing an older child to participate in a sexual activity),
(T) section 24 (causing an older child to be present during a sexual activity),
(U) section 25 (causing an older child to look at an image of a sexual activity),
(V) section 26(1) (communicating indecently with an older child),
(W) section 26(2) (causing an older child to see or hear an indecent communication),
(X) section 27(1) (engaging while an older child in penetrative sexual conduct with or towards another older child),
(Y) section 27(4) (engaging while an older child in consensual penetrative sexual conduct with another older child),
(Z) section 31 (sexual abuse of trust),
(ZA) section 35 (sexual abuse of trust of a mentally disordered person).

(8) In section 288C(2) (prohibition of personal conduct of defence in cases of certain sexual offences)—
(a) in paragraph (a), after the word “rape” there is inserted “(whether at common law or under section 1(1) of the Sexual Offences (Scotland) Act 2008 (asp 00))”, and
(b) for paragraph (j) there is substituted—
“(j) an offence under any of the following provisions of the Sexual Offences (Scotland) Act 2008 (asp 00)—
(i) section 2 (sexual assault),
(ii) section 3 (sexual coercion),
(iii) section 4 (coercing a person into being present during a sexual activity),
(iv) section 5 (coercing a person into looking at an image of a sexual activity),
(v) section 6(1) (communicating indecently),
(vi) section 6(2) (causing a person to see or hear an indecent communication),
(vii) section 7 (sexual exposure),
(viii) section 14 (rape of a young child),
(ix) section 15 (sexual assault on a young child),
(x) section 16 (causing a young child to participate in a sexual activity),
(xi) section 17 (causing a young child to be present during a sexual activity),

(xii) section 18 (causing a young child to look at an image of a sexual activity),

(xiii) section 19(1) (communicating indecently with a young child),

(xiv) section 19(2) (causing a young child to see or hear an indecent communication),

(xv) section 21 (having intercourse with an older child),

(xvi) section 22 (engaging in sexual activity with or towards an older child),

(xvii) section 23 (causing an older child to participate in a sexual activity),

(xviii) section 24 (causing an older child to be present during a sexual activity),

(xix) section 25 (causing an older child to look at an image of a sexual activity),

(xx) section 26(1) (communicating indecently with an older child),

(xxi) section 26(2) (causing an older child to see or hear an indecent communication),

(xxii) section 27(1) (engaging while an older child in penetrative sexual conduct with or towards another older child),

(xxiii) section 27(4) (engaging while an older child in consensual penetrative sexual conduct with another older child),

(xxiv) section 31 (sexual abuse of trust) but only if the condition set out in section 32(6) of that Act is fulfilled,

(xxv) section 35 (sexual abuse of trust of a mentally disordered person);”, and

(c) after paragraph (j) (as inserted by paragraph (b) above), there is inserted—

“(k) attempting to commit any of the offences set out in paragraphs (a) to (j).”.

(9) In Schedule 1 (offences against children under the age of 17 years to which special provisions apply)—

(a) after paragraph 1 there is inserted—

“1A Any offence under section 14 (rape of a young child) or 21 (having intercourse with an older child) of the Sexual Offences (Scotland) Act 2008 (asp 00).

1B Any offence under section 15 (sexual assault on a young child) or 22 (engaging in sexual activity with or towards an older child) of that Act.

1C Any offence under section 31 of that Act (sexual abuse of trust) towards a child under the age of 17 years but only if the condition set out in section 32(6) of that Act is fulfilled.”, and

(b) after paragraph 4 there is inserted—
“4A Any offence under section 4 (coercing a person into being present during a sexual activity), 5 (coercing a person into looking at an image of sexual activity), 6 (communicating indecently etc.) or 7 (sexual exposure) of the Sexual Offences (Scotland) Act 2008 (asp 00) towards a child under the age of 17 years.

4B Any offence under any of sections 16 to 19 or 23 to 27 of that Act (certain sexual offences relating to children).”.

The Criminal Injuries Compensation Act 1995 (c. 53)

3 In section 11(9) of the Criminal Injuries Compensation Act 1995 (approval by parliament of certain alterations to the Tariff or provisions of the Scheme), at the end there is inserted “, and in relation to anything done in Scotland means rape (whether at common law or under section 1(1) of the Sexual Offences (Scotland) Act 2008 (asp 00)) and rape of a young child (under section 14 of that Act)”.

The Sexual Offences Act 2003 (c.42)

4 In Schedule 3 to the Sexual Offences Act 2003 (sexual offences for purposes of Part 2 of that Act)—

(a) in paragraph 36, at the end there is added “at common law”,

(b) after paragraph 59C there is inserted—

“59D An offence under section 1 of the Sexual Offences (Scotland) Act 2008 (asp 00) (rape).

59E An offence under section 2 of that Act (sexual assault).

59F An offence under section 3 of that Act (sexual coercion).

59G An offence under section 4 of that Act (coercing a person into being present during a sexual activity).

59H An offence under section 5 of that Act (coercing a person into looking at an image of a sexual activity).

59J An offence under section 6(1) of that Act (communicating indecently).

59K An offence under section 6(2) of that Act (causing a person to see or hear an indecent communication).

59L An offence under section 7 of that Act (sexual exposure).

59M An offence under section 8 of that Act (administering a substance for sexual purposes).

59N An offence under section 14 of that Act (rape of a young child).

59P An offence under section 15 of that Act (sexual assault on a young child).

59Q An offence under section 16 of that Act (causing a young child to participate in a sexual activity).

59R An offence under section 17 of that Act (causing a young child to be present during a sexual activity).

59S An offence under section 18 of that Act (causing a young child to look at an image of a sexual activity).
59T An offence under section 19(1) of that Act (communicating indecently with a young child).
59U An offence under section 19(2) of that Act (causing a young child to see or hear an indecent communication).
59V An offence under section 21 of that Act (having intercourse with an older child).
59W An offence under section 22 of that Act (engaging in sexual activity with or towards an older child).
59X An offence under section 23 of that Act (causing an older child to participate in a sexual activity).
59Y An offence under section 24 of that Act (causing an older child to be present during a sexual activity).
59Z An offence under section 25 of that Act (causing an older child to look at an image of a sexual activity).
59ZA An offence under section 26(1) of that Act (communicating indecently with an older child).
59ZB An offence under section 26(2) of that Act (causing an older child to see or hear an indecent communication).
59ZC An offence under section 27(1) of that Act (engaging while an older child in penetrative sexual conduct with or towards another older child).
59ZD An offence under section 27(4) of that Act (engaging while an older child in consensual penetrative sexual conduct with another older child).
59ZE An offence under section 31 of that Act (sexual abuse of trust) where (either or both)—
   (a) the offender is 20 or over,
   (b) the condition set out in section 32(6) of that Act is fulfilled.
59ZF An offence under section 35 of that Act (sexual abuse of trust of a mentally disordered person).”, and
   (c) in paragraph 60, for the words “59C” there is substituted “59ZE”.

The Mental Health (Care and Treatment) (Scotland) Act 2003 (asp 13)
5 In section 326(4)(c) of the Mental Health (Care and Treatment) (Scotland) Act 2003, for “310 or 313(5)” there is substituted “or 310”.

The Protection of Children and Prevention of Sexual Offences (Scotland) Act 2005 (asp 9)
6 In section 1(5) of the Protection of Children and Prevention of Sexual Offences (Scotland) Act 2005, for the words from “Subsections” to “(c.39)” substitute “Subsection (7) of section 43 of the Sexual Offences (Scotland) Act 2008 (asp 00)”.

The Protection of Vulnerable Groups (Scotland) Act 2007 (asp 14)
7 In schedule 1 to the Protection of Vulnerable Groups (Scotland) Act 2007 (relevant offences for purposes of Part 1 of that Act), at the end of paragraph 1 there is added—
“(w) an offence under section 14 (rape of a young child) of the Sexual Offences (Scotland) Act 2008 (asp 00),
(x) an offence under section 15 (sexual assault on a young child) of that Act,
(y) an offence under section 16 (causing a young child to participate in a sexual activity) of that Act,
(z) an offence under section 17 (causing a young child to be present during a sexual activity) of that Act,
(za) an offence under section 18 (causing a young child to look at an image of a sexual activity) of that Act,
(zb) an offence under section 19(1) (communicating indecently with a young child) of that Act,
(zc) an offence under section 19(2) (causing a young child to see or hear an indecent communication) of that Act,
(zd) an offence under section 21 (having intercourse with an older child) of that Act,
(ze) an offence under section 22 (engaging in sexual activity with or towards an older child) of that Act,
(zf) an offence under section 23 (causing an older child to participate in a sexual activity) of that Act,
(zg) an offence under section 24 (causing an older child to be present during a sexual activity) of that Act,
(zh) an offence under section 25 (causing an older child to look at an image of a sexual activity) of that Act,
(zi) an offence under section 26(1) of that Act (communicating indecently with an older child) of that Act,
(zj) an offence under section 26(2) (causing an older child to see or hear an indecent communication) of that Act,
(zk) an offence under section 27(1) (engaging while an older child in penetrative sexual conduct with or towards another older child) of that Act,
(zl) an offence under section 27(4) (engaging while an older child in consensual penetrative sexual conduct with another older child) of that Act,
(zm) an offence under section 31 (sexual abuse of trust) of that Act.”.
### SCHEDULE 5
(introduced by section 48)

#### REPEALS

<table>
<thead>
<tr>
<th>Enactment</th>
<th>Extent of repeal</th>
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| 5  
Criminal Law (Consolidation) (Scotland) Act 1995 (c.39)                                               | Sections 3, 5 and 6.                                                             |
|                                                                                                     | Section 7(2) and (3).                                                            |
|                                                                                                     | Section 13(1), (2), (5) to (8A) and (11)(a).                                    |
|                                                                                                     | Sections 14, 16A and 16B.                                                        |
| 10 
Criminal Procedure (Scotland) Act 1995 (c.46)                                                       | Section 78(2A) and (2B).                                                        |
|                                                                                                     | Section 149A.                                                                    |
|                                                                                                     | In section 210A(10), in the definition of “sexual offence”, paragraphs (vii), (xx) and (xxi). |
| 15 
Crime and Punishment (Scotland) Act 1997 (c.48)                                                    | In Schedule 1, paragraph 18(3).                                                   |
| Criminal Justice (Terrorism and Conspiracy) Act 1998 (c.40)                                          | In Schedule 1, paragraph 8.                                                      |
| Sexual Offences (Amendment) Act 2000 (c.44)                                                          | The whole Act.                                                                   |
| 20 
Regulation of Care (Scotland) Act 2001 (asp 8)                                                      | In schedule 3, paragraph 25.                                                     |
| Convention Rights (Compliance) (Scotland) Act 2001 (asp 7)                                           | In section 10, paragraph (b) and the word “and” immediately before that paragraph. |
| 25 
Sexual Offences (Procedure and Evidence) (Scotland) Act 2002 (asp 9)                               | Section 6(1)(b) and (2).                                                         |
| Sexual Offences Act 2003 (c.42)                                                                      | Section 142(5).                                                                  |
|                                                                                                     | In Schedule 6, paragraph 33.                                                     |
| 30 
Criminal Justice (Scotland) Act 2003 (asp 7)                                                       | Section 19(2)(c).                                                                |
<p>| Mental Health (Care and Treatment) (Scotland) Act 2003 (asp 13)                                     | Sections 311 to 313 and 319.                                                     |</p>
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<tr>
<th>Enactment</th>
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<tr>
<td>Protection of Children and Prevention of Sexual Offences (Scotland) Act 2005 (asp 9)</td>
<td>In the schedule, paragraph 1.</td>
</tr>
<tr>
<td>Protection of Vulnerable Groups (Scotland) Act 2007 (asp 14)</td>
<td>In schedule 1, paragraph 1(p).</td>
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Sexual Offences (Scotland) Bill
[AS INTRODUCED]

An Act of the Scottish Parliament to make new provision about sexual offences, and for connected purposes.

Introduced by: Kenny MacAskill
On: 17 June 2008
Bill type: Executive Bill
These documents relate to the Sexual Offences (Scotland) Bill (SP Bill 11) as introduced in the Scottish Parliament on 17 June 2008

SEXUAL OFFENCES (SCOTLAND) BILL

EXPLANATORY NOTES

(CONTENT OTHER ACCOMPANYING DOCUMENTS)

CONTENTS

1. As required under Rule 9.3 of the Parliament’s Standing Orders, the following documents are published to accompany the Sexual Offences (Scotland) Bill introduced in the Scottish Parliament on 17 June 2008:

- Explanatory Notes;
- a Financial Memorandum;
- a Scottish Government Statement on legislative competence; and
- the Presiding Officer’s Statement on legislative competence.

A Policy Memorandum is printed separately as SP Bill 11–PM.
EXPLANATORY NOTES

INTRODUCTION

2. These Explanatory Notes have been prepared by the Scottish Government in order to assist the reader of the Bill and to help inform debate on it. They do not form part of the Bill and have not been endorsed by the Parliament.

3. The Notes should be read in conjunction with the Bill. They are not, and are not meant to be, a comprehensive description of the Bill. So where a section or schedule, or a part of a section or schedule, does not seem to require any explanation or comment, none is given.

THE BILL – AN OVERVIEW

4. The Sexual Offences (Scotland) Bill provides for a statutory framework for sexual offences in Scots law. The Bill repeals the common law offences of rape, sodomy and clandestine injury to women and a number of statutory sexual offences in addition to creating new statutory offences relating to sexual conduct, in particular where that takes place without consent. It provides a general definition of consent as “free agreement” and supplements this with a non-exhaustive list of factual circumstances in which free agreement, and therefore consent, is not present.

5. The Bill creates new statutory offences of rape, sexual assault, sexual coercion, coercing a person to be present during sexual activity, coercing a person to look at an image of sexual activity, communicating indecently, sexual exposure and administering a substance for a sexual purpose. The Bill also creates new “protective offences” which criminalise sexual activity with a person whose capacity to consent to sexual activity is either entirely absent or not fully formed either because of their age or because of a mental disorder. Separate “protective” offences are provided for in respect of sexual activity with young children (under the age of 13) and older children (from age 13 to age 15). In addition, the Bill makes it an offence of “abuse of position of trust” for a person in a position of trust (over a child or person with a mental disorder) to engage in sexual activity with that child or person.

COMMENTARY ON SECTIONS

PART ONE – RAPE ETC.

Section 1 – Rape

6. This section creates a statutory offence of “rape”. Subsection (1) provides that a person will commit the offence of rape by intentionally or recklessly penetrating, with their penis, the victim’s vagina, anus or mouth, in circumstances where the victim does not consent, and the accused has no reasonable belief that the victim is consenting to the penetration.

7. Subsection (2) defines “penetration” for the purposes of this section. It is defined as a continuing act from entry of the penis until its withdrawal.
These documents relate to the Sexual Offences (Scotland) Bill (SP Bill 11) as introduced in the Scottish Parliament on 17 June 2008

8. Subsection (3) provides that there may be circumstances where penetration is initially consented to but consent is subsequently withdrawn. In these circumstances, a person will have committed rape only if the penetration of the victim’s vagina, anus or mouth takes place (or continues to take place) after the point at which consent is withdrawn.

9. Subsection (4) defines the terms “penis” and “vagina”.

Section 2 – Sexual assault

10. This section creates a statutory offence of “sexual assault”. The constituent elements of the offence are set out in subsections (1) and (2).

11. Subsection (1) provides that such an offence is committed only if the victim did not consent to the sexual conduct in question and the perpetrator had no reasonable belief that the victim was consenting.

12. Subsection (2) sets out four separate sexual acts, each of which constitute the offence of sexual assault. It also provides that, in each case, in order to commit an offence the perpetrator must either act intentionally or recklessly when carrying out one of these sexual acts. The four sexual acts are:
   
   (a) penetrating the victim’s vagina, anus or mouth by any means in a sexual way;
   
   (b) touching the victim in a sexual way;
   
   (c) having any other sexual physical contact with the victim, whether directly or through clothing and whether with a body part or implement; and
   
   (d) ejaculating semen onto the victim.

13. Subsection (3) sets out the test for determining whether an activity under subsection (2) is sexual. It provides that an activity is sexual if a reasonable person would, in all the circumstances of the case, consider it to be sexual.

14. Subsections (4), (5) and (6) deal with penetration. Subsections (4) and (5) define penetration as a continuing activity and provide for circumstances where penetration is initially consented to but consent is then withdrawn before penetration has ended. This is similar to section 1(2) and (3) (see paragraph 7 and 8 above). Subsection (6) provides that penetration “by any means” in subsection (2) includes with the perpetrator’s penis. This means there is an overlap with the between the conduct which constitutes sexual assault under this section and that which constitutes rape under section 1. This is deliberate and is intended to cover circumstances where the victim knows that he or she was penetrated, but is unable to say whether penetration was penile or not (for example due to being blindfolded).

Section 3 – Sexual coercion

15. This section creates the offence of “sexual coercion”. Subsection (1) provides that the offence is committed if the perpetrator intentionally causes the victim to participate in a sexual
activity without the victim’s consent and without any reasonable belief that the victim was consenting.

16. Subsection (2) provides a test for whether an activity is sexual for the purposes of subsection (1). This is effectively the same as the test used in section 2 (see paragraph 13 above).

Section 4 – Coercing a person into being present during a sexual activity

17. This section creates the offence of “coercing a person into being present during a sexual activity”. Subsection (1) provides that there are two circumstances in which the offence is committed. These are first, that the perpetrator intentionally engaged in a sexual activity in the presence of the victim or, secondly, that the perpetrator intentionally caused the victim to be present while a third person engaged in a sexual activity. In either instance, the offence is committed only if the victim did not consent to being present during the sexual activity and the perpetrator did not have any reasonable belief that the victim consented.

18. Subsection (2) provides that an offence is committed only where the perpetrator has acted for the purpose obtaining sexual gratification or humiliating, distressing or alarming the victim.

19. Subsection (3) provides a test for whether an activity is sexual for the purposes of subsection (1). This is effectively the same as the test used in section 2 (see paragraph 13 above).

20. Subsection (4) provides that, for the purposes of this offence, the requirement that the victim is present, or that an activity is carried out in his or her presence, includes situations other than in which the person engaging in the sexual activity can be observed by means of an image (such as an image on a screen which is generated by a webcam). It is not essential that it be proved that the victim can be proved to have actually observed the activity; it is enough that the activity was in a place where it was capable of being observed by the victim.

Section 5 – Coercing a person into looking at an image of a sexual activity

21. This section creates the offence of “coercing a person into looking at an image of a sexual activity”. Subsections (1) and (2) provide that an offence is committed if a person intentionally (and for the purpose of obtaining sexual gratification or for the purpose of humiliating, distressing or alarming the victim) causes the victim to look at an image of a person engaging in a sexual activity.

22. Subsection (3) provides a test for whether an activity is sexual for the purposes of subsection (1). This is effectively the same as the test used in section 2 (see paragraph 13 above).
Section 6 – Communicating indecently etc.

23. This section creates two offences, each relating to unwanted sexual communication. Both subsections (1) and (2) provide that the offences are committed only where the victim did not consent to the activity and the perpetrator had no reasonable belief that the victim consented.

24. Subsection (1) creates the offence of “communicating indecently”. It is committed if a person, in the circumstances set out in paragraph 23 above, intentionally sends the victim a sexual written communication by whatever means, or directs a sexual verbal communication at the victim, by whatever means.

25. Subsection (2) creates the offence of “causing a person to see or hear an indecent communication”. It is committed if, in circumstances other than specified in subsection (1), a person causes the victim to see a sexual written communication or to hear a sexual verbal communication, in each case by whatever means and in the circumstances described in paragraph 23 above.

26. Subsection (3) provides that an offence under subsection (1) or (2) is committed only where the perpetrator’s purpose is to obtain sexual gratification, or to humiliate, distress or alarm the victim.

27. Subsection (4) defines “written communication” and “verbal communication” for the purpose of this section.

28. Subsection (5) provides a test for whether an activity is sexual for the purposes of this section. This is effectively the same as the test used in section 2 – see paragraph 13 above.

Section 7 – Sexual exposure

29. This section creates the offence of “sexual exposure”. Subsection (1) provides that the offence of sexual exposure is committed if a person intentionally exposes his or her genitals in a sexual manner to another person with the intention that the person will see them. In addition, the perpetrator must either intend that the victim will be caused alarm or distress as a result of the exposure, or must be reckless as to whether alarm or distress will be caused.

30. Subsection (2) provides a test for whether an activity is sexual for the purposes of subsection (1). This is effectively the same as the test used in section 2 (see paragraph 13 above).

31. Subsection (3) provides that it shall be a defence to a charge under this section that the person who exposed their genitals in breach of this section did so in the course of a performance or play. It is a further requirement that the director or presenter of the production must have directed the actor to expose his or her genitals in this way. Subsection (4) defines “play” for the purpose of subsection (3).
Section 8 – Administering a substance for sexual purposes

32. This section creates the offence of “administering a substance for sexual purposes” where a person intentionally gives a victim an intoxicant, or otherwise causes an intoxicant to be taken by the victim without the victim knowing, and without reasonable belief that the victim knows, for the purpose of stupefying or overpowering the victim in order that the perpetrator may engage in a sexual activity with the victim. It is immaterial whether or not any sexual activity actually takes place.

33. Subsection (2)(a) provides a test for whether an activity is sexual for the purposes of subsection (1). This is effectively the same as the test used in section 2 (see paragraph 13 above). Subsection (2)(b) extends the offence to apply to certain situations in which the victim does in fact know that he or she is taking the intoxicating substance. In such a situation, a person will commit an offence if he or she intentionally induces in the victim a reasonable belief that the substance is either substantially weaker than it really is, or is of a substantially smaller quantity than it really is. The fact that the victim knows that he or she is taking an intoxicant is to be disregarded.

PART 2 – CONSENT AND REASONABLE BELIEF

Section 9 – Meaning of “consent” and related expressions

34. This section defines consent as “free agreement”. The definition applies to Parts 1 and 3 of the Act.

Section 10 – Circumstances in which conduct takes place without free agreement

35. This section builds on the general definition of consent in section 9. It provides that, in the particular situations which are set out in subsection (2), there is no free agreement to sexual activity by a victim, and hence no consent. It is a non-exhaustive list and therefore does not imply that in situations which are not listed in subsection (2) there is free agreement.

36. Subsection (2)(a) provides that there is no consent if the victim’s only indication or expression of consent to sexual activity is given at a time when he or she is so intoxicated through alcohol or any other substance that he or she is incapable of giving consent. The exact point at which the victim reaches this level of intoxication will be a matter to be decided by the court but once it has been reached then any acting by the victim will not amount to consent.

37. Subsection (2)(b) provides that there is no consent if the victim is asleep or unconscious (for whatever reason) except in circumstances where the victim has freely agreed, prior to falling asleep or becoming unconscious, to sexual activity taking place while he or she is in that state.

38. Subsection (2)(c) provides that there is no consent in situations in which the victim agrees or submits to sexual activity because of violence used against him or her or another person, or because of threats of violence against him or her or another person.
39. Subsection 2(d) provides that there is no consent if the victim agrees or submits to sexual activity because he or she is unlawfully detained by the accused. The detention need not necessarily involve the use of direct force or violence.

40. Subsection 2(e) provides that the victim does not consent to sexual activity when the accused has deceived him or her and, as a result, the victim is mistaken as to the nature or the purpose of the activity.

41. Subsection 2(f) provides that there is no consent if the victim agrees or submits to sexual activity with the perpetrator as a result of the perpetrator impersonating someone whom the victim knows personally.

42. Subsection (2)(g) provides that there is no consent if the only expression or indication of the victim’s consent to sexual activity is from someone other than the victim.

43. Subsection (3) provides that in each of the paragraphs of subsection (2), the references to “A” and “B” are to be read in the same way as they are read in sections 1 to 6. Therefore, “A” is the person accused of the offence and “B” is the victim or complainer.

Section 11 – Consent: scope and withdrawal

44. This section makes further provision as to the meaning of consent for sections 1 to 6 of the Bill. It deals with two separate aspects of consent.

45. Subsection (2) provides that consent given to particular sexual conduct does not, of itself, imply consent to any other type of sexual conduct.

46. Subsections (3) and (4) deal with the withdrawal of consent. Subsection (3) provides that consent may be withdrawn at any time before or during that sexual activity. Consent may therefore be withdrawn before the activity begins or while the sexual activity is taking place. Subsection (4) provides that, if consent is withdrawn, the activity takes place without consent.

Section 12 – Reasonable belief

47. This section makes further provision in respect of determining, for the purposes of Part 1 of the Bill, whether a person’s belief as to consent or knowledge, in relation to the sexual activity that has taken place, was reasonable.

48. It will be for a court or the jury to determine in each particular case what amounts to reasonable belief but this section provides that, in determining whether such belief is reasonable, regard is to be had to whether the accused took any steps to ascertain whether there was consent, or, as the case may be, knowledge, and if so, to what those steps were.
PART 3 – MENTALLY DISORDERED PERSONS

Section 13 – Capacity to consent

49. This section deals with the capacity of those with a mental disorder to consent to sexual activity. Subsection (1) provides that it relates to the offences in sections 1 to 6, where lack of consent is an essential element.

50. Subsection (2) states that a mentally disordered person is incapable of consenting to conduct (i.e. any conduct which falls within sections 1 to 6) where, by reason of the mental disorder, he or she is unable to do any of the things listed in sub-paragraphs (a) to (c). This test for capacity mirrors the one set out in section 311(4) of the Mental Health (Care and Treatment) (Scotland) Act 2003.

PART 4 – CHILDREN

51. Part 4 of the Bill provides for a range of “protective offences”, which prohibit sexual contact with children. It makes separate provision for offences involving sexual activity with “young” and “older” children.

YOUNG CHILDREN

52. Sections 14 to 20 of the Bill make provision in relation to sexual conduct involving “young children”. The Bill uses the term “young child” to refer to a child who is under the age of 13 at the time the offence was committed. Therefore, each of the offences under sections 14 to 19 can be committed only against a child who is aged under 13.

Section 14 – Rape of a young child

53. This section creates the statutory offence of “rape of a young child”. It provides that a person will commit this offence by intentionally or recklessly penetrating, with their penis, the vagina, anus or mouth of a young child. There is no reference to consent of the victim in this section. An offence will be committed irrespective of whether a young child apparently “consented” to the penetration.

Section 15 – Sexual assault on a young child

54. This section creates the offence of “sexual assault on a young child”. Subsection (2) sets out four separate sexual acts, each of which constitute an offence. It also provides that, in each case, in order to commit an offence the perpetrator must either act intentionally or recklessly when carrying out one of these sexual acts. The four sexual acts are:

(a) penetrating a young child’s vagina, anus or mouth by any means in a sexual way;
(b) touching a young child in a sexual way;
(c) having any other sexual physical contact with a young child, whether directly or through clothing and whether with a body part or with an implement; and
(d) ejaculating semen onto a young child.
55. Subsection (3) provides a test for determining whether an activity under subsection (2) is sexual. This is effectively the same as the test used in section 2 (see paragraph 13 above).

56. Subsection (4) provides that penetration “by any means” in subsection (2) includes with the perpetrator’s penis. This means that there is an overlap between the conduct which constitutes sexual assault on a young child and that which constitutes rape of a young child. This is necessary for the same reasons as specified for the overlap between the offences at section 1 and 2 of the Bill (see paragraph 14 above).

Section 16 – Causing a young child to participate in a sexual activity

57. This section creates the offence of “causing a young child to participate in a sexual activity”. Subsection (1) provides that the offence is committed if the perpetrator intentionally causes the young child to participate in a sexual activity.

58. Subsection (2) provides a test for whether an activity is sexual for the purposes of subsection (1). This is effectively the same as the test used in section 2 (see paragraph 13 above).

Section 17 – Causing a young child to be present during a sexual activity

59. This section creates the offence of “causing a young child to be present during a sexual activity”. Subsection (1) provides that there are two circumstances in which the offence is committed. These are first, that the perpetrator intentionally engaged in a sexual activity in the presence of a young child or, secondly, that the perpetrator intentionally caused a young child to be present while a third person engaged in a sexual activity.

60. Subsection (2) provides that an offence is committed only where the perpetrator’s purpose in having a young child present is to obtain sexual gratification or to humiliate, distress or alarm the young child.

61. Subsection (3) provides a test for whether an activity is sexual for the purposes of subsection (1). This is effectively the same as the test used in section 2 (see paragraph 13 above).

62. Subsection (4) provides that, for the purposes of subsection (1), the requirement that the young child is present or that the activity is carried out in his or her presence, includes situations in which the person engaging in the sexual activity can be observed by the young child (other than by means of an image). It is not essential that it be proved that the young child actually observed the activity; it is sufficient that the young child was in a place where the sexual activity was capable of being observed from.

Section 18 – Causing a young child to look at an image of a sexual activity

63. Section 18 creates the offence of “causing a young child to look at an image of a sexual activity”. Subsection (1) provides that the offence is committed if a person intentionally causes a
young child to look at an image of the perpetrator, a third person or an imaginary person engaging in a sexual activity.

64. Subsection (2) provides that an offence is committed only if the perpetrator acts for the purpose of obtaining sexual gratification or to humiliate, distress or alarm the young child.

65. Subsection (3) provides a test for whether an activity is sexual for the purposes of subsection (1). This is effectively the same as the test used in section 2 (see paragraph 13 above).

Section 19 – Communicating indecently with a young child etc.

66. This section creates two offences, each relating to sexual communication with a young child. There are some common features shared by both offences.

67. Subsection (1) creates the offence of “communicating indecently with a young child”. It is committed if a person intentionally sends a young child a sexual written communication by whatever means or directs a sexual verbal communication at a young child, by whatever means.

68. Subsection (2) creates the offence of “causing a young child to see or hear an indecent communication”. It is committed if a person causes the young child to see a sexual written communication or to hear a sexual verbal communication in circumstances other than as described in subsection (1).

69. Subsection (3) provides that an offence is committed only where the perpetrator acts for the purpose of obtaining sexual gratification or to humiliate, distress or alarm the young child.

70. Subsection (4) defines “written communication” and “verbal communication” for the purposes of this section.

71. Subsection (5) provides a test for whether an activity is sexual for the purposes of this section. This is effectively the same as the test used in section 2 (see paragraph 13 above).

Section 20 – Belief that a child has attained the age of 13 years

72. Section 20 provides that it shall not be defence to a charge of a sexual offence against a young child, under sections 14 to 19 of the Bill, that the accused believed that the young child was aged 13 years or over.

OLDER CHILDREN

73. Sections 21 to 29 of the Bill make provision in relation to sexual conduct involving “Older Children”. The Bill uses the term “older child” to refer to a child who is aged 13, 14 or 15 at the time the offence was committed. Therefore, each of the offences under sections 21 to 27 can be committed only against an older child of those ages.
These documents relate to the Sexual Offences (Scotland) Bill (SP Bill 11) as introduced in the Scottish Parliament on 17 June 2008

Section 21 – Having intercourse with an older child

74. This section creates the offence of “having intercourse with an older child”. It provides that the offence may be committed only by a person aged 16 or over. A person will commit an offence under this section by intentionally or recklessly penetrating, with their penis, the vagina, anus or mouth of an older child.

Section 22 – Engaging in sexual activity with or towards an older child

75. This section creates the offence of “engaging in sexual activity with or towards an older child”. Subsection (1) provides that the offence may be committed only by a person aged 16 or over.

76. Subsection (2) sets out four separate sexual acts, each of which constitute an offence. It also provides that, in each case, in order to commit an offence the perpetrator must either act intentionally or recklessly when carrying out one of these sexual acts. The four sexual acts are:

(a) penetrating an older child’s vagina, anus or mouth by any means in a sexual way;
(b) touching an older child in a sexual way;
(c) having any other sexual physical contact with an older child, whether directly or through clothing and whether with a body part or with an implement; and
(d) ejaculating semen onto an older child.

77. Subsection (3) provides a test for whether an activity is sexual for the purposes of this section. This is effectively the same as the test used in section 2 (see paragraph 13 above).

78. Subsection (4) provides that penetration “by any means” for the purposes of subsection (2) includes with the perpetrator’s penis. This means that there is an overlap between the conduct which constitutes sexual assault on an older child under this section and that of having intercourse with an older child (under section 21). This is necessary for the same reasons as specified for the overlap between the offences at section 1 and 2 of the Bill (see paragraph 14 above).

Section 23 – Causing an older child to participate in a sexual activity

79. This section creates the offence of “causing an older child to participate in a sexual activity”. Subsection (1) provides that the offence may be committed only by a person aged 16 or over. Further, it provides that the offence is committed only where the perpetrator intentionally causes an older child to participate in a sexual activity.

80. Subsection (2) provides a test for whether an activity is sexual for the purposes of this section. This is effectively the same as the test used in section 2 (see paragraph 13 above).
Section 24 – Causing an older child to be present during a sexual activity

81. This section creates the offence of “causing an older child to be present during a sexual activity”. Subsection (1) provides that the offence may be committed only by a person aged 16 or over. It provides that the two circumstances in which this offence is committed are, first, where the perpetrator intentionally engages in a sexual activity in the presence of an older child or, secondly, where the perpetrator causes an older child to be present while a third party engages in a sexual activity.

82. Subsection (2) provides that the activities at subsection (1) are a crime only where the perpetrator acts for the purpose of obtaining sexual gratification or to humiliate, distress or alarm the older child.

83. Subsection (3) provides a test for whether an activity is sexual for the purposes of subsection (1). This is effectively the same as the test used in section 2 (see paragraph 13 above).

84. Subsection (4) provides that, for the purposes of this offence, the requirement that an older child is present when the perpetrator or a third person carried out sexual activity includes situations in which the person engaging in the sexual activity can be observed by an older child (other than by means of an image). It is not essential to prove that the older child actually observed the activity; so long as the older child was in a place where the sexual activity was capable of being observed from.

Section 25 – Causing an older child to look at an image of a sexual activity

85. This section creates the offence of “causing an older child to look at an image of a sexual activity”. Subsection (1) provides that the offence is committed where a person over the age of 16 intentionally causes an older child to look at an image of the perpetrator, a third person or an imaginary person engaging in a sexual activity.

86. Subsection (2) provides that it is an offence only where the perpetrator acts for the purpose of obtaining sexual gratification or to humiliate, distress or alarm the older child.

87. Subsection (3) provides a test for whether an activity is sexual for the purposes of this section. This is effectively the same as the test used in section 2 (see paragraph 13 above).

Section 26 – Communicating indecently with an older child etc.

88. This section creates two offences, each relating to sexual communication with an older child by a person aged 16 or over.

89. Subsection (1) creates the offence of “communicating indecently with an older child”. It provides that the offence is committed if a person intentionally sends an older child a sexual written communication by whatever means, or directs a sexual verbal communication at an older child, by whatever means.
90. Subsection (2) creates the offence of “causing an older child to see or hear an indecent communication”. It provides that an offence is committed where a person causes an older child to see a sexual written communication or to hear a sexual verbal communication by whatever means in any circumstances other than those specified in subsection (1).

91. Subsection (3) provides that an offence is committed only where the perpetrator acts for the purpose of obtaining sexual gratification or to humiliate, distress or alarm the older child.

92. Subsection (4) defines “written communication” and “verbal communication” for the purposes of this section.

93. Subsection (5) provides a test for whether an activity is sexual for the purposes of this section. This is effectively the same as the test used in section 2 (see paragraph 13 above).

Section 27 – Older children engaging in penetrative sexual conduct with each other

94. Section 27 provides that an older child who participates in penetrative sexual conduct with another older child commits an offence, whilst making clear that the Lord Advocate continues to have discretion to issue instructions to chief constables of police forces in Scotland on the reporting of such offences, for example, to the Children’s Reporter.

95. Subsections (1), (2) and (3) provide that an older child who intentionally or recklessly penetrates sexually another older child’s vagina or anus commits the offence of “engaging while an older child in penetrative sexual conduct with or towards another older child”.

96. Subsection (4) provides that an older child who consents to penetrative sexual conduct will also be guilty of an offence; that offence being “engaging while an older child in consensual penetrative sexual conduct with another older child”.

97. Subsections (5) and (6), when read with subsection (3) provide that penetration, for the purposes of this section, includes penetration with a penis (but penetration of or by the mouth is not an offence).

98. Subsections (7) and (8) declare that the Lord Advocate has discretion to issue instructions to chief constables of police forces in Scotland about reporting offences under this section. They make clear that the discretion which the Lord Advocate exercises in issuing instructions to chief constables about reporting offences (including sexual offences involving children) is not affected by these subsections.

Section 28 – Penetration and consent for the purposes of section 27

99. This section makes further provision as to the meaning of penetration and consent for the purposes of section 27.
100. Subsection (2) provides a test for whether penetration is sexual (effectively the same as the test used in section 2 (see paragraph 13 above)) while subsection (3) provides that it is a continuing act until withdrawal.

101. Subsections (4) to (8) mirror the approach taken in Part 1 of the Bill. Subsections (4) and (5) provides that for the purposes of section 27 “consent” means “free agreement” (as defined in section 9) and that free agreement to sexual conduct is absent in the circumstances specified in section 10(2).

102. Subsection (6) (like section 11) provides that consent given to particular sexual conduct does not, of itself, imply consent to any other type of sexual conduct.

103. Subsections (7) and (8) (like section 11) deal with the withdrawal of consent. Subsection (7) provides that consent to the sexual conduct may be withdrawn at any time before or during that conduct. Subsection (8) reinforces this by providing that any sexual conduct which takes place after consent is withdrawn takes place without consent.

Section 29 – Defences in relation to offences against older children

104. This section provides the defences which can be invoked by a person who is charged with an offence against an older child. Subsection (1) provides that it is a defence for an accused person who is charged with offence under sections 21 to 27 that he or she reasonably believed that the older child had attained the age of 16 years at the time the conduct took place.

105. Subsection (2) requires that an accused may not use the defences set out in subsection (1) if he or she has previously been charged by the police with a relevant offence. Subsection (5) provides that relevant offences may be specified in subordinate legislation.

106. Subsections (3) and (4) provide that it shall be a defence to a charge relating to the offences in sections 22(2)(b), (c) and (d) and sections 23 to 26 that the difference between the accused’s age and that of the older child did not exceed 2 years. It is also a defence to a charge under section 21 if the charge provides that there was penetration of the mouth. It is also a defence to a charge under section 22(2)(a) if the charge provides that there was penetration of or by the mouth.

107. Subsection (6) provides that a belief that the victim was in fact a young child is not a defence to a charge of any of the offences in sections 21 to 26 and that a belief that the other child was in fact a young child is not a defence to a charge of any offence in section 27.

Section 30 – Special provision as regards failure to establish whether child has or has not attained age of 13 years

108. The offences in Part 4 of the Bill divide into two distinct groups: those concerning sexual activity with a young child (where the child is under the age of 13 at the time of the conduct (sections 14 to 19)), and those concerning sexual activity with an older child (where, at the time of the conduct, the child has attained the age of 13 but is not yet the age of 16 (sections 21 to 27)). The question of which offence is appropriate in any particular case is determined solely by
the age of the child at the time when the offence is said to have been committed, and not by the accused’s belief as to the child’s age. Section 30 provides for circumstances where the Crown is unable to prove the age of the child at the time when the offence was said to have been committed.

109. Subsection (1) deals with charges under sections 21 to 26, which relate to older children. If the Crown is unable to prove, beyond reasonable doubt, that the child had attained the age of 13 at the time when the offence was said to have been committed, this subsection provides that the child will be deemed to have attained the age of 13. The Crown must be able to prove that the child was under the age of 16 at the relevant time.

110. Subsections (2) and (3) deal with charges under sections 14 to 19, which relate to sexual conduct involving a young child. If the Crown is unable to prove, beyond reasonable doubt, that the child was under the age of 13 at the relevant time but can establish that, in every other respect, the accused committed or attempted to commit the offence which is charged (and can prove that the child was under 16) then the accused may be acquitted of that charge but found guilty of the corresponding offence relating to an older child (as specified in subsection (3)).

111. Subsections (4) to (6) deal with situations where, but for a failure to prove that the victim was under 13, a person charged with an offence against a young child may be convicted of an alternative offence specified in schedule 2, as provided by section 38. These subsections set out the circumstances in which the person can be convicted of an alternative offence and which alternative offence the person can be convicted of.

PART 5 – ABUSE OF POSITION OF TRUST

Section 31 – Sexual abuse of trust

112. Section 31 creates the offence of “sexual abuse of trust”. Subsection (1) provides that a person commits the offence of sexual abuse of trust if they are aged 18 years or older and intentionally engage in a sexual activity with, or directed at, a person who is under 18 and in respect of whom the perpetrator is in a position of trust. Section 32 defines what is meant by “a position of trust.”

113. Subsection (2) provides a test for whether penetration is sexual. The test is effectively the same as the test used in section 2 (see paragraph 13 above).

Section 32 – Positions of trust

114. This section defines “position of trust” for the purposes of the offence of sexual abuse of trust in section 31. Definitions of the terms used in this section are provided in section 33.

115. Subsection (1) states that person A is in a position of trust in relation to person B if any of the five conditions set out in subsection (2) to (6) is fulfilled. It also creates a power for the Scottish Ministers to make an order (subject to negative resolution procedure) specifying other conditions which constitute a position of trust.
116. Subsection (2) provides that a position of trust is constituted if A looks after B, where B is detained in an institution by virtue of a court order or under an enactment.

117. Subsection (3) provides that a position of trust is constituted if A looks after B, when B resides in accommodation provided by a local authority under section 26(1) of the Children (Scotland) Act 1995.

118. Subsection (4) provides that a position of trust is constituted if A looks after B, when B is accommodated in any of the places described in paragraphs (a) to (e) of this subsection.

119. Subsection (5) provides that a position of trust is constituted if A looks after B, when B is receiving education at an educational establishment.

120. Subsection (6) provides that a position of trust is constituted if A and B are members of the same household and A has (or had, or fulfils) parental rights or parental responsibilities in respect of B, or if A treats B as a child of A’s family.

121. Subsection (7) provides that A “looks after” B for the purposes of this section if A cares for, trains, supervises or is in sole charge of B, so long as A does so regularly.

Section 33 – Interpretation of section 32

122. This section defines the meaning of certain terms for the purposes of section 32.

Section 34 – Sexual abuse of trust: defences

123. This section provides for the defences which can be invoked by a person who is charged with an offence under section 31 (sexual abuse of trust).

124. Subsection (1)(a) provides that it is a defence if the accused reasonably believed that, at the time the sexual conduct took place, the person with whom it took place (or towards whom it was directed) was aged 18 or over.

125. Subsection (1)(b) provides that it is a defence if the accused reasonably believed, at the time of the sexual conduct, that the person with whom it took place (or towards whom it was directed) was not a person in relation to whom the accused was in a position of trust.

126. Subsection (2)(a) provides that it is a defence for the accused to show that the other party was his or her spouse or civil partner at the time of the conduct they are charged with.

127. Subsection (2)(b) provides that it is a defence for the accused to show that a sexual relationship with the victim was in existence immediately before the particular position of trust with the victim was established. This defence has been provided in order that those who were already in a sexual relationship (but who are not married to, or in civil partnership with, each other) at the time that a position of trust arises should be free to continue that relationship while a position of trust persists without committing a criminal offence.
These documents relate to the Sexual Offences (Scotland) Bill (SP Bill 11) as introduced in the Scottish Parliament on 17 June 2008

128. Subsection (3) provides that the defences under subsection (3) do not apply where the position of trust is as described in section 32(6). In other words, they do not apply where the position of trust is within a family setting.

129. Subsection (4) provides a test for whether sexual activity is sexual for the purposes of subsection (2). The test is effectively the same as the test used in section 2 (see paragraph 15 above).

Section 35 – Sexual abuse of trust of a mentally disordered person

130. This section creates the offence of “sexual abuse of trust of a mentally disordered person”. The definition of “mental disorder” is provided at section 47. It is the same definition as in section 328 of the Mental Health (Care and Treatment) (Scotland) Act 2003.

131. Subsection (1) states that a person commits an offence under this section if they fall within the class of persons specified in subsection (2) and intentionally engage in a sexual activity with, or directed at, a mentally disordered person.

132. Subsection (2) defines those classes of person who are subject to the offence provisions in subsection (1). It provides that they are those who provide a care service to a mentally disordered person and those who are employed in (or contracted to provide services in, or who manage), a hospital in which a mentally disordered person is receiving medical treatment.

133. Subsection (3) provides a test for whether sexual activity is sexual for the purposes of subsection (1). The test is effectively the same as the test used in section 2 (see paragraph 13 above).

134. Subsection (4) defines the meaning of “providing care services” for the purpose of subsection (2) and provides that the Scottish Ministers may set out further circumstances which fall within this term by order (subject to negative resolution procedure).

135. Subsection (5) defines certain terms used elsewhere in this section.

Section 36 – Sexual abuse of a mentally disordered person: defences

136. This section provides for the defences which can be invoked by a person who is charged with an offence under section 35 (sexual abuse of trust of a mentally disordered person).

137. Subsection (1)(a) provides that it is a defence that the accused reasonably believed, at the time of the sexual conduct, that the person with whom that conduct took place (or towards whom it was directed) did not have a mental disorder.

138. Subsection (1)(b) provides that it is a defence that the accused reasonably believed, at the time of the sexual conduct, that he or she was not a person who fell within any of the classes of person specified in section 35(2).
139. Subsection (2)(a) provides that it is a defence for the accused to show that the victim was his or her spouse or civil partner at the time the sexual conduct in the charge was said to have taken place.

140. Subsection (2)(b) provides that it is a defence for the accused to show that a sexual relationship with the victim existed immediately before the time when the accused is considered to have fallen within either of the classes of person specified in section 35(2).

141. Subsection (3) provides a test for whether a relationship is sexual for the purposes of subsection 2(b). The test is effectively the same as the test used in section 2 (see paragraph 13 above).

PART 6 – PENALTIES

Section 37 – Penalties

142. This section introduces schedule 1, which sets out the maximum penalties which may be imposed for each of the offences created by the Bill. For those offences which may be tried under either summary or solemn procedure the maximum penalties are as specified in the third and fourth column of schedule 1 respectively. Two offences, rape and rape of a young child, may only be tried under solemn procedure.

PART 7 – MISCELLANEOUS AND GENERAL

Section 38 – Power to convict for offence other than that charged

143. This section provides that, where a charge is brought under certain provisions in the Bill but the court or the jury are not satisfied that the accused committed the offence in the charge, it may be open to convict the accused of a specified alternative offence. Schedule 2 specifies the available alternatives.

144. Subsection (1) provides that this power may be used where the court or jury are not satisfied that the accused committed or attempted to commit the offence which is charged but are satisfied (to the normal criminal standard of proof) that the accused committed or attempted to commit another offence (where the other offence is specified, in schedule 2 to the Bill, as being an available alternative to the offence charged). If these conditions are met, then the court or jury may acquit the accused of the offence which was charged but may find him or her guilty of the alternative offence.

145. Subsection (2) provides that fair notice must be provided to the accused of the possibility of being convicted of the alternative offence (as per subsection (1)), while subsections (3) and (4) provide for the procedure by which that requirement to give fair notice may be met.

146. Subsection (5) provides that those charged with attempting, inciting, counselling or procuring the commission of an offence, or with being art and part involved in an offence, may be convicted of an appropriate alternative offence.
Section 39 – Exceptions to inciting or being involved art and part in offences under Part 4 or 5

147. This section provides that a person who acts for any of the purposes specified in paragraph (a) will not be guilty of any of the offences contained in Part 4 and Part 5 of the Bill providing that they are not also acting for any of the purposes in paragraph (b).

148. Paragraph (a) of this section specifies purposes including protecting others from sexually transmitted infection or from physical harm, the prevention of pregnancy or promoting their emotional wellbeing.

149. Paragraph (b) of this section specifies the purposes as including obtaining sexual gratification, humiliating, distressing or alarming a person or causing or encouraging the activity which constitutes an offence or a person’s participation in such conduct.

Section 40 – Common law offences

150. This section provides that the common law offences listed in paragraph (a) are abolished (other than in respect of offences committed before this section is commenced).

151. This means that, where conduct which would otherwise have constituted one of those common-law offences is committed on or after this section has been commenced, that common law offence will not have been committed. Instead, the conduct will fall under one of the offences in the Bill. The particular common law offences which are to be abolished are rape, clandestine injury to women, lewd, indecent and libidinous practice or behaviour, and sodomy. All other common law crimes remain in place.

152. Paragraph (b) qualifies this by providing that any conduct which constitutes an offence under one of the provisions of the Bill and which takes place after the commencement of this section must be charged as an offence under the Bill. This means that it will not be competent to bring a charge under the common law nor under any other statutory offence in respect of that sexual conduct. Thus, for example, conduct falling within section 2 must be charged as sexual assault and not as a common law assault aggravated by indecency.

Section 41 – Continuity of sexual offences

153. This section is intended to provide a smooth transition between the current law in respect of sexual offences and the new offences contained in the Bill. The main purpose of this section is to make allowance for cases in which the sexual conduct in the charge takes place around the time that the offences contained in the Bill come into force. It may not always be possible to prove exactly when the sexual conduct took place and hence whether this occurred before or after the relevant offence in the Bill was commenced.

154. Subsection (1) provides that this section applies where a person is charged, in respect of the same conduct, with an existing offence specified in subsection (2) and with an offence under the Bill. It provides that the court or jury must be satisfied in all respects that the accused
committed the offences charged, other than as to the time on which the sexual conduct took place.

155. Subsection (3) provides that the accused may be found guilty, where the conditions in subsection (1) apply, of whichever of the offences they are charged with has the lower maximum penalty (as defined by subsection (4)). Where the penalties are the same, it provides that the accused may be found guilty of the new offence.

156. Subsection (5) provides that a reference to an offence in this section includes an attempt to commit the offence, inciting its commission, and being involved art and part in it and to an offence as modified by section 16A or 16B of the Criminal Law (Consolidation) (Scotland) Act 1995.

Section 42 – Incitement to commit certain sexual acts outside the United Kingdom

157. Section 42 re-enacts section 16A of the Criminal Law (Consolidation) (Scotland) Act 1995 (with amendments). Section 16A provides that incitement to commit certain sexual acts that would amount to an offence in Scotland is itself an offence even where the sexual acts are intended to occur outside the UK. That provision is currently subject to a “dual criminality” requirement, i.e. for a person to be guilty of an offence the act incited must be both an offence in Scots law and in the law of the country or territory where it was to take place.

158. Section 42 removes the dual criminality requirement in respect of UK nationals. Therefore, a UK national will commit an offence under this section if he or she incites a sexual act (which is intended to take place outside the UK) that would constitute an offence in Scotland. It is no longer necessary to show that the sexual act which was incited was an offence in the country in which it was intended to take place. This follows, but goes beyond, the requirements of the Council of Europe Convention on the Protection of Children Against Sexual Exploitation and Abuse which was signed by the UK Government on 8 May 2008. That Convention requires the removal of the dual criminality requirements in relation to offences of child abuse, child pornography and child prostitution. Dual criminality is retained for UK residents and persons other than UK nationals.

159. The section applies to the offences which are listed in part 1 of schedule 3. These include inciting offences under Part 1 of the Act (rape etc.) which are committed against a person under the age of 18, the offences against children in Part 4 and the sexual abuse of trust offences in sections 31 and 35.

160. By way of example, incitement in Scotland to commit rape in Scotland would be an offence by virtue of section 293 of the Criminal Procedure (Scotland) Act 1995. The effect of section 42 is that incitement in Scotland to commit rape in another country is also an offence in Scotland, for non-UK nationals if rape is an offence in that other country. It will be an offence for UK nationals to incite rape (which is an offence in Scotland) outside the UK regardless of whether rape it is an offence in that other country.
Section 43 – Offences committed outside the United Kingdom

161. Section 43 re-enacts section 16B of the Criminal Law (Consolidation) (Scotland) Act 1995, which currently makes it an offence for a UK national or UK resident to commit certain sexual acts outside the UK, if these acts would be an offence if they had taken place in Scotland. As with section 16A, described above in connection with section 42 of the Bill, section 16B is subject to a dual criminality requirement. Therefore, in order for it to be an offence under section 16B, the sexual act which has been carried out must also be an offence in the country in which it took place.

162. As with section 42, this dual criminality requirement is removed in respect of UK nationals, in line with the Council of Europe Convention. Therefore, a UK national will commit an offence under this section if he or she carries out a sexual act outside the UK that would constitute an offence in Scotland. It is no longer necessary to show that the sexual act that was committed is also an offence in the country in which it was intended to take place. The dual criminality test is retained in relation to UK residents.

Section 44 – Continuity of law on sexual offences committed outside the United Kingdom

163. Section 44 ensures the continuity of the extraterritorial sexual offences provisions in section 16B of the Criminal Law (Consolidation) (Scotland) Act 1995 (“the 1995 Act”) which are replaced by section 43 of the Bill. It deals with cases where it cannot be proved precisely when the offence occurred, i.e. before or after section 16B of the 1995 Act is repealed.

164. Subsection (1) provides that this section applies where a person is charged, in respect of the same conduct, with an existing offence as modified by section 16B of the 1995 Act and with the offence as modified by section 43 of the Bill. As with section 41, it provides that the court or jury must be satisfied in all respects that the accused committed the offences charged, other than as to the time on which the sexual conduct took place.

165. Subsection (3) provides that where this section applies the accused may be found guilty, of the offence as modified by section 16B of the 1995 Act.

Section 45 – Ancillary provision

166. This section enables Scottish Ministers to make ancillary provision by statutory instrument which is necessary or expedient, or in consequence of, giving full effect to the Bill.

Section 46 – Orders

167. This section sets out the order making powers which can be exercised by the Scottish Ministers in the Bill and the applicable parliamentary procedure.

Section 48 – Modification of enactments

168. This section provides for the modification of existing enactments. Subsection (1) introduces schedule 4 to the Bill which provides for modifications of existing enactments in...
These documents relate to the Sexual Offences (Scotland) Bill (SP Bill 11) as introduced in the Scottish Parliament on 17 June 2008

consequence of the Bill. Subsection (2) introduces schedule 5 to the Bill which provides for repeal of certain existing enactments in consequence of the Bill.

Section 49 – Short title and commencement

169. This section provides that the Bill will come into force on a day or days decided by order by Scottish Ministers. Such orders may make different provision for different purposes.

FINANCIAL MEMORANDUM

INTRODUCTION

170. This document relates to the Sexual Offences (Scotland) Bill introduced in the Scottish Parliament on 17 June 2008. It has been prepared the Scottish Government to satisfy Rule 9.3.2 of the Parliament’s Standing Orders. It does not form part of the Bill and has not been endorsed by the Parliament.

BACKGROUND

171. The Sexual Offences (Scotland) Bill provides for a statutory framework for sexual offences in Scots law. The Bill provides for statutory offences relating to sexual conduct which takes place without consent. It contains offences of rape, sexual assault, sexual coercion, coercing a person to be present during sexual activity, coercing a person to look at an image of sexual activity, communicating indecently and sexual exposure. The Bill contains a statutory definition of consent, which it defines as *free agreement*, and supplements this with a non-exhaustive list of factual circumstances in which consent is definitely not present. The Bill contains “protective offences” which criminalise sexual activity with a person whose capacity to consent to sexual activity is either entirely absent or not fully formed either because of their age or because of a mental disorder. Separate “protective” offences apply in respect of sexual activity with younger and older children. The Bill provides sexual offences of “abuse of position of trust” which criminalise a person in a position of trust over a child or person with a mental disorder who engages in sexual activity with that person.

172. The Bill does not contain substantive provisions relating to the management of sex offenders, or to policy on prostitution or pornography. Full details of the background, objectives and effect of the Bill’s provisions can be found in the accompanying Policy Memorandum and in the preceding Explanatory Notes (supplemented by the Delegated Powers Memorandum).

CONSULTATION

173. The main consultation document for this Bill, *Consultation on Scottish Law Commission Report on rape and sexual offences* was issued by the Scottish Government¹, following

publication of the Scottish Law Commission’s (SLC) report on rape and other sexual offences\(^2\) in December 2007. The SLC earlier undertook a public consultation on a discussion paper, seeking views on their emerging findings, in January 2006. The outcome of that consultation helped to inform their final report.

174. The Scottish Government consultation specifically asked consultees whether they had any comments with regard to the financial implications of the SLC’s proposals for the Scottish Administration, local authorities and other bodies, individuals or businesses. Where respondents to the consultation made comments about resource implications, these are reflected in this memorandum.

**COSTS ON THE SCOTTISH ADMINISTRATION**

175. The Bill is intended to clarify and modernise the existing mix of common-law and statutory provision in this area. For the most part, it does not criminalise conduct which is not currently criminal. For example, the conduct criminalised by the proposed statutory offence of rape could currently be prosecuted either as the common law offence of rape, the common law offence of indecent assault or the common law offence of sodomy. Conduct criminalised by the proposed statutory offence of “sexual exposure” could currently be prosecuted at common law either as public indecency or as breach of the peace. For these reasons, we believe that the provisions in the Bill should not, in and of themselves, lead to a significant increase in the number of sexual offences cases investigated by the police or prosecuted by Crown Office and Procurator Fiscal Service (COPFS). However, clarifying the law in this area should encourage victims to feel more confident in reporting crimes to the police. COPFS and the Association of Chief Police Officers in Scotland (ACPOS) do not think this is likely to result in a substantial number of additional cases.

176. The Bill also extends the criminal law in some specific areas. The offences relating to indecent communication have no direct equivalent in the law at present, though in some circumstances it might be prosecuted as a breach of the peace or under legislation on stalking and harassment. The provisions on protective offences in respect of children cover boys under the age of 16 where the existing common law provisions apply only to sexual activity with boys under the age of 14. COPFS consider that the number of additional offences reported to them as a result of these specific changes to the law are unlikely to be substantial. COPFS and ACPOS do not think these changes will result in a substantial number of additional cases.

**Prosecution, courts and legal aid costs**

177. Taking into account the above, it is difficult to gauge how many additional cases will be reported to the police or prosecuted, though it is clear that the increase will not be large. For the purpose of the financial memorandum, we have detailed the cost implications of a 1% and 3% increase in the number of sexual offences reported for prosecution.

178. In 2005/06 there were a total of 821 convictions for offences of indecency (excluding those convicted of prostitution related offences and incest, which are not covered by this Bill). The conviction rate for crimes of indecency is 79%, which implies that just over 1000 such cases

These documents relate to the Sexual Offences (Scotland) Bill (SP Bill 11) as introduced in the Scottish Parliament on 17 June 2008

were tried in the Scottish courts in 2005/06. A 1% increase in the number of cases tried in the Scottish courts would result in around 10 additional cases being tried each year.

179. In 2006/07, around 30% of sexual offence cases were tried in the High Court, and 69% were tried in the Sheriff Court. Less than 1% of all sexual offence cases were tried in the District Court. Precise figures for the proportion of sexual offence cases tried in the Sheriff Court under solemn and summary procedure are not available. However, based on the number of individuals granted legal aid in respect of a sexual offence tried under Sheriff summary procedure, we estimate that around half of sexual offence cases tried in the Sheriff Courts are tried under summary procedure. For the purpose of the Financial Memorandum, we therefore assume that 30% of additional cases will be tried in the High Court, 35% in the Sheriff Court under solemn procedure and 35% in the Sheriff Court under summary procedure.

180. Additional cases tried in the Scottish courts would carry costs for COPFS, the courts service and legal aid. Assuming that the additional cases would fall to the High Court, Sheriff Solemn and Sheriff Summary Courts in the proportions outlined above, the weighted average cost for COPFS would be £7,085 per case (based on average costs for COPFS in 2005/06). The weighted average cost to the Scottish Court Service (SCS) would be £2,485 per case (based on average costs for 2005/06). The Scottish Legal Aid Board (SLAB) state in their annual report for 2006/07 that the average legal aid cost of a sexual offence case in 2005/06 was £5,035. However, it should be noted that small increases, like that predicted in this case, can be accommodated within normal fluctuations in the number of cases reported to COPFS and prosecuted in the courts. In such circumstances, the marginal cost will be met from within existing budgets for COPFS, SCS and SLAB and will not require any additional funding. The total average cost per additional case is thus estimated to be £14,605.

Summary of Costs Arising From Additional Court Cases

<table>
<thead>
<tr>
<th>Description</th>
<th>Cost per Case</th>
<th>Source</th>
</tr>
</thead>
<tbody>
<tr>
<td>Prosecution Costs (COPFS) per case</td>
<td>£7,085</td>
<td>Para 180</td>
</tr>
<tr>
<td>Court costs per case</td>
<td>£2,485</td>
<td>Para 180</td>
</tr>
<tr>
<td>Legal aid costs per case</td>
<td>£5,035</td>
<td>Para 180</td>
</tr>
<tr>
<td><strong>Total cost per case</strong></td>
<td><strong>£14,605</strong></td>
<td></td>
</tr>
<tr>
<td><strong>Total cost per annum assuming ~1% increase in number of cases per year (10 additional cases)</strong></td>
<td><strong>£146,050</strong></td>
<td></td>
</tr>
<tr>
<td><strong>Total cost per annum assuming ~3% increase in number of cases per year (30 additional cases)</strong></td>
<td><strong>£438,150</strong></td>
<td></td>
</tr>
</tbody>
</table>
181. One-off costs will also be incurred by COPFS and the Scottish Court Service as a result of the requirement to train staff and adapt IT systems and databases to reflect the new legislative framework for sexual offences. COPFS consider it would be necessary to conduct a specific one-day training event for all legal and precognition staff to familiarise them with the new legislation. COPFS estimate the cost of this event to be between £50,000 and £60,000. COPFS will also require to update their IT systems and to update the training and information manuals on sexual offences for all staff. The costs are not anticipated to be significant and are estimated to be between £5,000 and £10,000.

182. The one-off costs for the Scottish Courts Service are not anticipated to be significant. The Bill does not amend criminal procedure or create new disposals in respect of sex offenders. There would be a requirement to amend IT systems and update briefing for clerks. It is estimated that the cost of this will be between £5,000 and £10,000.

Costs on the police

183. ACPOS consider that the primary financial implications for Scottish police forces will relate to the requirement for training and awareness raising work in relation to the new legislation, which will require to be delivered to all officers, with a particular emphasis on those officers likely to attend initial reports and Family Protection officers. There will be a need to review the current syllabus delivered to probationary Constables at the Scottish Police College and the general guidance documents regarding the investigation of sexual offences. It is estimated that the cost of this will be between £75,000 and £150,000. There may be additional costs for Scottish police forces arising from a possible increase in reporting and prosecution of sexual offences. Detailed figures on the average cost to the police arising from the reporting or prosecution of a sexual offence are not available.

184. However, ACPOS consider that as the Bill does not, in the main, seek to criminalise conduct which is not currently an offence, financial implications are unlikely to be significant.

Costs on the Scottish Prison Service

185. An increase in the number of persons prosecuted for sexual offences is likely to result in a slight upward pressure on the prison population. We estimate that a 1% increase in the number of sexual offences cases prosecuted would result in no more than 10 additional prisoner places each day and a 3% increase, in no more than 30 additional prisoner places each day. For planning purposes (and in line with advice on other legislation) the Scottish Prison Service (SPS) estimates that the recurring annual cost per prisoner place, if additional capacity were required, is £40,000 in addition to the capital cost of accommodation. We therefore estimate that a 1% increase in convictions would result in an additional cost to the Scottish Prison Service of £400,000 and a 3% increase would result in an additional cost of £1.2m.

186. However, for small increases in population, like that predicted in this case, it is expected that any extra prisoners may be accommodated within normal fluctuations in prison population at marginal cost only. This means that the recurring annual cost mentioned above is unlikely to arise in practice (and that information given in this respect is for background interest only). In such circumstances, the marginal cost will be met from within existing SPS budgets and will not require the allocation of additional funding.
Costs on the Scottish Children’s Reporter Administration

187. Unlike the draft Bill produced by the SLC, the Bill does not create a new ground for referral to the Scottish Children’s Reporter Administration (SCRA). Children engaged in under-age sexual activity who are investigated by the police would, in the vast majority of instances, already be referred to the Children’s Reporter, rather than being prosecuted in the criminal courts. It is possible that, by extending criminalisation of consensual under-age penetrative sexual activity to both the male and the female (under the current law, only a male child under 16 can commit this offence) there will be a small increase in the number of children referred to SCRA on offence grounds.

188. Discussions with the Scottish Children’s Reporter Administration (SCRA) suggest that this is unlikely to result in a significant increase in the number of referrals they receive as current practice regarding reports of consensual under-age sexual activity is that both parties are referred to the Children’s Reporter – the boy on offence grounds and the girl on non-offence grounds.

189. It is nonetheless possible that the provisions contained in the Bill will result in a small number of addition referrals of children who do not currently come into contact with the Children’s Hearing System. Detailed figures on the cost to the SCRA of referrals to the Children’s Reporter are not available at present. However, an indicative estimate based on the total number of referrals processed by SCRA each year (around 100,000 – of which 40,000 result in a Hearing, with 13,000 children subject to compulsory measures of supervision at any one time) and the total grant-in-aid to SCRA (£28m) would be that the average total cost of a referral to SCRA is £280. We estimate that the new provisions could result in 200 additional cases for the SCRA. However the following table outlines the cost of a range of levels.

<table>
<thead>
<tr>
<th>Referrals</th>
<th>Cost per annum (based on £280 per referral)</th>
</tr>
</thead>
<tbody>
<tr>
<td>100</td>
<td>£28,000</td>
</tr>
<tr>
<td>200</td>
<td>£56,000</td>
</tr>
<tr>
<td>300</td>
<td>£84,000</td>
</tr>
<tr>
<td>400</td>
<td>£112,000</td>
</tr>
</tbody>
</table>

COSTS ON LOCAL AUTHORITIES

Criminal Justice Social Work

190. We estimate that a 1% increase in the number of prosecutions for sexual offences would lead to an additional 2 probation orders a year, and that a 3% increase would lead to an additional 6 probation orders. The average cost of a probation order in 2004/05 (the most recent year for which figures are available) was £1,293. The costs for these fall to Criminal Justice Social Work. Based on the above assumptions, we would estimate the total additional cost arising from additional probation orders to be between £2,586 and £7,758.
These documents relate to the Sexual Offences (Scotland) Bill (SP Bill 11) as introduced in the Scottish Parliament on 17 June 2008

Costs arising from Children’s Hearings

191. Any additional referrals to the Children’s Reporter may result in additional costs for local authorities if, at any subsequent Children’s Hearing, it is determined that compulsory measures are required to be put in place in respect of the child. COSLA inform us that they do not have average figures for the cost to a local authority of a referral to the Children’s Reporter. However, based on our estimate that there may be between 100 and 300 additional referrals as a result of the legislation, we would not expect any additional costs to exceed 0.3% of the total costs falling to local authorities from Children’s Hearings.

COSTS ON OTHER BODIES, INDIVIDUALS AND BUSINESSES

192. Individuals who are convicted of any of the offences provided for in this Bill will be expected to pay any fine imposed on them by the court as a result of that conviction. There are no costs for other bodies or businesses.

SUMMARY OF ADDITIONAL COSTS ARISING

193. The table below summarises the estimated total one-off and potential recurrent costs which may arise from any increase in investigations or prosecutions from the Sexual Offences (Scotland) Bill. With regard to COPFS, SCS, SLAB and SPS costs, the lower estimate calculates the costs arising from a 1% increase in the prosecution of sexual offences, and the higher estimate from a 3% increase. Subject to the parliamentary progress of the Bill and the date of commencement, we would expect the one-off costs to arise in 2009-10 and the recurrent costs to start to arise from 2010-2011.

<table>
<thead>
<tr>
<th></th>
<th>One-off costs arising from training, changes to systems, etc</th>
<th>Recurrent costs arising from additional cases (low estimate)</th>
<th>Recurrent costs arising from additional cases (high estimate)</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>COPFS (para 180-181)</strong></td>
<td>£50,000 - £60,000</td>
<td>£70,850</td>
<td>£212,550</td>
</tr>
<tr>
<td><strong>Scottish Court Service (para 180 and 182)</strong></td>
<td>£5,000 - £10,000</td>
<td>£24,850</td>
<td>£74,850</td>
</tr>
<tr>
<td><strong>Scottish Legal Aid Board (para 180)</strong></td>
<td>N/A</td>
<td>£50,350</td>
<td>£151,050</td>
</tr>
<tr>
<td><strong>Scottish Children’s Reporter Administration (para 187-189)</strong></td>
<td>N/A</td>
<td>£28,000</td>
<td>£112,000</td>
</tr>
</tbody>
</table>
These documents relate to the Sexual Offences (Scotland) Bill (SP Bill 11) as introduced in the Scottish Parliament on 17 June 2008

<table>
<thead>
<tr>
<th>Police Costs (para 184)</th>
<th>£75,000 - £200,000</th>
<th>N/A</th>
<th>N/A</th>
</tr>
</thead>
<tbody>
<tr>
<td>Scottish Prison Service³ (para 185)</td>
<td>N/A</td>
<td>£400,000</td>
<td>£1.2m</td>
</tr>
<tr>
<td>Local Authority Criminal Justice Social Work (para 190)</td>
<td>N/A</td>
<td>£2,586</td>
<td>£7,758</td>
</tr>
<tr>
<td>TOTAL COSTS</td>
<td>£130,000 (low estimate) – £270,000 (high estimate)</td>
<td>£576,636</td>
<td>£1,758,208</td>
</tr>
</tbody>
</table>

SCOTTISH GOVERNMENT STATEMENT ON LEGISLATIVE COMPETENCE

194. On 17 June 2008, the Cabinet Secretary for Justice (Kenny MacAskill MSP) made the following statement:

“In my view, the provisions of the Sexual Offences (Scotland) Bill would be within the legislative competence of the Scottish Parliament.”

PRESIDING OFFICER’S STATEMENT ON LEGISLATIVE COMPETENCE

195. On 16 June 2008, the Presiding Officer (Alex Fergusson MSP) made the following statement:

³ As noted in Para 15, costs are based on Scottish Prison Service’s estimate of the average cost per prisoner-place. However, in practice, small increases in population, like that predicted in this case, it is expected that any extra prisoners may be accommodated within normal fluctuations in prison population at marginal cost only.
“In my view, the provisions of the Sexual Offences (Scotland) Bill would be within the legislative competence of the Scottish Parliament.”
INTRODUCTION

1. This document relates to the Sexual Offences (Scotland) Bill introduced in the Scottish Parliament on 17 June 2008. It has been prepared by the Scottish Government to satisfy Rule 9.3.3(c) of the Parliament’s Standing Orders. The contents are entirely the responsibility of the Scottish Government and have not been endorsed by the Parliament. Explanatory Notes and other accompanying documents are published separately as SP Bill 11–EN.

POLICY OBJECTIVES OF THE BILL

Background

2. There has been widespread public, professional and academic concern that the Scots law on rape and other sexual offences is out-dated, unclear and derives from a time when sexual attitudes were very different from those of contemporary society. Following certain high-profile decisions of the High Court of Justiciary on the law on rape, Scottish Ministers asked the Scottish Law Commission (SLC) in June 2004:

“To examine the law relating to rape and other sexual offences and the evidential requirements for proving such offences, and to make recommendations for reform.”

3. In September 2007, the First Minister announced during his speech on the legislative programme for 2007/08 that the Scottish Government would introduce legislation to reform the law on rape and other sexual offences in the light of the SLC’s final report and recommendations. The SLC published their final report, recommendations for reform and draft Bill on Rape and Other Sexual Offences on 18 December 2007.

4. The recommendations contained in the SLC’s final report differed in a number of respects from the proposals set out in their earlier Discussion Paper. In particular, the SLC adopted a different approach to sexual activity between children under the age of 16 to that proposed in their earlier discussion paper. There were also a number of issues, including the exact scope of the offences of rape and sexual assault (and whether there should be a separate offence of sexual assault by penetration) and the definition of consent, where the SLC’s earlier discussion paper sought the views of consultees on a number of different options, while their final report made a definite recommendation. As a consequence the Government issued an immediate consultation on the SLC’s recommendations.
Summary

5. The Sexual Offences (Scotland) Bill provides for a statutory framework for sexual offences in Scots law. It is largely based on the draft Bill published by the SLC in their final report. In general, the Government see the SLC’s proposals and draft Bill as representing a valuable reform of the law on rape and sexual offences; consolidating and clarifying the law on these matters. In the main, therefore, the Bill as introduced reflects the SLC’s proposed provisions. The exceptions to that approach are set out in the relevant parts of this memorandum.

6. The Bill repeals the common law offences of rape, sodomy and clandestine injury to women and a number of statutory sexual offences in addition to creating new statutory offences relating to sexual conduct, in particular where that takes place without consent. It provides a general definition of consent as “free agreement” and supplements this with a non-exhaustive list of factual circumstances in which free agreement, and therefore consent, is not present.

7. The Bill creates new statutory offences of rape, sexual assault, sexual coercion, coercing a person to be present during sexual activity, coercing a person to look at an image of sexual activity, communicating indecently, sexual exposure and administering a substance for a sexual purpose. The Bill also creates new “protective offences” which criminalise sexual activity with a person whose capacity to consent to sexual activity it either entirely absent or not fully formed either because of their age or because of a mental disorder. Separate “protective” offences are provided for in respect of sexual activity with young children (under the age of 13) and older children (from age 13 to age 15). In addition, the Bill makes it an offence for a person in a position of trust (over a child or person with a mental disorder) to engage in sexual activity with that child or person.

Changes to the provisions set out in the SLC’s draft Bill

8. Where we have made changes to the provisions set out in the SLC’s draft Bill, details of those changes and the reasons for them are noted in the relevant part of the Policy Memorandum. The most substantive changes relate to the provisions on older children in Part 4 of the Bill, where two new sections have been added and one deleted, and to the provisions on consensual sexual violence in Part 7 of the Bill, where section 37 of the SLC’s draft Bill has been deleted. There are also 3 new sections in Part 7 and a new schedule 3 to the Bill which deal with offences committed abroad.

The wider context: other work to improve the Scottish justice system’s response to rape and other sexual offences

9. As noted above, the Government believes that the reform of the law on rape and sexual offences provided for in this Bill represents a significant improvement to the law on these matters. In particular, it will improve the clarity and consistency of the law. In relation to the law on rape, the Government believes that the Bill represents improvements on the current law in a number of respects, including the definition of consent as “free agreement” and the provision that an “honest” belief in consent will not be a defence if that belief is not reasonable.

10. However, despite such improvements, reform of the substantive law on rape and other sexual offences will not, on its own, be sufficient to improve Scotland’s low conviction rate for
rape. That is why work is underway on a number of other fronts; on reforms to the law of evidence, improvements to the prosecution of cases of rape and sexual assault and to address public attitudes to rape and sexual assault. While it is not an instant solution in and of itself, this Bill’s reform of the law will, with these other associated strands of work, contribute to improving the response of the Scottish criminal justice system to the crimes of rape and sexual assault.

The wider context: the law of evidence

11. The 2004 reference to the SLC asked them to consider both the substantive law on rape and other sexual offences and the evidential requirements for proving such offences. In their final report, the SLC took the view that reform of the law of evidence would be best considered across the whole spectrum of criminal offences and not solely in the context of sexual offences. Consequently, the SLC’s final report does not make any recommendations for reform of the law of evidence.

12. In November 2007, the Cabinet Secretary for Justice wrote to the Chairman of the SLC, inviting them to undertake a review of certain aspects of the law of criminal procedure and evidence and to make any appropriate recommendations for reform. The terms of the proposed reference included consideration of:
   - the law relating to admissibility of evidence of bad character or of previous convictions, and of similar fact evidence; and
   - the Moorov doctrine.

13. These issues are especially relevant in the context of the prosecution of sexual offences. In accepting the reference, the Chairman of the SLC indicated that they would be interested to examine the operation of the Moorov doctrine in the context of a wider examination of the law of evidence more generally, including corroboration.

The wider context: improving the prosecution in cases of rape and sexual offences

14. In June 2006, the Crown Office and Procurator Fiscal Service (COPFS) published the results of their Review of the investigation and prosecution of sexual offences in Scotland. The report made 50 specific recommendations for reform and COPFS are currently taking forward a 3-year programme to implement its recommendations for completion in 2009. The Crown’s aim in implementing the review is to ensure consistent and high quality investigation and prosecution of such cases.

The wider context: public misunderstanding of the law

15. One of the issues highlighted in the COPFS review was the prevailing attitudes towards survivors of rape held by a significant minority of the public which blame women for their victimisation. The same surprising attitudes are reflected in other research findings. For example, a survey by Amnesty International in 2005 found that 34% of people thought that a woman was fully or partially responsible for being raped if she behaved in a “flirtatious” manner; 30% if she was drunk; 26% if she was wearing “sexy or revealing” clothing and 22% if

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she has had many sexual partners. A Scottish Government survey in 2007 reached similar conclusions.

16. It seems clear that there is a significant misunderstanding of the law as regards the necessity for express consent to sexual activity. The Bill makes express provision on this matter (see the section on Part 2, below). However, as juries in rape and sexual offence trials are made up of ordinary members of the public, such widely held attitudes may also act as an additional barrier to securing convictions in rape cases. The Scottish Government has therefore provided funding to Rape Crisis Scotland to undertake an information campaign designed to help to address public attitudes towards rape. That campaign will be launched later this year.

ALTERNATIVE APPROACHES

17. The overarching alternative to legislating to put Scots law on sexual offences on a statutory footing would be to leave the current common law in place. The arguments for and against codification of the law by putting it on the statute book as opposed to retaining the common law are well rehearsed. In particular, it is argued that the common law has the advantage of flexibility, and it is better able to deal with novel or unusual circumstances which had not been anticipated in the drafting of statutory provisions. Furthermore, there is an argument that the common law has the advantage that the police, courts and prosecutors are familiar with its workings.

18. Set against this, however, is the fact the common law relies on precedent and there are limits on how far and how fast the law can be altered by means of judicial decision alone. For example, broadening the coverage of the offence of rape by extending the types of prohibited conduct to include anal or oral penetration of the victim, would be unlikely to result from judicial development of the common law. In addition, it is clear that Parliament has over the years decided that it is not satisfied with the limitations of the common law as it relates to sexual offences as it has legislated on a number of occasions to make specific provision in relation to particular offences. While these have generally acted to modernise the law (e.g. relatively recent changes to bring the “age of consent” for homosexual activity in line with that for heterosexual activity), there remain inconsistencies, including in the “age of consent” (which is 14 for boys participating in heterosexual activity and 16 otherwise).

19. The law on rape and sexual offences is therefore, currently, a potentially confusing mixture of common law and statute which is far from clear to ordinary members of the public, including jury members and victims of rape and other serious sexual offences. The result is that misconceptions as to the definition of rape or other aspects of the law on sexual offences may easily persist. Research on these matters (see paragraph 15) demonstrates this is the case.

20. There was little support from respondents to either the SLC’s consultation, or the Scottish Government’s consultation for retention of the status quo. While many respondents acknowledged that reform of the substantive law alone would be unlikely to significantly improve the conviction rate for rape and other serious sexual offences, the vast majority nonetheless agreed that there was a need for reform. Rape Crisis Scotland commented in their Briefing Paper on the SLC’s report that:
“Rape Crisis Scotland believes that the new Sexual Offences (Scotland) Bill is an important step in improving legal responses to rape in Scotland, but that it cannot be seen in isolation from the wider changes that are required.”

21. In view of the problems which the SLC have highlighted with the current law on sexual offences in Scotland, and considering the importance of ensuring that the law in this area is clearly defined and comprehensible, the Scottish Government considers that it is not an option to continue to rely on the existing, fragmented mix of common law and statutory provision in this important area of the criminal law. Codification of the law, in the way set out in the attached Bill, represents significant improvements on the alternative.

22. Alternative approaches to particular provisions of the Bill (for example, alternative definitions of the scope of the offences of rape and sexual assault, or alternative approaches to the definition of consent) are considered at the relevant part of the Policy Memorandum.

CONSULTATION


24. The SLC received a total of 82 responses to their discussion paper, which helped to inform the recommendations contained in their final report. A full list of those who submitted written responses to the SLC’s discussion paper can be found at Annex B to their final report. http://www.scotlawcom.gov.uk/downloads/rep209.pdf

25. The SLC also established an Advisory Group to assist their consideration of the subject. The Advisory Group consisted of representatives from: Rape Crisis Scotland, University of Aberdeen Law School, Outright Scotland, the Law Society of Scotland Criminal Law Committee, Glasgow Women’s Support Project, Equality Network, Scottish Women’s Aid, the Faculty of Advocates and Brook Centres.


27. The consultation ran until 14 March 2008. Over 1,200 responses were received to the consultation, the vast majority of which were from individuals and related specifically to the SLC’s recommendations on underage sexual activity. There was general support for the SLC’s proposals to codify the law on rape and other sexual offences from those responses which related to the whole report. These responses helped to inform changes which have been made to the draft Bill contained in the SLC’s final report, particularly in respect of a number of recommendations contained in their final report which had not been contained in their earlier discussion paper. References to consultation responses are made elsewhere in the Policy Memorandum, particularly where the Government has decided to depart from the provisions proposed in the SLC’s draft Bill.
PART ONE – RAPE ETC

Policy objectives

29. Part One of the Bill creates a set of statutory sexual offences in which the lack of consent of the victim is a central element in the definition of the offence. The Bill provides for offences of: rape; sexual assault; sexual coercion; coercing a person into being present during a sexual activity; coercing a person into looking at an image of a sexual activity; communicating indecently; sexual exposure; and administering a substance for sexual purposes. These replace the current common law offence of rape and a number of existing statutory sexual offences.

Mens rea

30. The Government agrees with the approach which the SLC has taken to reform of the law on these matters, subject to the comments below on the definition of rape. The offences provided for in sections 1 to 8 of the Bill are therefore the same as those proposed in the SLC’s final report and draft Bill. Further details of the SLC’s approach and thinking on this matter can be found at paragraphs 1.17 to 1.31, 2.1 to 2.19 and 3.1 to 3.54 of their report.

31. For a finding of guilt of a criminal offence (other than a strict liability offence), it is necessary to prove both that the accused engaged in the criminal conduct and that he had the requisite criminal or guilty mind (“mens rea”). In relation to common law offences, mens rea may be established by proving either the accused’s criminal intent or his recklessness.

32. There are two aspects of mens rea to be considered in respect of the offences of rape and sexual assault and coercion (and related offences). The first is the act or conduct itself (e.g. penetration, touching, etc.) and the second is that the conduct takes place without the consent of the victim.

33. The approach to the required mens rea for committing the offences at Part One of the Bill is in line with what is proposed by the SLC in their final report. The report notes that:

“Each offence identifies the required mens rea as to the type of conduct at its core. In general terms, the mens rea is intention or recklessness. For example, the definition of rape requires that the accused intended penile penetration, or was reckless as to penetration, of the victim’s vagina, anus or mouth. Similarly, sexual coercion requires proof that the accused intentionally caused the victim to participate in sexual activity. Neither intention nor recklessness is defined…but will carry their normal meaning in criminal law.

“Other offences require that the act is done intentionally and also that it is done for a particular purpose or goal. For example, the mens rea of engaging indecently in sexual activity is that A intentionally engages in a sexual activity but does so for the purpose of obtaining sexual gratification by means of B being present.” (para 3.68)
34. For some of the offences in the Bill, there is a second matter for which mens rea is required – that the victim did not consent to the act in question. Where it can be shown that the accused knew that the victim did not consent to what the accused was doing to him or her, there is clearly mens rea. A more difficult issue is where the accused claims that he genuinely believed the victim was not consenting.

35. The Bill provides that in such circumstances, the accused’s belief as to consent must be reasonable. Section 12 of the Bill provides that, in assessing the reasonableness of the accused’s belief that consent was present, regard is to be had to the steps, if any, taken by the accused, to establish whether the other party was consenting. The SLC note in their report that:

“We consider that a virtue of this test, by making reference to the accused’s taking steps to ascertain the other party’s consent, is that it articulates and reinforces the point that the law is using a positive, co-operative model of consent.” (para 3.77)

36. The provisions concerning mens rea are the same as that contained in the SLC’s final report and draft Bill. Further details of the SLC’s approach and thinking on this matter can be found at paragraphs 3.67 to 3.78 of their report.

Rape

37. The Bill provides for a statutory offence of rape which replaces the existing common-law offence. It defines rape as intentional or reckless penetration, with the accused’s penis, of a victim’s vagina, anus or mouth, without the victim’s consent and without any reasonable belief that the victim consented. This is broader than the current common law offence of rape, which is restricted to penile penetration of a woman’s vagina without her consent.

In the Government’s view, this expanded definition more accurately reflects what should ordinarily be considered to be the offence of rape. We agree with the conclusion reached by the SLC, in their final report on the need to widen the current definition:

“We see no reason why rape should continue to be defined so narrowly. Penile violation of a person’s anus or mouth is as severe an infringement of sexual autonomy as violation of a vagina. Furthermore the present definition means that while penile penetration of a man is criminal (either as sodomy or indecent assault), it is not regarded as rape… we can identify no reason why men and women victims of penile assault should be treated in different ways.” (para 3.23)

38. The offence is also broader than the current law in that it expressly provides that, where the victim does not in fact consent, but the accused wrongly believes that the victim consented, the accused’s mistaken belief as to the victim’s consent must be reasonable. This differs from the position at common law at present, which is that the accused must merely have an honest or genuine belief that the victim consented. The reason there is concern about the law as it now stands is that it is generally considered that this honest mistaken belief need not be reasonable (albeit that the reasonableness of a person’s belief that the victim consented is likely to affect the credibility of a claim of honest belief).
40. The Government’s view is that an accused in a rape case should not be able to maintain that they had an “honest” belief in the victim’s consent if that is not reasonable belief. We are therefore content that the SLC’s draft Bill defines the law as it should be in this respect.

41. Further details of the SLC’s approach and thinking on the offence of rape can be found at paragraphs 3.23 to 3.35 of their report. The Bill’s further provision on “reasonable belief” in Part Two of the Bill, at section 12, is discussed below.

*Alternative approaches: rape*

42. An alternative approach which had been proposed by some respondents to the SLC’s earlier consultation had been to widen the definition of rape so that it covered penetration with an object as well as with a penis. The SLC took the view that:

“…as the penis is a sexual organ, penetration with a penis represents a quite different wrong from other forms of penetration. There is an added dimension to the sexual nature of an attack when it involves penetration with the sexual organ of another person, which for practical purposes means the penis.” (para 3.12)

43. There is some merit in that argument and it corresponds most closely with the traditional definition of the crime of rape. The maximum sentence for both rape and sexual assault is life imprisonment, reflecting the potential seriousness of sexual assault, so there is not an issue about such assaults being subject to a lesser penalty. However, the SLC’s approach is not gender neutral and there is no doubt that the violent nature of some sexual attacks involving penetration with an object is such that they can be amongst the most brutal sexual assaults. From this perspective there is a strong argument for widening the definition of rape to include such attacks.

44. However, there are also violent sexual assaults which do not involve penetration. To catch these the definition of rape would need to be widened further, to take account of the level of violence involved. That would be difficult to accomplish and would move further away from what is traditionally taken to be the crime of rape.

45. Another potential problem with a definition of rape which included all forms of penetration is that it would bring the full range of sexual assaults involving penetration within the definition of rape. That would include cases where there might be minimal or no violence and which would usually be considered a less serious sexual offence. That would seem to argue for either an overlap between the crimes of rape and sexual assault (so that more minor cases of penetration could be charged as sexual assault rather than rape) or perhaps a relaxation of the requirement that rape must be prosecuted in the High Court. Neither seems a particularly desirable outcome.

46. There are further potential dangers in extending the definition of rape to include any forms of penetration. While penetration of the anus or vagina with an implement is almost inevitably sexual, the same cannot necessarily be said of oral penetration involving an object. Where violence is involved, or where the penetration takes place without the consent of the victim, it is clear that this constitutes an assault, but where a person’s mouth is penetrated with an object or implement other than a penis, it would not always be the case that such penetration was *sexual* in nature. There would therefore be a need to extend the definition of the offence to
make that clear, which would lose some of the certainty and clarity of the SLC’s proposed definition.

47. A number of respondents to the Government’s consultation and to the SLC’s earlier consultation on their discussion paper considered that, in addition to the offences of rape and sexual assault, there should be a separate offence of “sexual assault by penetration” which would apply when the perpetrator penetrated the victim with an object other than a penis. This would acknowledge that some of the most brutal sexual assaults occur when the perpetrator penetrates the victim violently with an object. However, we consider that to subdivide the offence of sexual assault would be to risk overcomplicating this area of the law and prefer to keep only two offences.

48. Having considered the various arguments for and against the further extension of the definition of rape the Government’s conclusion is that the SLC’s proposed definition is a definite improvement on the current law and represents an acceptable basis for the law in future. However, we acknowledge that there are also strong arguments in favour of the alternative approach of extending the definition of the offence to include other forms of penetration. On balance we concluded that it would be preferable to retain the SLC’s proposed approach on the basis that our general preference is to make limited changes to their proposals ahead of any Parliamentary debate on the issues.

**Sexual assault**

49. The Bill provides for a statutory offence of sexual assault, which criminalises sexual physical contact with a person without that person’s consent. It will replace the existing common law offence of assault aggravated by indecency in respect of conduct falling within the scope of this offence (though the common law of assault is not repealed, and still open to use for any behaviour falling outwith statutory definition of sexual assault).

50. The Government agrees with the SLC’s conclusions on the need for such an offence and the offence provided for in section 2 of the Bill is therefore the same as that contained in the SLC’s final report and draft Bill. Further details of the SLC’s approach and thinking on this matter can be found at paragraphs 3.36 to 3.47 of their report.

51. The offence defines a number of specific forms of conduct that constitute sexual assault. These are: sexual penetration of a person’s vagina, anus or mouth without their consent; sexual touching of a person without their consent; other sexual contact with a person without their consent; and ejaculating semen onto a person without their consent.

52. The offence of sexual assault by penetration provides that penetration is defined as including penile penetration. There is therefore an element of overlap between the offences of rape and of sexual assault by penetration. However, this is not intended to represent any downgrading of the seriousness of such conduct. In their report, the SLC explain that

“…we do not envisage, where the Crown has evidence that the complainer was subject to penile penetration by the accused, that a charge of sexual assault would be brought. Such a case should be charged as rape. Rather the purpose of allowing an overlap is to cover the situation where the complainer knows that she was penetrated but is not sure what
penetrated her (for example because the attack occurred when she was blindfolded). If an overlap did not exist, then a charge of sexual assault could not lead to a conviction where evidence emerged that the accused had penetrated the victim with his penis.” (para 3.45)

On that basis we are content with the SLC’s proposed overlap between the two offences and have maintained it in the draft Bill we have brought before Parliament.

53. For the offence of rape, it is implicitly assumed that the purpose of intentional or reckless non-consensual penile penetration of the mouth, anus or vagina is necessarily sexual. However, touching, contact or penetration other than with a penis, is not necessarily sexual in nature. The SLC considered several different approaches to this in their interim consultation:

“The first is to take a purely objective approach: would the reasonable person regard the conduct as sexual in nature? A second is to view the conduct through the eyes of the perpetrator: was the purpose of the conduct to seek sexual stimulation? A further option is to adopt the perspective of the victim: whatever the attacker’s intentions, did the victim perceive the attack on her as sexual? A final option is to combine these viewpoints.” (para 3.42)

54. In their final report, the SLC recommended an objective approach, namely that, for the purpose of the law on sexual assault, penetration, touching or contact is sexual if a reasonable person would consider it to be sexual. The same approach is taken in relation to other offences where it is a requirement of the offence that the activity was sexual in nature. For example, the offence of coercing a person into being present during a sexual activity provides that the activity is sexual if a reasonable person would, in all the circumstances of the case, consider it to be sexual. The Government is content that the question of whether any particular conduct is of a sexual nature or otherwise should be resolved in this way.

Direct coercive sexual conduct

55. The offence of sexual assault criminalises non-consensual physical sexual contact of any kind. However, as the SLC noted in their final report:

“A different scenario is where the offender compels the victim to engage in sexual activity which may, but need not, involve contact with the offender. There is a wide variety of ways in which this sort of conduct could occur. For example, the offender could compel the victim to have sex with a third party or to have sexual contact with an animal or an object or herself.” (para 3.48)

56. There is an overlap to a certain extent with the offence of sexual assault in cases where the perpetrator compelled the victim to engage in conduct which involved physical contact with the perpetrator. However, this offence is primarily intended to capture coercive sexual conduct which does not involve physical conduct between the perpetrator and the victim.

57. The Government is content with the approach which the SLC has taken to this offence and the offence provided for in section 3 of the Bill is the same as that contained in the SLC’s final report and draft Bill. Further details of the SLC’s approach and thinking on this matter can be found at paragraphs 3.48 to 3.54 of their report.
Other coercive sexual conduct

58. The Bill provides four further offences relating to coercive sexual conduct. The SLC considered that being forced to be present while sexual activity takes place, being forced to view an image of a sexual activity or being subjected to indecent communication without consent (strictly, two separate offences) constitute an invasion of a person’s sexual autonomy.

59. Under the common law, such activity directed towards a child would constitute the offence of lewd, indecent and libidinous practices. However, no specific equivalent offence exists for adults who are coerced into being present during sexual activity, into viewing an image of sexual activity or being made the subject of indecent communications (though, depending on the circumstances it may amount to a form of sexual assault or possibly breach of the peace).

60. The Government therefore agrees with the SLC’s conclusions on the need for specific offences and the offences provided for in sections 4 to 6 of the Bill are the same as those contained in the SLC’s final report and draft Bill. Further details of the SLC’s approach and thinking on this matter can be found at paragraphs 3.55 to 3.63 of their report.

Sexual exposure

61. Section 7 of the Bill provides for a new offence of “sexual exposure”. This provides that it shall be an offence for a person to intentionally expose his or her genitals in a sexual manner to another person or people either with the intention of causing alarm or distress, or reckless as to the alarm or distress which may be caused.

62. It may appear that there is some overlap with the common law offence of public indecency. However, the two offences are intended to address different types of conduct. The offence of sexual exposure is intended to criminalise specifically sexual exposure of the genitals, which is aimed at a specific person or group of people, with the intention of causing alarm or distress to those people, or reckless as to the distress or alarm which may be caused. By contrast, the offence of public indecency is a public order offence which would relate to activities such as nude sunbathing, urinating in public or streaking. The offence of public indecency requires that the conduct takes place in, or so as to be seen from, a public place. By contrast, the offence of sexual exposure can be committed in a private place, providing that the perpetrator’s intention in exposing his or her genitals is as specified above. As such, unlike the offence of public indecency, it is by definition a sexual offence.

63. The Government endorses the SLC’s conclusion in their final report that:

“In the Discussion Paper, we took the view that indecent exposure was in many ways similar to a sexual assault. It is a form of sexual attack but without any direct physical contact. We also took note of research which indicated that indecent exposure aimed at specific victims is not experienced as a minor nuisance or as trivial in nature.” (para 5.13)
This document relates to the Sexual Offences (Scotland) Bill (SP Bill 11) as introduced in the Scottish Parliament on 17 June 2008

64. The offence provided for in section 7 of the Bill is therefore the same as that contained in the SLC’s final report and draft Bill. Further details of the SLC’s approach and thinking on this matter can be found at paragraphs 5.11 to 5.18 of their report.

Administering an intoxicating substance for sexual purposes

65. In their final report, the SLC note that:

“One way in which someone may find herself having sex without her consent is where she had previously been given a stupefying substance. Where A administers a drug of this nature to B and A has sex with B when B loses consciousness, A will have committed rape or sexual assault on B. But we consider that there should be provision which makes the administering of the substance in itself criminal.” (para 3.64)

66. The Government agrees with the SLC’s conclusions on this matter and the offence provided for in section 8 of the Bill is therefore the same as that contained in the SLC’s final report and draft Bill. Further details of the SLC’s approach and thinking on this matter can be found at paragraphs 3.64 to 3.66 of their report.

67. At present, section 7(2)(c) of the Criminal Law (Consolidation) (Scotland) Act 1995 ("the 1995 Act") imposes liability on any person who “applies or administers to, or causes to be taken by, any woman or girl, any drug, matter or thing, with intent to stupefy or overpower so as thereby to enable any person to have unlawful sexual intercourse with such woman or girl.”

68. The offence contained in the Bill will replace that offence and extend it to apply to both male and female victims and to sexual activity of any kind, rather than intercourse only. The Bill provides that it shall be an offence for someone to cause another person to consume an intoxicating substance without their knowledge, for the purpose of stupefying or overpowering them, so as to engage in sexual activity with them. It also provides that, where the perpetrator tricks the victim into believing that the substance is of substantially lesser strength, then any knowledge that victim has that it is being administered or taken is to be disregarded. This makes such behaviour an offence, even if no sexual activity actually takes place. If the perpetrator then proceeds to actually engage in sexual activity with their victim while the victim is in an intoxicated state, the perpetrator will commit a further offence.

PART TWO – CONSENT AND REASONABLE BELIEF

Policy objectives

69. As will be clear from the structure of the offences in Part One of the Bill, the concept of “consent” is central to the SLC’s approach to acceptable sexual conduct and to their proposed definition of sexual offences. In essence, the offences at Part One of the Bill provide that any sexual activity without consent is an offence.

70. The importance of sexual autonomy, and therefore of the concept of “consent”, is reflected in the SLC’s report, which devotes a whole chapter to analysis, consideration and

the exposed penis is erect or being masturbated, the effect is to induce fear, shock, disgust and a powerful fear of rape or death.” (Setting the Boundaries, para 8.2.3)
This document relates to the Sexual Offences (Scotland) Bill (SP Bill 11) as introduced in the Scottish Parliament on 17 June 2008

discussion of the issue. The Government is persuaded by the SLC’s conclusions on this issue and the approach taken to the definition of “consent” and associated issues in Part Two of the Bill is the same as that contained in the SLC’s final report and draft Bill. Further details of the SLC’s approach and thinking on this matter can be found in chapter 2 of their report.

71. Part Two of the Bill defines “consent” as “free agreement”, makes specific provision relating to the scope of consent and its withdrawal and provides a non-exhaustive list of situations in which consent is definitely absent.

Meaning of consent

72. Defining consent as “free agreement” is intended to provide clarity as to what is meant by the term. “Consent”, in and of itself, may be ambiguous. It could be argued that a person can “agree” or “consent” to conduct because of the threat of violence, but it is clear that any such “agreement” or “consent” is not “free agreement” in such circumstances.

The definition of consent as free agreement therefore captures the idea of an active, positive, co-operative approach to the concept of consent. Moreover, in the view of the SLC:

“The result is that the focus of attention is moved away from the victim, and towards what both parties did to bring about consent. In particular, it allows the law to adopt the position that if one person wants to have sex with another, and there is any doubt that the other person is consenting, then the obvious step to take is to ask.” (para 2.27)

Absence of consent

74. Section 10 of the Bill provides a non-exhaustive list of situations (“statutory indicators”) in which consent or free agreement cannot be present. If the prosecution prove that one of these factual situations apply, this in itself will be sufficient to prove that consent was not present.

75. The SLC note that many of the jurisdictions which adopt a positive model of consent in sexual offences supplement the general definition with examples of situations where consent is not, or is presumed not to be, present. The SLC’s report adds:

“It is important to stress that these two elements are linked. The statutory indicators are to be read not as examples of “consent” or lack of “consent” in the abstract sense but as referring to consent as set out in the general definition.” (para 2.43)

76. Section 10(2)(a) provides that consent is not present where the only indication of consent to the conduct occurs at a time when the complainer is incapable, because of the effect of alcohol or any other substance, of consenting to it. Its scope is limited to the scenario where, when they are in a state of intoxication, a person makes the only expression or indication of “consent” to sexual activity. Where the complainer is at the time so intoxicated as to have no capacity to freely agree to sexual activity, then anything he or she said or did to indicate “consent” does not amount to free agreement.

77. The SLC note that the:
“particular value of this … is that it sends a signal that anyone dealing with someone who is intoxicated is put on notice that that person may not be able to give consent to sex no matter what he or she says or does. The definition also helps in countering any social stereotype that people who are drunk, especially young women, are by that very fact consenting to sex and are to shoulder the full blame for any unwanted sex which follows”. (para 2.62)

78. Section 10(2)(b) provides that consent is not present where, at the time of the conduct, the complainer is asleep or unconscious in circumstances where that person had not, prior to becoming asleep or unconscious, consented to the conduct taking place while in that condition. The definition makes clear that people who are asleep or unconscious lack capacity to give or express consent while in that state.

79. The SLC note:
“Surprisingly at common law (at least until the decision of the Lord Advocate’s Reference (no 1 of 2001) it was not rape for a man to have sexual intercourse with a woman who was asleep or unconscious. What the definition makes clear is that if someone lacks capacity to consent to a sexual act because they are asleep, then he or she has not consented to that act.” (para 2.80)

80. The definition does allow for one situation where consent to sexual activity might be present although the person concerned is asleep or unconscious at the time sexual activity takes place. That is, where that person has consented in advance to that particular sexual act taking place whilst he or she is asleep or unconscious. In such circumstances, the question of whether consent as free agreement was given is to be determined by reference to the general definition of consent.

81. Section 10(2)(c) provides that consent is not present where the complainer agrees or submits to the conduct because of violence or threats of violence made against that complainer or against any other person. The purpose of this indicator is to make clear that where a person agrees or submits to sexual conduct because of violence or the threat of violence, this does not constitute free agreement. The definition does not require that the violence occurred or the threat was made at the time of the sexual act, and therefore covers what is known as historic abuse (though it may, in practice, be difficult for the prosecution to establish a causal link between such historic violence or threat and the agreement or submission to sexual activity).

82. Section 10(2)(d) provides that consent is not present where the victim agrees or submits to the conduct because he or she is unlawfully detained by the perpetrator. This definition is limited it two ways: first, the detention must have been carried out by the accused, and second the detention must be unlawful. Whether consent to sexual activity is present or absent in other circumstances involving detention will be answered by reference to the general definition of consent.

83. Section 10(2)(e) provides that consent is not present where the person agrees or submits to the conduct because that person is mistaken, as a result of deception by the perpetrator, as to the nature or purpose of the conduct. This would cover, for example, circumstances where a woman is told that some form of sexually intimate examination is a necessary medical
procedure. Deceptions by the accused which do not relate to the nature or purpose of the act are not covered by this definition but will be answered by reference to the general definition of consent (unless covered by section 10(2)(f)).

84. Section 10(2)(f) provides that consent is not present when the victim agrees or submits to the conduct because the perpetrator impersonates a person known personally to the victim. Deception on the part of the accused is required so circumstances where the victim mistakes the identity of the accused for any other reason are not covered and the general definition of consent would then apply. Equally, the person whom the accused is impersonating must be known to the accused. This goes wider than the current provision, in section 7(3) of the Criminal Law (Consolidation) (Scotland) Act 1995, which provides that those who impersonate a woman’s husband and have sexual intercourse are deemed to be guilty of rape. The definition does not however cover situations where the accused induced the victim into having sex by, for instance, claiming falsely that they were a famous film star or football player or that they were rich.

85. Section 10(2)(g) provides that consent is not present where the only expression or indication of agreement to the conduct is from someone other the victim. It might be argued that such a provision is unnecessary and that the general definition of “free agreement” adequately provides for this situation. However, the SLC’s report notes that:

“…there is value in the law explicitly making the point that if sex with someone is being contemplated then reasonable steps have to be taken to ensure that he or she has expressed her consent to it. Respect for a person’s autonomy requires nothing less.” (para 2.78)

Scope of consent and its withdrawal

86. Section 11 of the Bill makes detailed provision in relation to certain aspects of consent which amplify the meaning of “free agreement” in certain contexts.

87. Its first important provision is that consent to one form of conduct does not of itself imply consent to any other conduct. The SLC’s report notes that:

“the main utility of this is to rule out any implied escalation of consent. People should be free to chose to engage in certain types, or certain levels, of sexual activity without that consent being implied to cover other types or levels of sexual activity”. (notes to section 11 of draft Bill, page 147)

88. The second important issue which is expressly provided for by section 11 is withdrawal of consent. Subsections (3) and (4) of section 11 provide that consent may be withdrawn at any time – before the conduct takes place or during the conduct. Where the conduct has already begun when consent is withdrawn then conduct must cease immediately if criminal liability under the Bill is to be avoided.

Alternative approaches

89. An alternative option would be to have left consent undefined.
There is currently no specific definition of consent under current Scots law. The SLC’s report noted that:

“it has been held that a judge should not provide the jury with a definition. In *Marr v HM Advocate* (1996, SCCR 696) a jury in a trial involving a charge of indecent assault had asked for guidance on the meaning of consent. The sheriff’s response was that the “definition of consent is a common, straightforward definition of consent. It’s a common English word given its normal meaning. And that, I am afraid, is it. Consent is consent.” (para 2.4)

However, the SLC went on to observe that:

“...as far as we can discover, no other legal system follows the current approach of Scots law of using the concept of consent in sexual offences but of allowing no definition to be given to it.” (para 2.21)

Having considered the issue, the Government is persuaded by the SLC’s conclusion that defining consent as “free agreement” in statute will be helpful to judges and juries in making decisions on this issue, as explained above.

The Bill provides for a non-exhaustive list of factual circumstances in which consent is definitely not present. This differs from the approach provided for by the Sexual Offences Act 2003 in England and Wales, which contains a set of “evidential presumptions” which, if proved, are taken as showing lack of consent unless the accused brings forward sufficient evidence to raise an issue as to whether consent was given.

Some respondents to the SLC’s earlier consultation favoured the adoption of a similar approach in Scots law. However, the experience in practice of the Sexual Offences Act 2003 in English law suggests that evidential presumptions have proven be of limited usefulness in proving lack of consent as they have tended simply to prolong argument on these matters rather than simplify it. For those reasons the Government is persuaded by the approach favoured by the SLC.

**PART 3 – MENTALLY DISORDERED PERSONS**

**Policy objectives**

The SLC acknowledge that there is a challenge in making provision for sexual activity with people with a mental disorder. On the one hand, the law must recognise the rights of those persons to engage in sexual activity and promote their sexual autonomy in so far as possible. Set against this, the law must also protect vulnerable persons from sexual exploitation and recognise that, in certain situations, mental disorder may preclude any meaningful understanding of and valid consent to sexual activity.
94. The SLC examined the existing law on this matter (section 311 of the Mental Health (Care and Treatment) (Scotland) Act 2003 (the 2003 Act)) which provides that it shall be an offence for a person to engage in a sexual act with a person who suffers from a mental disorder who either does not consent to that act or who is incapable of consenting to the act. They concluded that the general thrust of that provision is in line with their approach, but that much of it is no longer necessary as a result of the Bill’s detailed provisions for a definition of consent.

95. However, there remains a need to provide a legislative definition of the circumstances in which a person with a mental disorder lacks the capacity to consent to sexual activity. Part Three (section 13) of the Bill therefore provides that, where apparently consensual sexual activity involving a mentally disordered person occurs, any consent is to be disregarded if, by reason of the mental disorder, the person is unable to understand what the conduct is, unable to make a decision as to whether to engage in the conduct or unable to communicate any such decision. This effectively re-enacts the provisions of section 311(4) of the 2003 Act (which section is repealed by the Bill), though references to “consent” should now be read so as to refer to the general definition of consent in this Bill.

96. The provision concerning the capacity of a person with a mental disorder to consent to sexual activity contained in the Bill is the same as that contained in the SLC’s final report and draft Bill. Further details of the SLC’s approach and thinking on this matter can be found at paragraphs 4.88 to 4.100 of their report.

Alternative approaches

97. An alternative approach would have been to continue to rely on the provisions contained in the Mental Health (Care and Treatment) (Scotland) Act 2003. However, this would have resulted in a different definition of consent applying to people who suffer from a mental disorder. In the Government’s view, that would be incompatible with the objective of equality of treatment.

98. Legislating in this Bill for those with a mental disorder means that the same definition of “consent” as “free agreement”, supplemented with the non-exhaustive list of factual circumstances in which consent is definitely absent, will apply equally to everyone.

PART 4 – CHILDREN

Policy objectives

99. Part Four of the Bill contains offences relating to sexual activity involving children. These “protective” offences recognise that children are particularly vulnerable to sexual exploitation and therefore require special provision to be made in law.

100. The general principle underlying the Bill is that sexual activity which takes place without consent constitutes a criminal offence. In their final report, the SLC considered that, in addition to the general offences concerning sexual activity which takes place without consent, there should be specific offences which criminalise sexual activity with a person whose capacity to consent to sexual activity is either absent or not fully-formed by reason of their age.
101. The Bill distinguishes between “young children”, aged under 13, whom the SLC consider have no capacity to consent to sexual activity and “older children” aged between 13 and 15 whom they consider to have only a very limited capacity to consent to sexual activity. The age at which a person is considered to be capable of exercising sexual autonomy is 16. While the approach the Government has taken to this part of the Bill differs in other ways from the approach proposed by the SLC, we agree with their broad approach of distinguishing between offences committed against young children and those committed against older (teenage) children under the age of 16 and we have therefore retained it.

“Young children”

102. The Bill provides a set of statutory offences which criminalise sexual activity with a young child (under the age of 13). The Government have not proposed any changes to the SLC’s proposed approach to these offences. Sections 14 to 20 of the Bill are therefore the same as those contained in the SLC’s final report and draft Bill. Details of the SLC’s approach and thinking on these matters can be found at paragraphs 4.1 to 4.17 and 4.21 to 4.42 of their report.

103. The Bill provides that it shall be an offence (rape of a young child) to penetrate with a penis the mouth, vagina or anus of a child under the age of 13. A separate offence (“sexual assault on a young child”) provides that any physical sexual activity with a young child shall constitute an offence (“sexual assault against a young child”).

104. This part of the Bill also contains a range of other offences which mirror those provided for in Part One of the Bill (“causing a young child to participate in a sexual activity”; “causing a young child to be present during sexual activity”; “causing a young child to view an image of a sexual activity” and “communicating indecently with a young child”). The latter 3 are offences only where they are done for the purpose of obtaining sexual gratification or alarming, humiliating or distressing the child. They would not be committed where, for instance, someone engaged in sexual activity in private without being aware of the presence of a young child.

105. The above offences are based on those in Part One of the Bill. However, they differ in that they do not refer to consent, as a child under the age of 13 is deemed incapable of consenting to sexual activity. The maximum penalties for these offences are the same as for their equivalents in Part One of the Bill. It is not a defence for the accused to argue that he or she reasonably believed the child to be older. This mirrors the current position with regard to the offence of intercourse with a girl under the age of 13 contained at section 5(1) of the Criminal Law (Consolidation) (Scotland) Act 1995.

“Older children”

106. The Bill contains provisions which make it an offence for someone over the age of 16 to engage in sexual activity of any kind with an older child (aged 13 to 15). The Government do propose changes to the SLC’s proposed approach to these offences in respect of sexual activity between older children (see below). However, we agree with the basic structure of the SLC’s approach to offences concerning sexual activity with older children and sections 21 to 26 of the Bill are the same as those contained in the SLC’s draft Bill. Details of the SLC’s approach and thinking on these matters can be found at paragraphs 4.1 to 4.20 and 4.43 to 4.57 of their report.
107. The Bill provides for offences in respect of older children in the same way as it does for young children, except that these older children offences (with the exception of offences under section 27) can only be committed by a person aged 16 or over. It provides for a range of offences in respect of sexual activity with older children (“intercourse with an older child”; “engaging in sexual activity with or towards an older child”; “causing an older child to participate in a sexual activity”; “causing an older child to be present during a sexual activity”; “causing an older child to look at an image of a sexual activity”; and “communicating indecently with an older child”). Like the young children offences, these older children offences mirror those in Part One of the Bill.

108. The penalties for these older children offences are lower than those for equivalent offences concerning activity with a young child. Similarly, the penalties are lower than those for the equivalent offences in Part One of the Bill. There is an overlap to some extent between the coverage of the older children offences and the offences in Part One of the Bill, as any non-consensual sexual activity against an older child could be prosecuted as an older child offence or using the offences of non-consensual sexual conduct provided for in Part One of the Bill. However, the overlap is not complete as any instances sexual activity between an adult and an older child can be prosecuted as an older child offence, even where it cannot be proven beyond reasonable doubt that the activity took place without the consent of the child.

109. This approach mirrors the current position with regard to the offence of intercourse with a girl under the age of 16, at section 5 of the Criminal Law (Consolidation) (Scotland) Act 1995 (which does not refer to consent). Where the girl is aged between 13 and 15, the maximum penalty is 10 years imprisonment. This is of course lower than the maximum penalty for rape (which is life imprisonment) even though cases of non-consensual intercourse could in theory be prosecuted as either offence. Again, the difference with the offence with the lower penalty is that any sexual intercourse with a girl under 16 may be prosecuted, even where absence of consent cannot be proved beyond reasonable doubt. Where a girl is aged under 13, the maximum penalty under section 5 of the 1995 Act is life (which is reflected in the provision made in the Bill for offences against young children).

Sexual activity between older children

110. The Bill follows the SLC’s proposals in criminalising any sexual activity between an adult and an “older child” or which is non-consensual. While we agree with the SLC that there is a distinction to be drawn between such predatory sexual behaviour and consensual sexual activity, we are concerned that the law should continue to make clear that society does not encourage underage sexual intercourse as it can be cause for concern for the welfare of a child, even where it is consensual.

111. The Government have therefore made changes from the way in which the SLC’s draft Bill dealt with sexual activity between older children. This has resulted in the addition of new sections 27 and 28, changes to what was section 27 (and is now section 29) and the deletion of what was section 29 of the SLC’s draft Bill. Details of the SLC’s approach and thinking on these matters can be found at paragraphs 4.52 to 4.58 of their report.
112. While non-consensual or predatory sexual activity is a cause for significant concern, consensual sexual activity between teenagers needs to be approached differently. In particular, a distinction is drawn between sexual intercourse and other forms of sexual activity.

113. Touching, kissing and sexual conversations are considered by most people to be a normal part of growing up for a teenager. The Scottish Government does not propose that the law should interfere with this kind of activity between two young people aged 13 to 15 so long as both parties consent to the activity. We take a different view in relation to sexual intercourse since this poses much greater risks to a young person’s welfare and health and the law is an important aspect in guiding young people’s behaviour in approaching sexual intercourse.

114. The Scottish Government’s sexual health strategy places a particular emphasis on encouraging young people to delay engaging in sexual intercourse. Early sexual experiences play a significant part in young people’s ability to form relationships throughout their lives and it is important therefore that young people are mature and ready before they engage in sexual intercourse. Such maturity increases with age and therefore the age at which the law is seen to grant sexual autonomy to young people is relevant. Sexual intercourse can also lead to transmission of sexually transmitted infections and to unwanted pregnancies. It can therefore have long-term health and life consequences for young people. In 2007, the total number of under 16s conceptions in Scotland in 2005 was 678, a rate of 7.1 per 1,000 with 3.0 per 1,000 ending in birth and 4.1 per 1,000 ending in abortion. A total of 343 people under the age of 16 were diagnosed with sexually transmitted infections (323 with Genital Chlamydia, 20 with Genital herpes and 8 with Gonorrhoea).

115. The SLC’s report proposed that any consensual sexual activity between older children should not constitute a criminal offence and should instead be grounds for referral to the Children’s Reporter, where there are concerns about the child’s welfare. The effect of this would be to decriminalise consensual underage sexual activity between children over the age of 13. The Scottish Government does not agree with this proposal in relation to sexual intercourse since we do not think it strikes the right balance between the freedom of young people to make decisions and protecting them from activity which could give rise to longer term adverse consequences.

116. Respondents to the Scottish Government’s consultation on the SLC’s proposals had mixed views on the SLC’s proposals to decriminalise consensual sexual activity between older children, though all were agreed that the welfare of children themselves is of key importance. There was significant opposition to the SLC’s proposals regarding decriminalisation of consensual sexual activity. Those opposed included the Association of Chief Police Officers in Scotland, the vast majority of individual respondents (many of whom appear to have been responding as a result of campaigning by the Christian Institute), a number of Child Protection Committees, a majority of religious/faith organisations and groups providing support to victims of rape and sexual assault.

117. A majority of those opposed to the SLC’s proposals took the view that the “age of consent” serves an important function in signalling to children that they should not engage in sexual activity below the age of 16 and that the law acts as a deterrent to such activity. Though the SLC’s proposals did not amount to a lowering of the age of consent (the SLC provided that
such activity could be referred to the Children’s Reporter where there were welfare concerns, though not on criminal offence grounds, and it would in any case have remained an offence for an adult to engage in sexual activity with someone under the age of 16) there were concerns that removing criminal liability from 13 to 15 year olds who engage in consensual sexual activity with others of the same age would serve as a signal that society condones “underage” sex and will increase the extent to which such activity takes place.

118. On the other hand, those who supported the SLC’s proposals, including most children’s groups, the Scottish Children’s Reporter Administration, the Scottish Commissioner for Children and Young People and a number of Child Protection Committees, considered it inappropriate that the criminal law should intervene in consensual sexual activity between older children. There were also concerns that the involvement of the criminal law may serve to deter young people under the age of 16 from seeking appropriate advice and help on sexual health matters.

119. Having a definitive age in law at which young people are deemed to have the capacity to consent to sexual intercourse is important. That age is currently 16 in Scotland and throughout the rest of the UK. We are concerned that the SLC’s proposals could be perceived as reducing this to 13 in Scotland and are therefore concerned about the potential for damaging consequences for young people. Retaining 16 as the age at which the law recognises that young people have sexual autonomy is consistent with existing legal provision. Decriminalising sexual intercourse between teenagers under the age of 16 may make it more difficult for young people to resist peer pressure to engage in sexual intercourse and therefore risks more and earlier sexual activity amongst young people in Scotland. While we cannot be certain about the extent to which the fact that sexual intercourse with a girl under the age of 16 is a criminal offence shapes or moderates behaviour, there is a risk that action perceived as lowering the age of consent could change the sexual behaviour of some young people and run contrary to the Government’s policy of encouraging young people to delay sexual activity. Young people’s sexual health is not an area in which risks should be taken and there is a strong case for guarding against the possibility of rises in teenage pregnancies and sexually transmitted infections with associated long-term consequences. The Scottish Government considers that the legal age at which a young person can consent to sexual activity is important in signalling society’s view on sexual activity and did not feel that it was an area which should be altered without very careful regard to the potential consequences in terms of harm to young people.

120. We have therefore added a new section to the Bill which confirms the existing criminality of sexual intercourse between older children. Section 27 of the Bill provides that it shall be an offence for children aged between 13 and 15 to engage in sexual intercourse. Due to the sexual health risks, the Bill provides that sexual activity involving penetration of the anus or vagina shall be an offence. The offence applies to the person who penetrates and the person who consents to being penetrated. We have adopted this approach as we believe that the way in which the law currently acts to criminalise only boys (where the activity is consensual and both are of similar age) is discriminatory.

121. However, where such sexual activity takes place without the consent of the person being penetrated, that person does not commit an offence. In such circumstances, the perpetrator would be committing both the offence at section 27 and the more serious offence of sexual assault or rape.
122. A consequence of this approach is that the new ground of referral to the Children’s Reporter proposed by the SLC, and provided for in section 29 of their draft Bill, is no longer necessary. It had therefore been deleted.

Defences to offences committed against older children

123. Section 29 of the Bill makes provision for specific defences to the offences concerning sexual activity with older children. This section has been amended (from what was section 27 of the SLC’s draft Bill), partly to reflect the Government’s changes to the SLC’s approach to sexual activity between older children, but also in other respects. Full details of those changes are set out below. Details of the SLC’s approach and thinking on these matters can be found at paragraphs 4.59 to 4.82 of their report.

Defences: teenage relationships and “age proximity”

124. There is a need for the law to be specific about the age of children whom it protects. However, creating such boundaries dependent on age has the potential to cause significant problems in practice unless specific measures are put in place to address the issues which may arise.

125. For instance, the Bill recognises that some consensual sexual contact between older children (e.g. kissing) is normal but the Bill’s protective offences criminalise any form of sexual contact between those over 16 and those under that age, for the good reasons set out above. However, the result of that (if provision were not made to modify it) would be that a boy or girl’s sixteenth birthday would result in them committing a criminal offence if they had any form of sexual contact (even kissing and cuddling) with their 15 year old boyfriend or girlfriend; even though such activity would not have been against the law the day before. That would obviously be absurd.

126. The Bill therefore makes special allowance for such situations by providing for a defence of “proximity of age” in respect of sexual activity with older children. This defence relates to those forms of sexual conduct which are not criminal when both parties are older children (i.e. non-penetrative sexual activity). The Bill provides that it is a defence for a person over the age of 16 to engage in sexual conduct (other than sexual activity involving penetration of the anus or vagina which is criminalised by section 27 of the Bill when both parties are older children) provided he or she is no more than 2 years older than the child.

127. The SLC recommended a defence of age proximity, also extending two years, but using a different basis for measuring that difference. The Bill therefore differs from the SLC’s proposals on this matter by providing that the age difference is measured by date of birth. We believe that this is a simple and straightforward way of providing for the reality of teenage relationships and is one which will be easily understood by young people themselves.

128. The SLC had recommended that age difference for these purposes should be measured by age at last birthday. However, that would allow an age gap of nearly 3 years (e.g. where the younger party could have only just turned 15 while the older party is nearly 18). Furthermore, it creates anomalies where a gap of 2 years becomes 3 years because the older party’s birthday comes first. The SLC proposed to address such anomalies by means of a provision that
legitimised sexual contact even where there was an age gap of three years, so long as there had been an existing sexual relationship prior to the elder party’s birthday which created that age gap.

129. The Government were concerned that such a provision presented a perverse incentive to initiate sexual activity early in cases where there was a relatively significant discrepancy in age. That not only ran contrary to our sexual health policy but presented a risk of legitimising predatory behaviour. Hence the change to measuring age difference by date of birth. By measuring it in this way, the Bill ensures that such anomalies do not arise as the age difference between two individuals is not subject to change.

Defences: mistake as to age

130. The offences concerning sexual activity with a child under the age of 13 are strict-liability offences, and it is not a defence for the accused to argue that they mistakenly believed the child to be older. This approach is in line with that proposed by the SLC, who commented:

“….offences involving children below 13 are different from those involving children under 16 … where there may be greater scope for a defence of mistake as to the child’s age.” (para 4.43)

131. The Bill provides that it shall be a defence to a charge of sexual activity with an older child that the accused reasonably believed that the child was 16 years old or older. This is similar to what the SLC proposed but differs by restricting the use of the defence to those not previously charged with a like offence.

132. This reflects the current law, where the defence is allowed in respect of a charge of intercourse with a girl under 16, but it is a requirement that the accused had not previously been charged with a like offence. Currently, the accused must also be under the age of 24. For this reason, it is sometimes referred to as “the young man’s defence”.

133. The SLC’s report proposed that both of the qualifications on the defence should be removed and that the age of the accused, and the fact that he or she had previously been accused with a similar offence would more properly be treated as issues affecting the credibility of the accused’s defence of mistaken belief as to the age of the child.

134. It is possible to envisage circumstances in which a mistaken belief in a child’s age would be reasonable. For example, the accused could have met the child in a night club or other venue where only adults should be admitted. They may even have enquired as to the child’s age and been shown some “proof of age”. We therefore agree with the SLC that the availability of this defence should not be dependent on the age of the accused. It will be for the court to decide on the credibility of the individual offering such a defence.

135. However, the Bill retains the requirement that the accused had not previously been charged by the police with a like offence. The SLC took the view that this fact should also be considered by the court in determining the credibility of the accused person’s defence, rather than precluding the accused from using the defence. However, at present, it would be difficult to lead evidence of previous charges brought against the accused and thus difficult, in our view, for
the court to reach a proper conclusion on the credibility of the defence. We were concerned that removing this restriction could enable serial sexual predators to evade conviction and have therefore re-instated it.

**Defences: marriage or civil partnership**

136. The SLC proposed that it should be a defence to a charge of an offence relating to sexual activity with an older child that the accused was in a marriage or civil partnership with the victim. In so far as the defence related to marriage, that reflected the current law in Scotland. However, no such defence is provided for in England and Wales.

A founding principle of this Bill is that children under the age of 16 should be protected from premature sexual activity. A similar principle is reflected in Scotland’s laws on marriage and civil partnership, since someone under the age of 16 cannot be married or enter into a civil partnership in Scotland. The Government therefore considers that it would be inconsistent to provide an express defence of marriage or civil partnership to the offences concerning sexual activity with an older child.

**Alternative approaches**

138. Two alternative approaches to that proposed in this Bill with respect to sexual offences against children are that proposed by the SLC in their final report and the approach provided for in the Sexual Offences Act 2003 in England and Wales.

139. The SLC’s final report proposed the decriminalisation of all consensual sexual activity between older children (aged 13 to 15) and recommended instead that the Children (Scotland) Act 1995 should be amended to provide for a new ground for referral to the Children’s Reporter. As discussed above, the Government was concerned that this approach would risk sending the wrong message about the appropriateness of early sexual conduct. It has therefore been rejected.

140. The Sexual Offences Act 2003, by contrast, criminalised all sexual activity involving children, regardless of the age of the perpetrator, and regardless of whether it was consensual. While this approach has the advantage of simplicity, it was widely criticised at the time because it had the effect of criminalising all and any sexual conduct between teenage children even that which does not involve any degree of exploitation and which would be regarded by many as a normal part of growing up. Amending the Bill so as to provide that all the offences against older children can be committed by a person under the age of 16 would have the result that teenage children would commit a criminal offence if they engaged in any form of sexual conduct with each other, including even kissing and cuddling, if that conduct were deemed sexual in nature. While, in practice, such conduct has not been prosecuted in England and Wales, we do not consider that it is appropriate to create such wide ranging criminal offences which serve no clear purpose and would risk making indictable sex offenders of a significant proportion of Scots teenagers.
PART 5 – ABUSE OF POSITION OF TRUST

Policy objectives

141. There are a number of existing provisions which make it an offence for a person to have sexual contact with another person in relation to whom he or she is in a position of trust. Section 3 of the Criminal Law (Consolidation) (Scotland) Act 1995 provides that it is an offence for a person over the age of 16 to have sexual intercourse with a person under the age of 16 if he is a member of the same household as the child and is in a position of trust or authority in relation to the child.

142. Section 3 of the Sexual Offences (Amendment) Act 2000 provides that it is an offence for a person of 18 or over to engage in sexual activity with a person under that age where there was a position of trust between the parties, other than in a family setting. “Position of trust” is defined so as to include persons looking after the child in a residential establishment of any kind (including a care home, young offender’s institute, etc), a hospital or an educational establishment.

143. Section 313 of the Mental Health (Care and Treatment) (Scotland) Act 2003 provides that it is an offence for a person to engage in sexual activity with a mentally disordered person where he or she is providing care services in respect of that other person.

144. The SLC considered whether such provisions added anything to what is already contained in the other offence provisions they proposed in their report, or whether the general protective offences, together with the general statutory sexual offences and the definition of consent as free agreement, negated the need for such provisions. They concluded:

“Even if some instances of sexual contact with a person are wrong because of some characteristic of that person (such as age or mental condition), there is a separate and additional type of wrong where the perpetrator holds a position of trust over the victim. The existence of the trust relationship renders highly problematic any consent which the vulnerable person may give to sexual activity. But over and above the issue of the validity of consent, a person who holds a position of trust over another is acting inconsistently with the duties imposed by that position if he engages in sexual activity with that person.” (para 4.107)

145. Having determined that there remains a need for provisions specifically criminalising sexual abuse of trust, the SLC considered that they should be consolidated into a single Bill on sexual offences, rather than continuing to sit in separate acts. In doing so, the SLC also recommended that a number of inconsistencies in the existing legislation on abuse of trust required to be addressed. The Government endorses the SLC’s proposals on this matter.

Abuse of position of trust: children

146. Section 31 of the Bill provides for an offence of sexual abuse of trust of a child under the age of 18. This offence replaces the existing the existing offences contained in the 1995 Act and the Sexual Offences (Amendment) Act 2000 (“the 2000 Act”) and cover both circumstances where a sexual breach of trust occurs in a family setting and where it occurs in respect of
someone who had a position of trust over a child in their care in, for example a school, residential institution or hospital.

147. The provision amends the existing law in that all breach of trust provisions in relation to children now apply to conduct directed by someone over the age of 18 towards someone under the age of 18 (the existing provisions on breach of trust in a family setting apply in respect of persons over and under the age of 16.) It also extends the definition of “sexual conduct” in respect of the breach of trust provisions to cover all types of sexual conduct. The provisions differ from the existing provisions contained in the 2000 Act insofar as they extend to cover persons in part-time education and add a requirement in respect of persons working in educational institutions that, for an offence to be committed, the person must regularly care for, train, supervise or be in sole charge of the person in order for there to be a relationship of trust between the two.

148. The SLC considered that, because the provisions extended to people over the age of 16, and to higher education institutions, such a provision was necessary as otherwise:

“It would have the effect of creating a relationship of trust, for example, between a lecturer in a law school in one campus of a university and a student of medicine based in another campus, even though there was no professional contact between the two.”

(footnote 140, page 95)

149. Section 34 of the Bill provides for four specific defences to the offence of sexual abuse of trust. The first two defences apply in relation to all the “positions of trust” defined at section 33. The Bill provides that it is a defence that the accused reasonably believed that the person in relation to whom they were in a position of trust had attained the age of 18 years. It is also a defence that the accused reasonably believed that they were not in a position of trust in relation to the person with whom they were engaging in sexual conduct.

150. The Bill also provides that it shall be a defence that the accused and the person with whom he or she was engaging in sexual activity were married or in a civil partnership and that, immediately before the position of trust arose, a sexual relationship already existed between the two individuals. The need for these defences arise mainly as a consequence of the fact that the breach of position of trust offences, unlike the general “protective” offences applying to children, apply to children aged 16 and 17, who can legally marry, and with whom an adult can legally engage in sexual activity. These defences do not apply to abuse of trust in family settings (section 32(6) of the Bill) as it is considered highly unlikely that a relationship of trust in the sense provided for here could ever arise between people who are married, in a civil partnership or had been in a sexual relationship with each other before the position of trust arose (of course, where the child was under 16, the general “protective offences” at sections 13 to 27 would apply).

Abuse of position of trust: mentally disordered persons

151. Section 35 of the Bill provides for an offence of sexual abuse of position of trust of a person with a mental disorder. It replaces the existing provisions at section 313 of the Mental Health (Care and Treatment) (Scotland) Act 2003 (the 2003 Act) which, though not referring to the term “breach of trust” clearly have this concept at their core. The provisions are wider in
This document relates to the Sexual Offences (Scotland) Bill (SP Bill 11) as introduced in the Scottish Parliament on 17 June 2008

their application than those at Part One of the Bill, in that they apply in respect of a person with a mental disorder, regardless of whether that person’s mental disorder is such as to negate their ability to consent to sexual conduct. However, in another sense, the provisions are narrower, insofar as they apply only to those in providing care services to the mentally disordered person.

152. The new provisions largely restate the provisions in the 2003 Act, though the definition of prohibited sexual activity is amended and clarified. They provide that it shall be an offence for a person providing care services to a person with a mental disorder to engage in sexual activity with that person. “Care services” are defined by sections 1 and 2 of the Regulation of Care (Scotland) Act 2001.

153. The Bill provides that it shall be a defence: that the person providing the care service did not know, on reasonable grounds, that the other person was mentally disordered; that the person providing the care services did not know, on reasonable grounds, that there was a relationship of trust with the other person; that the parties were married to, or in a civil partnership with, each other at the time of the sexual activity; or that a sexual relationship existed between the parties at the time when the relationship of trust between them was constituted. The last two defences are provided as the specific role of carer may arise where the parties involved are married, civil partners or in a sexual relationship prior to the provision of care. The SLC noted:

“It is not obvious that where the parties are married or in a civil partnership and are also in this type of relationship of trust, sexual activity should necessarily be seen as involving a breach of trust.” (para 4.123)

Alternative approaches

154. The two main alternative approaches would be either to continue to rely on the existing provisions regarding breach of position of trust, or to repeal the provisions altogether and rely on the general definition of “consent” to address situations amounting to a breach of position of trust.

155. For the reasons outlined at paragraph 144, neither the SLC nor the Scottish Government considered it appropriate to simply repeal the specific provisions relating to breach of position of trust and rely on the Bill’s approach to sex offences more generally. Our conclusion was that to do so would leave a significant gap in the law and the Bill therefore restates the current provisions relating to breach of position of trust but amends in the light of the Bill’s statutory definition of consent, bringing all provisions relating to sexual breach of trust within a single statute on sexual offences.

PART 6 – PENALTIES

Policy objectives

156. Part Six of the Bill deals with the penalties for the offences set out elsewhere in the Bill. These are gathered together in the table in schedule 1. All of the offences other than rape (section 1) and rape of a young child (section 14) can be tried under either solemn or summary procedure. This is in accordance with the current law, whereby rape can only be prosecuted in the High Court. Under summary procedure, the maximum penalty on conviction is imprisonment for 12
months and/or a fine not exceeding the statutory maximum (£10,000). The maximum penalties under solemn procedure are an unlimited fine and/or imprisonment, with the maximum period of imprisonment varying between 5 years and life imprisonment. These penalties are as proposed by the Scottish Law Commission, and the penalty for the new offences in section 27 are in keeping with those for the other offences involving sexual activity with an older child.

157. The penalties may be compared with the existing penalties for the common law and statutory offences replaced by the Bill. For all common law offences the maximum penalty on conviction on indictment is life imprisonment and/or an unlimited fine. Offences under sections 3 (intercourse of person in position of trust with child under 16), 5 (intercourse with girl under 16), 6 (indecent behaviour towards girl between 12 and 16) of the Criminal Law (Consolidation) (Scotland) Act 1995 carry a maximum penalty of life imprisonment, 10 years and 10 years respectively.

158. Within the maxima set by the Bill, sentences are further limited by the normal maximum sentencing powers of particular courts, e.g. a maximum of 5 years in the sheriff court under solemn procedure. And sentences for individual cases remain a matter for the court.

PART 7 – MISCELLANEOUS AND GENERAL

Policy objectives

159. Part Seven of the Bill contains a number of miscellaneous and general provisions relating to offences committed outside the UK, power to convict for offences other than that charged, exceptions to incitement and art-and-part guilt of offences and others. The provisions relating to offences committed abroad were not contained in the draft Bill included with the SLC’s final report. The draft Bill included provisions which would have decriminalised acts of consensual sexual violence, providing they were not such as to be likely to result in severe injury. The Scottish Government did not support their inclusion in this Bill for reasons considered below, and they have been dropped from the Bill.

Power to convict for offence other than that charged

160. Section 38 provides a power for the court to convict an offender for an offence other than that charged. It applies where the court is not satisfied that the accused committed the offence charged, but are satisfied that he committed one of the other offences listed in schedule 2. For example if a man is indicted for rape and the court is satisfied that there was non-consensual penetration but not that it was with the offender’s penis, then he may instead be convicted of the offence of sexual assault set out in section 2. The maximum penalties for these alternative offences are the same as, or lower than, for the main offence. Similar provision is currently made for cases of rape or intercourse with a girl under 16 by section 14 of the Criminal Law (Consolidation) (Scotland) Act 1995.

161. Without this provision, it would be necessary for the Crown to bring alternative charges as a matter of course or, where problems emerge in the course of a trial, the Crown may have to seek leave to amend the indictment or abandon proceedings. Statutory provision for alternative verdicts avoids these difficulties. The Scottish Law Commission has proposed a procedural safeguard that the accused must be given notice of the availability of alternative verdicts.
Exceptions to inciting or being involved art-and-part in offences under Parts 4 and 5

162. Section 39 provides a number of exceptions to the offences of inciting or being involved art and part in offences under Part Four (Children) and Part Five (Abuse of position of trust). These ensure that persons involved in counselling or who otherwise give advice on sexual matters will not be guilty of offences so long as they act in good faith. It avoids the (probably theoretical) risk that a counsellor who gave advice to a child under 16 might be prosecuted for inciting that child to commit an offence, e.g. under section 27. Without this provision in the Bill, the provision of counselling services etc intended to protect children from pregnancy or sexually transmitted infection might be put at risk.

Abolition of common law offences

163. Section 40 abolishes a number of common law offences that have been replaced by the Bill, together with the offence of sodomy for which there is no equivalent. The statutory offences that are replaced by the Bill are repealed by the entries in schedule 5. The intention is to replace this part of the common and statute law rather than to provide a further set of statutory alternatives to the existing offences. The alternative would have been to leave the existing common law and statutory offences in place, but this would have been likely to cause confusion.

164. Section 41 is intended to ensure a smooth transition between the current law on sexual offences and the new offences set out in the Bill. For most offences, the date/time when the offence was committed will be clear and there should be no difficulty in determining whether the old or new offences apply. However there may be rare occasions when this is not clear and there is a risk that prosecutions would fail. The section therefore allows a person to be convicted of the new offence in such circumstances, unless the penalty is higher than for the old offence in which case the old offence applies. Without such a provision, the scenario described at paragraph 7.8 of the Scottish Law Commission’s report could arise.

Offences committed abroad

165. Sections 42 and 43 re-enact, with amendments, the provisions of sections 16A and 16B of the Criminal Law (Consolidation) (Scotland) Act 1995 on the commission of, and incitement to commit, certain sexual acts outside the United Kingdom. Those provisions were inserted into the 1995 Act by the Sexual Offences (Conspiracy and Incitement) Act 1996 and the Sex Offenders Act 1997 and have been amended several times since then. It is an offence under section 16A and 16B for a person to incite, or commit, sexual acts outside the UK if such an act would constitute an offence, listed in those sections, if it had taken place in Scotland. The sexual act must also be an offence under the law of the country in which it took place. This constitutes the dual criminality requirement. The offences which are listed in those provisions are mainly common law offences or statutory offences in the 1995 Act, most of which are being replaced by the provisions of the Bill. It was therefore considered appropriate to consolidate those provisions and amend them by reference to the new sexual offences set out in the Bill.

166. The opportunity has also been taken to implement changes required by the Council of Europe Convention on the Protection of Children Against Sexual Exploitation and Sexual Abuse (CETS 201)\(^4\), to which the United Kingdom is a signatory. Articles 18 to 29 require certain

\(^4\) http://conventions.coe.int/Treaty/EN/treaties/Html/201.htm
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sexual activity to be criminalised. Article 25 requires a party to the Convention to establish jurisdiction over offences committed by its nationals or residents as is already provided for by sections 16A and 16B. However it also requires that, at least so far as certain sexual offences committed by nationals are concerned, they should not be subject to the “dual criminality” requirement. Therefore, it is no longer necessary to provide that the sexual act must also be an offence under the law of the country in which it took place.

167. Section 43 provides that the dual criminality requirement does not apply to acts committed by UK nationals. While the Convention requires this only for offences relating to sexual abuse of children, child pornography and child prostitution, this approach has been applied to all offences which are committed against persons who are under the age of 18. The same approach has also been taken in the provisions in section 42 dealing with incitement to commit sexual acts outside the United Kingdom, although this is not strictly required by the Convention. The dual criminality requirement still requires to be satisfied in order to raise criminal proceedings against UK residents under sections 42 and 43 and any other individuals who incite sexual acts in accordance with section 43.

168. Section 44 is required to deal with the possibility of cases involving sexual offences outside the UK where the date of the offence is uncertain and there is doubt as to whether section 16B of the 1995 Act or section 43 of the Bill applies. It ensures that such cases will continue to be dealt with under the old provisions which will mean, if a prosecution is raised against a UK national, the Crown will need to satisfy the dual criminality test set out in section 16B of the 1995 Act.

Miscellaneous provisions

169. Sections 45 to 49 contain general provisions common to most Bills. The minor and consequential amendments introduced by section 48 and set out in schedule 4 are generally intended to bring existing legislation into line with the new offences created in the Bill, e.g. by replacing references to the old offences with references to the new offences. The amendments in paragraphs 2(2) and (3) ensure that prosecutions for the new rape offences in sections 1 and 14 must be brought in the High Court, as is the case at present for common law rape. Further amendments, for example to secondary legislation, will be made by order under section 45. Some of the amendments proposed by the Scottish Law Commission have not been included in the schedule for the time being. These generally relate to enactments on reserved matters, such as the Gambling Act 2005, and further consideration is being given to whether these amendments are best achieved in the Bill or by an order under the Scotland Act 1998.

Decriminalisation of consensual sexual violence

170. In their final report, the SLC recommended that:

“It should not be the crime of assault for one person to attack another where: both parties are 16 or older; the purpose of the attack is to provide sexual gratification to one or other (or both) of the parties, and the parties agree to that purpose; the person receiving the attack consents to its being carried out; and the attack is unlikely to result in serious injury.” (para 5.27)
171. In general, the SLC’s proposals focus on consent as the legitimising element of sexual activity and criminalise lack of consent. In that context, it makes sense that consensual sexual violence should be decriminalised. However, the vast majority of respondents to the Scottish Government’s consultation on the SLC’s final report were opposed to the inclusion of such a provision. In particular, many consultation respondents were concerned that such a provision could provide a loophole for defendants in rape and domestic violence cases. There was a real concern that defendants in such cases might try to argue that the victim consented to the attack and, as such, no crime was committed. It may not always be possible to prove beyond reasonable doubt that such consent was not given. At present, any such consent would be irrelevant as it is not possible to consent to be assaulted. There were also concerns expressed that the general thrust of the Bill is to put in place measures to protect people from sexual exploitation and that this provision runs contrary to that aim.

Alternative approaches

172. Alternative approaches to provisions concerning offences committed abroad were considered. The principal alternative approach would have been to leave sections 16A and 16B in the 1995 Act and to amend them to add references to the new offences created by the Bill and to remove the dual criminality requirement in relation to UK nationals. This would have been unsatisfactory as it would have left heavily amended provisions on offences outside the UK in the 1995 Act while the principal sexual offences in that Act had been repealed and replaced by the new offences in the Bill. The extent of the removal of the dual criminality requirement could also have been limited to those offences for which the Convention requires it, i.e. offences against children, or removed from other classes of offenders, e.g. UK residents.

EFFECTS ON EQUAL OPPORTUNITIES, HUMAN RIGHTS, ISLAND COMMUNITIES, LOCAL GOVERNMENT, SUSTAINABLE DEVELOPMENT ETC.

Equal opportunities

173. The Bill’s provisions do not discriminate on the basis of gender, race, marital status, religion, disability, age or sexual orientation. They provide greater gender neutrality than the current common law and statutory sexual offences, many of which can only be committed against girls or against boys. Where gender differences remain, as for the offences involving penetration, they are a reflection of physiological differences. Existing discrimination on the basis of marital status, for example in section 7(3) of the Criminal Law (Consolidation) (Scotland) Act 1995 which provides for inducement of a married woman to permit sexual intercourse by impersonating her husband to be treated as rape, is removed. Existing sexual offences distinguish on the basis of the age of the victim and, in some cases, the age of the offender. Distinction on the basis of age of the victim, e.g. in the special protective offences against younger and older children is maintained, but those based on the age of the offender (such as the “young man’s defence” in section 5(5) of the 1995 Act which was available only to men under the age of 24) are removed, except where the offender is also under the age of 16. Special protection for mentally disordered persons is maintained in Part Three and in the sexual abuse of trust provisions of section 35.
Human rights

174. The Scottish Government is satisfied that the provisions of the Bill are compatible with the European Convention on Human Rights. The SLC’s report contains a commentary and analysis of compatibility of its recommendations and draft Bill at paragraphs 1.31, 1.35 and elsewhere in the report as referenced at para 1.35. The issues examined relate to:

- strict liability in relation to offences against younger children;
- the burden of proof relating to defences of reasonable belief in the age of a child and on the existence of a valid marriage or civil partnership;
- proof of age;
- provisions on sado-masochistic practices;
- commencement and transitional provisions;
- and notice of the possibility of alternative verdicts

175. The differences between this Bill and the one proposed by the SLC do not affect their analysis.

Island communities

176. The Bill has no differential impact upon island communities. The provisions of the Bill apply equally to all communities in Scotland.

Local government

177. CoSLA and local authorities have been consulted on the provisions of the Bill. The Scottish Government is satisfied that the Bill has no detrimental impact on local authorities.

Sustainable development

178. The Bill will have no negative impact on sustainable development.
SEXUAL OFFENCES (SCOTLAND) BILL

DELEGATED POWERS MEMORANDUM

PURPOSE

1. This memorandum has been prepared by the Scottish Government in accordance with Rule 9.4A of the Parliament’s Standing Orders. Its purpose is to assist consideration by the Subordinate Legislation Committee, in accordance with Rule 9.6.2 of the Standing Orders, of provisions in the Sexual Offences (Scotland) Bill conferring powers to make subordinate legislation. It describes the purpose of each such provision and explains the reasons for seeking the proposed delegated powers. This Memorandum should be read in conjunction with the Explanatory Notes and Policy Memorandum for the Bill.

2. This memorandum sets out—
   • the person upon whom the power to make subordinate legislation is conferred and the form in which the power is to be exercised;
   • why it is considered appropriate to delegate the power to subordinate legislation and the purpose of each such provision; and
   • the parliamentary procedure, if any, to which the exercise of this power to make subordinate legislation is to be subject and why it was considered appropriate to make each power subject to the relevant parliamentary procedure.

OUTLINE OF BILL PROVISIONS

3. The Sexual Offences (Scotland) Bill provides for a statutory framework for sexual offences in Scots law. The Bill repeals the common law offences of rape, sodomy, lewd, indecent and libidinous practice or behaviour and clandestine injury to women and a number of statutory sexual offences in addition to creating new statutory offences relating to sexual conduct, in particular where that takes place without consent. It provides a general definition of consent as “free agreement” and supplements this with a non-exhaustive list of factual circumstances in which free agreement, and therefore consent, is absent.

4. The Bill creates new statutory offences of rape, sexual assault, sexual coercion, coercing a person to be present during sexual activity, coercing a person to look at an image of sexual activity, communicating indecently, sexual exposure and administering a substance for a sexual purpose. The Bill also creates new ‘protective offences’ which criminalise sexual activity with a person whose capacity to consent to sexual activity is either entirely absent or not fully formed.
either because of their age or because of a mental disorder. Separate ‘protective’ offences are provided for in respect of sexual activity with young children (under the age of 13) and older children (from age 13 to age 15). In addition, the Bill makes it an offence of ‘abuse of position of trust’ for a person who is aged 18 or over and in a position of trust (over a child or person with a mental disorder) to engage in sexual activity with that child or person.

5. Further information about the Bill’s provisions are contained in the Explanatory Notes and Financial Memorandum published separately as [SP Bill 11—EN] and in the Policy Memorandum published separately as [SP Bill 11—PM].

APPROACH TO USE OF DELEGATED POWERS – OUTLINE

6. The Bill contains a number of delegated powers provisions which are explained in more detail below. In deciding whether these provisions should be specified on the face of the Bill or left to subordinate legislation, the Scottish Government has carefully considered the importance of each matter against the need to—

- strike the right balance between the importance of the issue and the need to provide flexibility to respond to changing circumstances quickly, in the light of experience, without the need for primary legislation;
- make proper use of valuable Parliamentary time;
- allow detailed administrative arrangements to be kept up to date with the basic structures and principles set out in the primary legislation; and
- ensure that the legislation can easily be amended to accurately reflect changes to sexual offences legislation in the UK (for example section 29 which contains a power to amend the definition of ‘relevant offences’)

GENERAL SUBORDINATE LEGISLATION PROVISION

7. Section 46 contains the general subordinate legislation provisions and provides that all powers to make orders under the Bill are exercisable by statutory instrument. Subsection (1) also allows different provision to be made for different purposes and permits the powers to be used to make, incidental, supplemental, consequential, transitional, transitory or saving provisions. Subsections (2) and (3) provides that the powers conferred by the Bill on the Scottish Ministers are subject to negative resolution procedure, with the exception of the following—

- orders which make ancillary provision under section 45 to amend primary legislation are subject to affirmative procedure;
- commencement orders made under section 49 are not subject to any parliamentary procedure.

8. The provisions containing delegated powers are listed below with an explanation of each power, why the power has been taken in the Bill and why the selected form of Parliamentary procedure, if any, has been considered appropriate.
This document relates to the Sexual Offences (Scotland) Bill (SP Bill 11) as introduced in the Scottish Parliament on 18 June 2008

SUBORDINATE LEGISLATIVE POWERS – DETAIL

Section 29(5) – Power to specify “relevant offences” for the purpose of section 29(2)

Power conferred on: Scottish Ministers
Power exercisable by: Order made by statutory instrument
Parliamentary procedure: Negative resolution of the Scottish Parliament

Provision

9. Section 29(1) provides that it shall be a defence for an accused person who is charged with an offence under sections 21 to 27 (which are concerned with sexual activity involving or directed towards a child aged 13-15) that he or she reasonably believed that the child, with whom he or she engaged in sexual activity, had attained the age of 16 years at the time the conduct took place. Section 29(2) provides that such a defence is not available to an accused if that accused has previously been charged by the police with a ‘relevant offence’. Section 29(5) provides the Scottish Ministers with a power to specify by order which offences or offences of such description will constitute a ‘relevant offence’ for the purpose of section 29(2).

Reason for taking this power

10. The purpose of providing a power for Scottish Ministers to specify a “relevant offence” is that it is considered more appropriate to set out this detail in an order than on the face of the Bill. In addition to certain offences under this Bill, the list of “relevant offences” is likely to include a number of current and historic offences, including not only Scottish offences but other UK sexual offences. Listing such “relevant offences” by virtue of an order making power provides the flexibility to respond to new and changing legislation north and south of the Border without the need for primary legislation. We consider that it would not be an effective use of Parliamentary time to require that primary legislation is brought forward to amend the definition of ‘relevant offence’ on each occasion that the law in this area is amended.

Choice of procedure

11. We consider that the negative resolution procedure provides the appropriate level of parliamentary scrutiny given the limited nature of the enabling power. It provides only a power to specify what a ‘relevant offence’ for the purpose of the defence of reasonable mistake of belief as to age in relation to a charge brought under sections 21 to 27 of the Bill. It does not allow for the creation of a new offence or provide a power to further extend or restrict the range of offences in the Bill to which the defence in section 29(1) can be invoked.
Section 32(1) – Power to amend the definition of what constitutes a ‘position of trust’ in respect of the offence of sexual abuse of trust at section 31.

Power conferred on: Scottish Ministers
Power exercisable by: Order made by statutory instrument
Parliamentary procedure: Negative resolution of the Scottish Parliament

Provision

12. Section 31 creates an offence of sexual abuse of trust. It provides that a person commits an offence of sexual abuse of trust if they are aged 18 years or older and intentionally engage in a sexual activity with, or directed at, a person who is under 18 and in respect of whom the perpetrator is in a position of trust. Section 32 defines “position of trust” for the purposes of the offence of sexual abuse of trust at section 31. Section 32(1) of the Bill provides the Scottish Ministers with a power to make an order specifying what other conditions, in addition to those already specified in section 32, will constitute a position of trust.

Reason for taking this power

The reason for taking this power is to allow for sufficient flexibility to amend the definition of a ‘position of trust’ to reflect any future changes to the arrangements relating to the education or care of young people in Scotland. Ensuring that children are protected from harm by those in positions of trust or responsibility over them has been an area of policy subject to recent developments, and it is possible that further developments in the future may necessitate changes as to what constitutes a ‘position of trust’. Without a power to do so by statutory instrument, primary legislation will be required to ensure that this definition continues to accurately reflect the changes in circumstances in which positions of trust arise. Further, it is considered appropriate to specify the level of detail which may be required to specify any additional conditions in an order rather than place this on the face of the Bill.

Choice of procedure

13. The negative resolution procedure is considered the appropriate level of parliamentary scrutiny in light of the limited nature of the power. The order making power is limited to specifying the conditions in which a person is considered to be in a position of trust. It cannot be used to modify other aspects of section 31 such as the age limit provided for in subsection (1)(b). Given this, the Scottish Government does not consider it would be effective use of the Parliament’s time to require such orders to be subject to affirmative resolution procedure.
Section 35(4) – Power to specify circumstances which are to be regarded as constituting the provision of care services for the purpose of the offence of sexual abuse of trust of a mentally disordered person

Power conferred on: Scottish Ministers
Power exercisable by: Order made by statutory instrument
Parliamentary procedure: Negative resolution of the Scottish Parliament

Provision

14. Section 35 creates the offence of sexual abuse of trust of a mentally disordered person. Subsection (1) provides that a person commits an offence under this section if they fall within the class of persons specified in subsection (2) and intentionally engage in sexual activity with, or directed at, a mentally disordered person. Subsection (2) sets out the classes of person who are subject to the offence provisions in subsection (1). It provides that they are those who provide a care service to a mentally disordered person and those who are employed in, or contracted to provide services in, or who manage, a hospital in which a mentally disordered person is receiving treatment. Subsection (4) defines what is meant by the “provision of care services” for the purpose of subsection (2) and in addition to listing examples of such services contains a power for Scottish Ministers to specify by order such other circumstances which constitute the provision of care services.

Reason for taking power

15. The purpose in taking this power is to ensure that there is sufficient flexibility to amend the definition of the “provision of care services” to reflect any future changes to the way in which care services are provided to persons with a mental disorder, without using primary legislation for this purpose. For example, if in future, circumstances arose where someone provided care services to a person with a mental disorder without a contract being in place between the organisation providing the care service and the individual directly responsible for providing the service, this power would ensure that the definition of “providing care services” can be amended without recourse to primary legislation. An order making power is considered appropriate to specify the level of detail which is required and can be brought forward in shorter timescales than primary legislation.

Choice of procedure

16. The negative resolution procedure is considered the appropriate level of parliamentary scrutiny for any regulations made under this section in light of the limited nature of the enabling power.
This document relates to the Sexual Offences (Scotland) Bill (SP Bill 11) as introduced in the Scottish Parliament on 18 June 2008

Sections 30(6) and 38(4) – Power to prescribe form of notice of alternative verdicts

Power conferred on: The High Court of Justiciary
Power exercisable by: Act of Adjournal
Parliamentary procedure: None

Provision

17. Section 38 provides that, where a charge is brought under specified provisions of the Bill, and the court or jury are not satisfied that the accused committed the offence charged but are satisfied that the accused committed a specified alternative offence, the court or jury may acquit the accused of the charge but find the accused guilty of that alternative offence. Subsection (2) provides that an accused cannot be convicted of an offence other than that charged unless fair notice of that fact has been provided to the accused. Subsections (3) and (4) provide that the format of the notice which is to be given to the accused will be prescribed in an Act of Adjournal and must be appended to the indictment or complaint.

18. Section 30 provides that, where a person is charged with an offence against a young child under sections 21 to 26 of the Bill, but for a failure to prove beyond a reasonable doubt that the child had attained the age of 13 when the offence took place, the court or jury may acquit the accused of the charge and find him or her guilty of an alternative offence. Section 30(4) provides that an accused person can only be convicted of an alternative offence in subsection (5) if the court or jury are satisfied that the child had not attained the age of 16 at the time the offence took place and fair notice of the alternative verdict is given to the accused. Subsection (6) applies section 38(3) and (4) to section 30. Therefore, the format of the notice which is to be given to the accused for the purpose of section 30(4) will be prescribed in an Act of Adjournal and appended to the indictment or complaint.

Reason for taking power

19. The power in sections 30(4) and 38(1) to convict a person of an alternative verdict cannot be used unless fair notice has been given to the accused. Therefore, it is important to provide for a power which sets out the format of the notice which has to be given to the accused so as to avoid any subsequent dispute as to what exactly constitutes “fair notice” and whether the condition in section 38(2) has been complied with. The format of any such notice is essentially an administrative matter and would not normally be the subject of primary legislation. The Scottish Government therefore considers it appropriate that the High Court of Justiciary should be able to prescribe this.

Choice of procedure

20. Detailed matters related to court procedure, such as the content of court forms relate to the type of matters which are not considered appropriate to be included in primary legislation. Such administrative matters can appropriately be dealt with by the High Court by Act of Adjournal rather than being subject to any Parliamentary procedure (see section 305 of the Criminal Procedure (Scotland) Act 1995 which makes provision for the Act of Adjournal generally).
Section 42(4) – Power to prescribe period of notice of defence to offence at section 42(1)

Power conferred on: The High Court of Justiciary
Power exercisable by: Act of Adjournal
Parliamentary procedure: None

Provision

21. Section 42 re-enacts section 16A of the Criminal Law (Consolidation) (Scotland) Act 1995 (with amendments). In accordance with section 42(1) and (2) an individual who is not a UK national will commit an offence if he or she incites another person to commit sexual conduct outside the UK if (a) the intended conduct would amount to a listed offence in Scotland if the conduct were to have taken place in Scotland and (b) if the intended conduct also constitutes an offence in the law in force in the country in which it was intended to take place.

22. Section 42(4) provides that the condition specified in subsection 42(2) (the intended conduct must be an offence in the country in which it was intended to take place) is taken to be satisfied unless, not later than such time as the High Court may by Act of Adjournal prescribe, serve a notice on the prosecutor, stating—

- that on the facts as alleged with respect to the accused’s conduct, the condition is not in the accused’s opinion, satisfied;
- the grounds for the accused’s opinion; and
- requiring the prosecutor to prove that the condition is satisfied.

Reason for taking power

23. Section 42(4) creates a power for the High Court to make rules specifying the time period within which a person who is not a UK national and who is accused of an offence under section 42 must notify the prosecution, of the reasons they do not consider their conduct to have satisfied the conditions at section 42(2). The time period within which the defence should be required to serve such a notice is essentially an administrative and procedural matter for the High Court to determine and as such is not considered appropriate to be included in primary legislation.

Choice of procedure

24. Rules made under this power are procedural and administrative. Detailed matters related to court procedure, such as the timescales in which notices should be sent to the prosecution relate to the type of matters which can appropriately be dealt with by the High Court by Act of Adjournal rather than being subject to any Parliamentary procedure.
Section 43(4) – Power to prescribe period of notice of defence to offence at section 43(2)(b)

Power conferred on: The High Court of Justiciary
Power exercisable by: Act of Adjournal
Parliamentary procedure: None

Provision

25. Section 43 re-enacts section 16B of the Criminal Law (Consolidation) (Scotland) Act 1995. In accordance with section 43(2), a UK resident will commit an offence if he or she does an act in a country outside the UK if (a) the act would amount to a listed offence in Scotland if the conduct were to have taken place in Scotland and (b) if the act also constitutes an offence in law in force in the country in which it was intended to take place.

26. Section 43(4) provides that the condition specified in section 43(2)(b) is taken to be satisfied unless, not later than such time as the High Court may by Act of Adjournal prescribe, serve a notice on the prosecutor, stating—

- that on the facts as alleged with respect to the act of the accused, the condition is not in the accused’s opinion, satisfied;
- the grounds for the accused’s opinion; and
- requiring the prosecutor to prove that the condition is satisfied.

Reason for taking power

27. Section 43(4) creates a power for the High Court to make rules specifying the time period within which a person accused of an offence at section 43(2)(b) must notify the prosecution, of the reasons they do not consider their conduct to have satisfied the condition at section 43(2)(b). The time period within which the accused should be required to serve such a notice is essentially an administrative and procedural matter for the High Court and as such is not considered appropriate to be included in primary legislation.

Choice of procedure

28. Rules made under this power are procedural and administrative. Detailed matters related to court procedure, such as the content of court forms relate to the type of matters which can appropriately be dealt with by the High Court by Act of Adjournal rather than being subject to any Parliamentary procedure.
Section 45 – Ancillary provision

Power conferred on:  Scottish Ministers
Power exercisable by:  Order made by statutory instrument
Parliamentary procedure:  Generally negative resolution but affirmative resolution if modifying the text of an Act.

Provision

29. Section 45 of the Bill confers on Scottish Ministers a power to make by order such incidental, supplemental, consequential, transitional, transitory or saving provision as they consider necessary or expedient for the purposes of, or in connection with, the Bill. Section 45(2) provides that the power extends to the modification of any enactment, instrument or document.

Reason for taking power

30. Any body of new law, particularly one such as contained in this Bill, which seeks to replace a significant part of the common law with statutory provision, may give rise to the need for a range of ancillary provisions. For example, whilst a number of consequential modifications have been identified prior to the introduction of the Bill, it may be that not all of the consequences have been identified and as such further changes may be required. The order making power is considered to be necessary by the Scottish Government to allow for this flexibility.

31. The Scottish Government considers that the power to make such provision should extend to the modification of enactments. Without the power to make incidental, supplementary and consequential provision, it may be necessary to return to Parliament, through subsequent primary legislation, to deal with a matter which is clearly within the scope and policy intentions of the original Bill. That would not be an effective use of either the Parliament’s or the Scottish Government’s resources.

32. The power, whilst potentially wide is limited to the extent that it can only be used if the Scottish Ministers consider it necessary or expedient to do so for the purposes of, or in consequence of, or for giving full effect to the Bill or any provision of it.

Choice of procedure

33. Section 47(3) provides that any order made under this section will be subject to affirmative resolution procedure if it adds to, replaces or omits any part of the text of an Act. Otherwise, it will be subject to negative resolution procedure. The Scottish Government considers that this provides the appropriate level of parliamentary scrutiny for the powers conferred.
Section 49(2) Commencement

Power conferred on: Scottish Ministers
Power exercisable by: Order made by statutory instrument
Parliamentary procedure: None

Provision

Section 49 of the Bill provides that with the exception of sections 1(4), 13(3) and 45 to 47, the Scottish Ministers may by order bring the provisions of the Bill into force. As is the usual practice any such commencement orders will not be subject to parliamentary procedure.
Justice Committee

1st Report, 2009 (Session 3)

Stage 1 Report on the Sexual Offences (Scotland) Bill

Published by the Scottish Parliament on 16 January 2009
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Rev Graham Blount, Scottish Churches Parliamentary Officer;
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Professor Pamela Ferguson, School of Law, University of Dundee;
James Chalmers, School of Law, University of Edinburgh;
Professor Michele Burman, The Scottish Centre for Crime and Justice Research, University of Glasgow;
Professor Gerry Maher QC, Former Commissioner, Scottish Law Commission;
Bill McVicar, Convener of the Criminal Law Committee, and Alan McCreadie, Secretary to the Criminal Law Committee, Law Society of Scotland;
Ian Duguid QC, and Ronnie Renucci, Faculty of Advocates.

29th Meeting, 2008 (Session 3), Tuesday 25 November 2008

Oral evidence

The Rt Hon Elish Angiolini QC, Lord Advocate;
Fiona Holligan, Principal Procurator Fiscal Depute, and Andrew McIntyre, Head of Victim Policy, Crown Office and Procurator Fiscal Service;
Kenny MacAskill MSP, Cabinet Secretary for Justice;
Gery McLaughlin, Sexual Offences Bill Team Leader, Patrick Down, Sexual Offences Bill Team, and Caroline Lyon, Legal Directorate, Scottish Government.
Remit:

To consider and report on (a) the administration of criminal and civil justice, community safety, and other matters falling within the responsibility of the Cabinet Secretary for Justice and (b) the functions of the Lord Advocate, other than as head of the systems of criminal prosecution and investigation of deaths in Scotland.

Membership:

Bill Aitken (Convener)
Robert Brown
Bill Butler (Deputy Convener)
Angela Constance
Cathie Craigie
Nigel Don
Paul Martin
Stuart McMillan

Committee Clerking Team:

Douglas Wands
Anne Peat
Andrew Proudfoot
Christine Lambourne
INTRODUCTION

1. The Sexual Offences (Scotland) Bill was introduced to the Parliament on 17 June 2008 by Kenny MacAskill, Cabinet Secretary for Justice. The Parliament designated the Justice Committee as the lead committee for the Bill. Under Rule 9.6 of the Parliament’s Standing Orders, it is for the lead committee to report to the Parliament on the general principles of the Bill.

2. The Justice Committee received a report from the Subordinate Legislation Committee making recommendations in relation to the Bill’s delegated powers. Those recommendations are considered in this report in the context of the sections to which they relate. The report of the Subordinate Legislation Committee is contained in Annexe A to this report.

3. The Finance Committee agreed to adopt level 1 scrutiny of the Bill’s financial provisions. The main issue drawn to the attention of this Committee is covered at paragraph 397 of this report. In addition, the correspondence from the Finance Committee is contained in Annexe B to this report.

4. Additionally, the Equal Opportunities Committee invited written evidence from various organisations on whether the Bill would provide adequate protection from abuse for prostitutes and trafficked women, an issue not identified separately in the Bill although particular provisions may be relevant. Three responses were received and passed to the Justice Committee to take account of during its Stage 1 consideration. The correspondence from the Equal Opportunities Committee is contained in Annexe C to this report.

BACKGROUND AND CONSULTATION

5. In June 2004, Scottish Ministers asked the Scottish Law Commission (“the SLC”) to “examine the law relating to rape and other sexual offences and the evidential requirements for proving such offences, and to make recommendations for reform.” This request followed several high profile decisions of the High Court
of Justiciary on the law of rape.\textsuperscript{1} Thereafter, the SLC undertook a process of discussion with stakeholders and interested bodies, set up an Advisory Group and in June 2006 published a discussion paper.\textsuperscript{2} The responses to the SLC’s discussion paper have not been published.

6. In September 2007, during his speech on the legislative programme, the First Minister announced that the Scottish Government would introduce legislation to reform the law on rape and other sexual offences “in the light of the Scottish Law Commission’s review.”

7. In December of that year, the SLC published its Report on Rape and Other Sexual Offences, containing at Appendix A, a draft Bill.\textsuperscript{3} At paragraph 6.2 of its report, the SLC said—

“after consultation we have decided not to make any recommendations as to reforming the law of evidence in relation to the offences which are within the scope of this project”

and continued—

“our conclusion is based on two fundamental considerations; first, many of the topics which we considered (such as mutual corroboration and character evidence) are better suited for reform across the whole spectrum of criminal offences and not solely in the context of sexual offences; secondly, for topics which are specific (or mainly so) to sexual offences (such as sexual history evidence), the required detailed and thorough analysis cannot be made within the timescale of this project.”

Scottish Government consultation

8. As the SLC’s final report included specific legislative recommendations in the form of a draft Bill, some of which differed from its initial thinking, the Scottish Government issued a further consultation. This consultation ran until March 2008 and received over 1,200 responses, “the majority of which were from individuals and related specifically to the Scottish Law Commission’s recommendations on underage sexual activity.”\textsuperscript{4}

9. The responses to the Government’s consultation on the SLC’s final report and draft Bill, although available in hard copy in the Government library, were not, during the course of the Committee’s Stage 1 evidence taking, publicly available. However in the final stages of preparing this report the responses were made available more widely.

\textsuperscript{1} Lord Advocate’s reference (No 1 of 2001) 2002 SLT 466 in which the court held that the crime of rape was defined as a man having sexual intercourse with a woman without her consent but it was not a requirement that the man forcibly overcame the will of the woman. McKearney v HM Advocate and Cinci v HM Advocate, decisions interpreted as flagging up problems for the Crown in proving the accused’s lack of belief in the consent of the victim.

\textsuperscript{2} Scottish Law Commission. (2006) \textit{Discussion Paper on Rape and Other Sexual Offences}. Available at: \url{http://www.scotlawcom.gov.uk/downloads/dp131_rape.pdf}

\textsuperscript{3} Scottish Law Commission. (2007) \textit{Report on Rape and Other Sexual Offences}. Available at: \url{http://www.scotlawcom.gov.uk/downloads/rep209.pdf}

\textsuperscript{4} Policy Memorandum, Paragraph 27.
10. The Policy Memorandum accompanying the Scottish Government’s Bill, states that a “full analysis of the responses to the consultation will be published separately and copies placed in SPICe.” No such analysis has been provided or published by the Scottish Government.

11. The Committee was disappointed that the responses to the consultation on the Scottish Law Commission’s draft Bill were not publicly available during the Committee’s evidence taking and that the full analysis has not, to date, been made available or published. Timely publication of the responses and the analysis would have been helpful to both the Committee and witnesses and other interested parties. The Committee requests that in future such information is made available from the beginning of the parliamentary scrutiny process and certainly by the time the Committee comes to take evidence.

12. The Scottish Government’s Bill, introduced in June 2008, is based on the draft Bill published by the SLC and in the main reflects the Scottish Law Commission’s proposed provisions. However, there are important aspects where the Bill under consideration differs from what was proposed by the SLC in its draft Bill and these are discussed in the relevant parts of this report.

EVIDENCE RECEIVED BY THE COMMITTEE

13. The Committee issued a call for evidence in June 2008 and received fifty eight written submissions by the time of completion of the evidence-taking. All written submissions, accepted by the Committee into evidence, are available on the Committee’s web page.

The Committee took oral evidence as follows—

28 October 2008

Sandy Brindley, Rape Crisis Scotland

Susan Gallagher and Frida Petersson, Victim Support Scotland

Louise Johnston, Scottish Women’s Aid

4 November 2008

Netta McIver and Karen Brady, Scottish Children’s Reporter Administration

Martin Crewe, Barnardo’s Scotland

Jan McClory, Children 1st

Kathleen Marshall, Scotland’s Commissioner for Children and Young People

Dr Jonathan Sher, Children in Scotland

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5 Policy Memorandum, Paragraph 28.
6 http://www.scottish.parliament.uk/s3/committees/justice/index.htm
OVERVIEW OF THE BILL

14. The Policy Memorandum states that the Bill provides for a statutory framework for sexual offences in Scots law. The Bill repeals the common law offences of rape, sodomy, clandestine injury to women and a number of other statutory sexual offences and creates new statutory offences relating to sexual conduct, in particular where there is no consent.
15. New statutory offences are created including rape, sexual assault, sexual coercion, coercing a person to be present during sexual activity, communicating indecently and administering a substance for a sexual purpose.

16. The Bill provides a general definition of consent as “free agreement” and provides a non-exhaustive indicative list of factual scenarios in which free agreement or consent, is absent.

17. A category of new offences is created, known as “protective offences” which will criminalise sexual activity with anyone who does not have capacity to consent to sexual activity either because of age or because of mental disorder.

18. Professor Gerry Maher, who was the lead Commissioner for the SLC’s discussion paper and the SLC’s draft Bill, summarised the principles behind the proposals put forward by the SLC—

“first and foremost we are concerned about sexual autonomy as a principle: the Bill should both promote and protect sexual autonomy. Of course, the sexual autonomy principle has important implications for the provisions on consent. Another fundamental principle is protection. There are people out there who are vulnerable to sexual exploitation and there are people for whom sex is not an appropriate activity. The law should be seen to protect such people. We also had other aims. Clarity in law is an important aim for any law reform, and this is an area in which the law must be clear.”

Rape – present conviction rates

19. The provisions in the Bill were broadly welcomed, by those from whom the Committee heard, as part of a wider programme to improve the low conviction rate for rape. However many acknowledged that there were limitations to what the Bill, on its own, could do.

20. The Lord Advocate stated that there is no “magic bullet” for improving conviction rates but that she hoped—

“that a package of changes and reforms and consideration will adjust the situation. It is not about improving the conviction rate; it is about ensuring that sound cases are put before the juries, that juries are placed in a position where they are able to test the evidence that is available and that the process has been expeditious and supportive for the victim as well as fair to the accused.”

21. Professor Michele Burman, University of Glasgow, was supportive of what the Bill was trying to achieve and said—

“I think that the Bill will have a positive impact. In particular, it marks an attempt to place existing common-law and statutory sexual offences in a single act and represents an important attempt to bring clarity into this area of law. The provision of a statutory definition of consent is important, because it brings much needed clarity, and will be a positive impact of the Bill...Having

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a clear understanding of what consent means will be especially helpful to juries, as well as to complainers and, dare I say it, to the accused.”

22. Professor Pamela Ferguson, University of Dundee, also agreed, but in doing so said—

“The Bill is to be welcomed because it provides clarification. However more needs to be done on the law of evidence, such as sexual history evidence. That needs to be looked at next. In addition, there is a greater role for education, particularly in schools, about what we mean by rape and sexual offences.”

23. However, other witnesses were more circumspect. For example, James Chalmers, University of Edinburgh, said—

“It is reasonable to say that simply clarifying the definitions of the relevant offence should ensure that there is less possibility of a jury being misdirected, for example, which might be helpful. I do not envisage any detrimental effects coming out of the Bill. All told, I simply do not envisage there being much effect one way of the other.”

24. The Law Society of Scotland said—

“The Society is concerned, however, that there is room for public misconception as to the purpose of this legislation. It is the Society’s understanding from discussion between the Society’s Criminal Law Committee and the Scottish Government’s Bill Team and perusal of the Bill itself that the proposed legislation is intended to be a consolidating and not a particularly innovative measure.”

25. One written submission, from the UK Men’s Movement, expressed fundamental opposition to the Bill—

“the draft Bill is an ill-advised and malevolent attempt by an over-weaning State to use the blunt instrument of the law to over-regulate complex and private human behaviour.”

Statistical data
26. The Committee is aware that recorded crime figures do not generally provide a full picture of all crime committed because many criminal incidents are never reported. The SPICe briefing on rape indicates that many instances of rape or attempted rape are never reported to the police (some studies looking at Scotland and other countries suggest that 80% or more may not be reported). Such cases never therefore appear in the statistics produced by the Police and COPFS.

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12 Law Society of Scotland. Written submission to the Justice Committee.
13 UKMM. Written submission to the Justice Committee.
14 Scottish Parliament Information Centre (SPICe) briefing on rape published June 2008.
27. The Scottish Crime and Victimisation Survey\textsuperscript{15} seeks to provide information which complements recorded crime data. During the last survey, researchers found that only 38\% of crimes highlighted by victims responding to the survey had been reported to the police. The methods used during that survey did not produce sufficient data to allow analysis of the level of rape (and other sexual offences) in Scotland. Changes have been made to the 2008 survey, now referred to as the Scottish Crime and Justice Survey, which should increase its potential to provide meaningful statistics on sexual offending in Scotland.

28. The statistical bulletin \textit{Recorded Crime in Scotland, 2007/08}\textsuperscript{16} provides information on crimes recorded by the police. The following table reproduces some of its figures for the numbers of rapes and attempted rapes recorded by the police. The Committee is aware that these figures only provide a partial picture of the actual level of offending in this area.

<table>
<thead>
<tr>
<th>Recorded Crime – rape and attempted rape</th>
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<tbody>
<tr>
<td>Year</td>
</tr>
<tr>
<td>Rape</td>
</tr>
<tr>
<td>Attempted rape</td>
</tr>
<tr>
<td>Total</td>
</tr>
</tbody>
</table>

Source: Recorded Crime in Scotland 2007/08, tables 1 and A2

29. The bulletin \textit{Criminal Proceedings in Scottish Courts, 2006/07}\textsuperscript{17} provides information on the outcome of criminal court proceedings. The table below reproduces figures for the number of persons against whom a charge of rape or attempted rape was proven.

<table>
<thead>
<tr>
<th>Persons with a Charge Proved – rape and attempted rape\textsuperscript{18}</th>
</tr>
</thead>
<tbody>
<tr>
<td>Year</td>
</tr>
<tr>
<td>Persons</td>
</tr>
</tbody>
</table>

Source: Recorded Crime in Scotland 2007/08, table 4(a)

30. The Committee noted that the figures for persons with a charge proved of rape or attempted rape are significantly lower than the recorded crime figures for the same offences. An allegation of rape may fail to produce a conviction for various reasons (e.g. due to a lack of evidence). Some such allegations will not reach court because of decisions of the police or prosecution. In relation to those cases which do reach court, Scottish Government statistics for 2006/07 indicate that a charge was proved in 49\% of rape and attempted rape cases.\textsuperscript{19}

\textsuperscript{15} A large-scale household survey of people’s experiences and perceptions of crime. The latest published results are from a survey carried out in 2006 which sought information on incidents taking place between April 2005 and March 2006.


\textsuperscript{17} Scottish Government. (2008) \textit{Statistical Bulletin Crime and Justice Series: Criminal Proceedings in Scottish Courts, 2006/07.} Available at: \url{http://www.scotland.gov.uk/Publications/2008/06/02124526/0}

\textsuperscript{18} The bulletin states that the 2006/07 figure may be underestimated slightly due to late recording of disposals.

\textsuperscript{19} See \textit{Criminal Proceedings in Scottish Courts, 2006/07, Table 2.}
31. If allegations which never reach court are included, and indeed allegations which are never reported to the police, estimates of conviction rates for rape or attempted rape fall dramatically from the figure of 49%.

**Call for research**

32. It was put to the Committee by the Lord Advocate that the conviction rate for sexual offences in Scotland is no worse than in other jurisdictions, rather it is the restrictive definition of rape that causes the difficulty in Scotland, a matter considered later in this report.

33. Despite this, the Law Society of Scotland and the Faculty of Advocates both suggested that further research is required into what the problems are and why juries do not convict in rape cases. The Committee recognises that there would be difficulties in trying to do this, not least of which is the Contempt of Court Act 1981 which makes it a contempt of court to “obtain, disclose or solicit any particulars of statements made, opinions expressed, arguments advanced or votes cast by members of a jury in the course of their deliberations in any legal proceedings.”

34. Rape Crisis Scotland suggested that a full attrition study was needed for Scotland as presently it is not known how many cases fall because of the complainer withdrawing the allegation as opposed to prosecution decisions.

35. The term “attrition” is used to describe the process whereby criminal cases “fail” at some point between the commission of the crime and the securing of a conviction. This can occur because the victim is, or becomes, reluctant to support a prosecution or, alternatively, because a decision is taken by one of the constituent parts of the criminal justice process that the allegation should be pursued no further.

36. **The Committee asks the Scottish Government to advise what consideration, if any, it is giving to a full attrition study of cases of sexual assault and rape.**

**Law of evidence**

37. Concerns were also expressed by some witnesses about the law of evidence, and in particular, issues around sexual history and character evidence. The Lord Advocate spoke in support of further work in this area saying—

“The law of evidence in particular is crucial in relation to the conviction rate in Scotland. That law must be examined and a decision must be made as to whether it remains as it is or whether consideration should be given to variation – for example, in relation to the Moorov doctrine and its operation.”

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21 Contempt of Court Act 1981, Section 8.
38. The Moorov doctrine is not confined to sexual offences. It is the general rule of the law of evidence that, in certain circumstances, where a person is charged with a series of offences, evidence from a single source in respect of any one of the offences can corroborate the evidence in relation to another of them, provided that there is an underlying unity which makes each offence part of a single course of conduct.

39. In November 2007, the Scottish Ministers invited the SLC to consider the law relating to judicial rulings that can bring a solemn case to an end without the verdict of a jury, and rights of appeal against such; the principle of double jeopardy, and whether there should be exceptions to it; admissibility of evidence of bad character of previous convictions, and of similar fact evidence; and the Moorov doctrine. Following from this reference, the work was split into separate projects. A discussion paper on Crown Appeals was published in March 2008, followed in July 2008 by a report. The SLC aims to report on double jeopardy in early 2009 and on the other matters in 2010 or 2011.

40. It may be that the issues raised by witnesses in relation to sexual history and character evidence can be considered in the round by the SLC under the referral made in November 2007 by the Scottish Ministers, however it is not clear that this is the intention.

41. Despite the origins of the SLC’s remit, the issue of increasing the conviction rate for rape did not appear to be significant when considering the implications of the Bill.

42. The Committee therefore seeks clarification from the Scottish Government on what is being done at present on the issues of sexual history and character evidence.

PART 1 – RAPE ETC.

Rape

43. Section 1 of the Bill creates a statutory offence of “rape” involving penile penetration of the vagina, anus or mouth of another person without consent and without any reasonable belief that there was consent. The Bill’s Explanatory Notes explain that— 

“a person will commit the offence of rape by intentionally or recklessly penetrating, with their penis, the victim's vagina, anus or mouth, in circumstances where the victim does not consent, and the accused has no reasonable belief that the victim is consenting to the penetration.”

Existing common law definition of rape

44. At present in Scotland, rape is governed by the common law. The common law offence involves penile penetration of a woman’s vagina without her consent. The common law definition does not include any other form of penile penetration. For example, under current provisions, penile penetration of a man's anus, without

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his consent, although criminal (chargeable as either as sodomy or indecent assault) is not rape. Thus, by including penile penetration of the anus or mouth within the definition of rape, the Bill will widen the scope of the offence.

Definitions of rape – other jurisdictions

45. In comparative terms, the Scots law definition of rape is quite narrow and is seen by some as being too restrictive. Many other legal systems now have a much wider definition of rape.

46. For example, since 2003, rape in England and Wales can be penile penetration of the victim’s vagina, anus or mouth. In France, rape involves any act of sexual penetration. In Sweden, rape involves sexual intercourse or another sexual act that, having regard to the nature of the violation and the circumstances in general, is comparable to sexual intercourse. In Victoria, Australia, rape involves penile penetration of the victim’s vagina, anus or mouth or penetration of the victim’s vagina or anus by any object or body part other than the penis. In Western Australia and New South Wales there is no offence called “rape” but the offence of sexual assault covers those acts described elsewhere as rape.

Problems with existing common law definition of rape

47. The Lord Advocate told the Committee that there are many common obstacles throughout the world to securing convictions in cases of rape and sexual assault and, as highlighted earlier in this report, that—

“the conviction rate for sexual offences in general is as good here as it is in any other jurisdiction; it is the restrictive aspect of our definition of rape that causes the difficulty. So far as that is concerned, the problems arise from a number of complex variables. First, we operate with a very narrow definition of rape...Secondly corroboration is required. That is another feature that is unique to this jurisdiction.”

48. When considering the existing law in this area, the SLC said—

“There are limits on how far (common) law can be altered by means of judicial decision, even if it is clear that the law no longer reflects contemporary social values. For example, there was, from at least the late 18th Century, a rule that a husband could not be convicted of raping his wife. That rule was abolished by judicial decision but only in 1989. A more far-reaching change to the law of rape, as for example extending the types of prohibited conduct to include anal or oral penetration of the victim, would be unlikely to result from judicial development of the common law.”

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26 For example, see Scottish Law Commission, *Discussion paper on Rape and other Sexual Offences* (Discussion Paper No 131) paragraphs 4.18 – 4.20; Clive, Ferguson and Gane, *Draft Criminal Code for Scotland*, ss. 60 and 61with related commentary.


49. Another concern with the common law as it stands is that a man cannot be guilty of rape if he has sexual intercourse with a woman in the belief that she consents, even if he has no reasonable grounds for that belief.29

New statutory definition of rape

50. The creation of a new statutory offence of rape with a wider definition, recognising that men can be the victims of rape, was generally welcomed by all from whom the Committee took evidence. Also welcomed was the clear statement in the Bill that where a victim does not consent, any unreasonable belief on the part of the perpetrator that there was consent would not prevent a conviction.

51. Professor Gerry Maher explained how the SLC reached its decision on how to define rape—

"We took the view that, in trying to separate out the different types of sexual assault offences, of which rape is one, it is important to make it clear that the law should reflect the specific type of wrong that has been done to the victim. It seemed to us that penetration with someone else’s sexual organ is a distinct type of wrong that should have its own offence, which should be a separate offence from other types of sexual assault including other types of penetration."30

52. Many witnesses were supportive of the Bill’s definition of rape and noted that it reflects the fact that the crime of rape is mainly committed by men. For example Professor Michele Burman, said—

"I support the view that penile penetration is a crucial element of rape. I think that I said in my written submission that rape is a powerful and weighty word that taps into complex symbolic meanings. It conveys in specific terms the nature of the offence and denotes a specific type of wrong, with characteristics that are quite distinct."31

53. James Chalmers, said—

"It is fair to say that penile penetration is a different form of wrong. Technically, the Bill is gender neutral, because any person can commit the offences, so the Bill therefore avoids the questions that might arise due to gender reassignment. However, once the wrong of penile penetration is identified as being separate and distinct, it flows from that that essentially only men can commit the crime of rape – at least, as the principal actor."32

54. However in both written and oral evidence, the Faculty of Advocates expressed concern about the proposed statutory definition of rape—

"Judging from our experience, we think that juries will be reluctant to consider oral penetration as a form of rape, which is why we are against it...Our experience so far has been that there have been perfectly proper

prosecutions and convictions for indecent assault, which deals with the libel of oral penetration and is dealt with appropriately by the courts. Therefore, we see no need to change the law in the way that is suggested.”

55. The Faculty also said that, in its view, there was a difficulty with the concept of recklessness being introduced into the actus reus (the actions required to constitute the crime). The Faculty commented—

“It is not easy to envisage a situation in which the actus reus of the offence could be committed “recklessly”...the extension of an offence that is substantially an offence of assault to include recklessness is a fundamental change in the law.”

56. In the view of the Faculty, there will be recklessness in the physical act not in the intention, as is the case presently. However this view was not shared by the Law Society of Scotland who said—

“Our view was that the recklessness that is specified related to mens rea, and we did not have a difficulty with it being placed in the section. I hear what the Faculty of Advocates has said, and understand its concerns, but if one considers the idea of recklessness as part of mens rea, there is no particular difficulty.”

57. The Bill provides that the act of penetration may be intentional or reckless. The Committee understands that this would, for example, allow the successful prosecution of a man for rape where there is proof that there was penile penetration of the victim’s vagina, even if the man claims that he only intended to have external sexual contact and the prosecution is only able to prove that he was reckless in relation to penetration.

58. Notwithstanding the Committee's understanding in this regard, the Committee considers that it would be helpful if the Scottish Government would confirm that this is the case.

59. Other witnesses felt that the definition of rape was not wide enough. In its written and oral evidence Victim Support Scotland said it believed that—

“the term “rape” should include any (intentional or reckless) sexual penetration of the vagina, anus or mouth without that person’s consent, regardless if this penetration is made by penis, other parts of the body or an object.”

60. Victim Support Scotland said that this definition would make the offence completely gender neutral (the crime of rape could then be committed by both men and women), and would recognise that penetration with an object has the potential to cause a higher level of physical, internal damage and that victims experience

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34 Faculty of Advocates. Written submission to the Justice Committee, Official Report, 18 November 2008, Col 1376.
36 Victim Support Scotland. Written submission to the Justice Committee.
the same distress and psychological impact regardless of what is used to penetrate.

61. In Victim Support Scotland’s view, changing the definition of rape in this way would remove the need for an overlap and confusion between rape (section 1) and sexual assault (section 2) and create a distinction in law between penetrative and non-penetrative acts.

62. The Cabinet Secretary for Justice said that although Scottish Ministers took the definition of rape from the SLC’s proposals and that in Scottish Minister’s views, the inclusion of oral penetration was felt to be satisfactory, he was happy to take account of views and to re-consider whether the definition should include penetration by an object.

63. **Having considered the evidence received, the Committee is content with the definition of rape as proposed in the Bill.**

*Transgender issues*

64. The Equality Network said that it is unclear whether the definition of rape would cover the rape of a transsexual woman who has a surgically constructed vagina, either because of the surgical construction or because the victim might still legally be a man if she had not received gender recognition under the Gender Recognition Act 2004.

65. In its written submission, the Lesbian, Gay, Bisexual and Transgender Abuse Project stated that the language used in section 1 of the Bill to describe genitalia that have been created in the course of surgery, such as gender reassignment surgery is inappropriate. It advised that the term “artificial” is not generally used to refer to surgically reconstructed parts of the body but to prosthetic parts. The Committee notes that the terms “artificial penis” and “artificial vagina” are not used in the Sexual Offences Act 2003, the corresponding legislation for England and Wales.

66. **As the Cabinet Secretary undertook to consider this issue, the Committee requests confirmation of the Scottish Government’s intention in this regard and that the appropriate changes will be brought forward by way of amendments at Stage 2.**

*Sexual assault*

67. Section 2 of the Bill creates a statutory offence of sexual assault which will, in the main, involve physical contact without consent or without any reasonable belief that consent exists.

68. Subsection (2) provides the four specific sexual acts which will each constitute a sexual assault: (a) penetrating the victim’s vagina, anus or mouth by any means in a sexual way; (b) touching the victim in a sexual way; (c) having any other sexual contact with the victim, whether directly or through clothing and whether with a body part or implement; and (d) ejaculating semen onto the victim.
69. These acts are generally covered by existing offences, in particular the common law offence of indecent assault. It should be noted that the Bill does not abolish the existing offence of indecent assault, but it does provide that any conduct that could be charged under section 2 could not be charged under a pre-existing offence.

70. An example of where a person might still be prosecuted for indecent assault, rather than charged under the new statutory offence created by section 2 of this Bill, is given at paragraph 3.46 of the SLC’s report – where someone urinates on another (without that person’s consent). Such an act is not covered by the new offence in section 2, as in terms of the Bill, there is a general requirement for physical contact between the perpetrator and the victim.

71. In its report, the SLC explained—

“We do not recommend that the common law on indecent assault should be abolished in its entirety. Instead we favour retaining the common law except in relation to those activities which constitute the proposed statutory offence of sexual assault (or indeed any other offence in the draft Bill)…We wish to retain the possibility that someone who engages in an attack, but not of a type within the definition of sexual assault, should still be liable to be convicted of assault, and where the circumstances merit it, of indecent assault.”

72. The Committee sees the merit in this approach.

Counselling and advice

73. Sense Scotland, an organisation which provides services for people who are deafblind, have sensory impairment or other physical, learning or communication difficulties, said that under current legislation, it is almost impossible to provide sexual health information to some of the people it supports. Primarily this is because of the tactile nature of communication, a general lack of formal language; the impossibility of fully understanding new information or concepts without experiencing them and therefore difficulties with consent or free agreement.

74. Sense Scotland said that it had concerns about section 2(2)(b)—

“From this is it is quite clear that any hands-on teaching is likely to be impossible, unless there is free agreement from the person involved.”

75. Other organisations such as the Scottish Child Law Centre raised similar concerns with regard to the offences against children and suggested that there should be clear exemptions for legitimate counselling and advice work.

76. The Committee draws these concerns to the attention of the Scottish Government and asks for its response.

38 Sense Scotland. Written submission to the Justice Committee.
Overlap with section 1

77. The new statutory offence proposed in the SLC’s draft Bill and adopted by the Government in its Bill provides, in section 2, for sexual assault by penetration and indeed creates a deliberate overlap with section 1 by virtue of the definition of penetration “by any means”. The maximum penalty on conviction on indictment for an offence under either section 1 or 2 is life imprisonment.

78. The Faculty of Advocates questioned why the legislation seemed to make the same situation eligible for prosecution in two different ways, seeing no obvious reason for choosing to prosecute a case under section 1 rather than section 2. 39

79. The Law Society of Scotland suggested that section 2(6) could cover the situation where a victim did not know what penetration was with. If the accused was tried under section 2, instead of section 1, and gave evidence that penetration was with his penis, it would then be open to the Crown to seek a conviction under section 2(6) even if something else was libelled at the outset. 40

80. The Lord Advocate confirmed that if there was a crime that supported the offence of rape, then it would be prosecuted as rape, but that the overlap was deliberate—

“The difficulty would be in cases where it might not be possible to corroborate the fact that it was a penis that made the penetration. Victims might be blindfolded in some cases, and they might have no idea with what they have been penetrated” 41

81. The Committee understands the rationale for the approach taken with regard to the offences covered by sections 1 and 2 and for the element of overlap. The Committee is content with this approach.

Sexual assault by penetration

82. In its original discussion paper, the SLC proposed that in addition to rape, there should be a further separate offence of sexual assault by penetration. This proposal received support from consultees.

83. However the SLC’s thinking shifted and its draft Bill did not recommend that sexual assault by penetration should be a separate offence. In its final report accompanying the draft Bill, the SLC said that it was still of the view that the law should recognise non-penile penetration as a specific sexual wrong but not as a separate offence, rather it should be “one of several forms of conduct which constitute sexual assault.” 42

84. The SLC gave a number of reasons for this change of approach. One reason was that the scope of the proposed offence would be limited to non-penile penetration of the vagina or mouth. Extension of the offence to cover penetration of the mouth, although in some instances as serious as other forms of sexual

penetration, could catch activities such as a “stolen” kiss. Another reason was that
the SLC wanted to avoid creating a hierarchy of offences.

85. In explaining the approach adopted in its draft Bill, the SLC said that including
non-penile penetrative activity under the heading of sexual assault avoided a
distinction being drawn between penetrative attacks which constitute the offence
of sexual penetration and penetrative attacks which are to be regarded as sexual
assaults. 43

86. Despite the explanation given by the SLC for its approach to defining rape and
sexual assault in sections 1 and 2, much of the evidence taken by the Committee
was in favour of the SLC’s initial proposal to create a further offence of sexual
assault by penetration.

87. For example, in its written submission, Rape Crisis Scotland said—

“there should be a separate offence of sexual assault by penetration which is
equivalent in seriousness and maximum sentence to rape, rather than this
being subsumed within the new offence category of sexual assault.” 44

88. This was supported by Scottish Women’s Aid, who explained in oral
evidence—

“the violation of someone’s person by an object should be acknowledged as
being equal in severity to rape. If that offence were enshrined as a separate
offence, it would give some weight to that view of the severity of the offence.
Women have commented that violation of their person by an object is as
distressing as penile penetration. Although we clearly wish to differentiate
between penile penetration and penetration by an object, they are equal in
severity.” 45

89. The Equality Network said—

“There should be a separate offence. The English offence is called “sexual
assault by penetration”, but the term “rape with an object” would be better
because it captures the victim’s rape-like experience while distinguishing the
crime from the central rape offence of penile penetration. The offence should
cover vaginal and anal penetration, but not oral penetration; that is what the
English law does.” 46

90. A number of witnesses 47 raised the issue of rape by a woman and to research
by Stonewall Scotland which found that one in fifteen lesbian or bisexual women
said that they had been raped by a partner. For that reason, the LGBT Domestic
Abuse Project, supported by the Equality Network, spoke in favour of creating a
new offence—

44 Rape Crisis Scotland and Scottish Women’s Aid. Written submissions to the Justice Committee.
47 Equality and Human Rights Commission, the Equality Network and the LGBT Domestic Abuse
Project.
“It is important that the rape with an object offence is included to cover lesbian and bisexual women’s experience in the context of domestic abuse. Without that we cannot say that the legislation is sexual-orientation neutral because it will not cover the experience of a sizeable proportion of women. I support what Scottish Women’s Aid and Rape Crisis Scotland said on the issues. It is important that “rape with an object” is used.”

91. Professor Pamela Ferguson agreed that there could be merit in this suggestion—

“There might be merit in having a separate offence of penetration with an object. Currently, that offence is included in section 2 as part of sexual assault. However, it is a serious form of sexual assault and, for the point of fair labelling and having previous convictions reflect the gravity of the offence, having a separate offence has merit.”

92. Professor Michele Burman also gave support—

“I support the proposal to have a separate offence that is distinct from sexual assault and equivalent in seriousness and maximum sentence to rape.”

93. Professor Gerry Maher, in oral evidence, explained further why the SLC had adopted the approach taken in the Bill—

“There is no suggestion that in confining rape to penile penetration we are saying that all instances of penile penetration are worse than other forms of penetration, or that there is some form of hierarchy in that respect...One of our pragmatic reasons for including sexual assault of penetration within the broader category of sexual assault was to do with the point about maximum penalties. It seemed to us that it would be better to keep sentences for all types of sexual assault within the range of the possible maximum of life imprisonment. Technically it might be more difficult to attach a maximum of life imprisonment to what might be termed bare sexual assault – in other words, non-penetrative assault – but locating sexual assault by penetration within the broader category of sexual assault might have advantages.”

94. Professor Maher also drew attention to the fact that there are existing conventions about maximum penalties for statutory offences and stated that although it would not be impossible to argue for life imprisonment as a maximum penalty for a residual category of sexual assault, in the view of the SLC, it was easier to create a general type of sexual assault, under section 2, which avoided any perception of hierarchy.

95. This approach was supported by the Faculty of Advocates and the Law Society of Scotland. Bill McVicar of the Law Society said—

“In my view it would be redundant under the Bill to create an offence of rape with an object. We should get away from the notion that the Bill creates a hierarchical structure of offences – offences should be considered in the round, rather on the basis that one offence is more serious than another. There is no need for a separate offence relating specifically to penetration with an object.”

96. Victim Support Scotland did not support the creation of a further offence separate from rape and non-penetrative sexual assault.

97. After careful consideration of the evidence received and in recognition of the comparable distress such an act is likely to cause the victim, the Committee has reached the view that there should be a separate offence of rape with an object or with another part of the body, limited to vaginal or anal penetration, and with the same penalties as rape. Such an offence already exists for England and Wales and the Committee recommends that the same offence should be created for Scotland.

Sexual coercion

98. Section 3 creates the offence of “sexual coercion” intended to cover circumstances in which sections 1 and 2 will not apply, for example where someone forces another to have sex or to engage in sex that does not involve the accused. Professor Maher explained—

“It seemed to us that there is an important gap in the law in that regard, which the Bill’s sexual coercion provisions are meant to cover. An accused can get sexual pleasure, for a variety of reasons, from forcing someone else to engage in a sexual act. We thought that the law should make it absolutely clear that that is a crime.”

99. The Faculty of Advocates felt that further clarity was required and suggested that it would be useful if the Bill made it explicit that the provisions in this section are directed at coercion by someone of someone else into sexual activity with a third person.

Coercing a person into being present during a sexual activity

100. Section 4(2) provides that in relation to coercing a person into being present during a sexual activity, one of two purposes must be proved. The purposes are obtaining sexual gratification or humiliating, distressing or alarming the victim. The Lord Advocate said that this could present a problem for prosecutors as—

“The actual motivation, or the reason why something has been done, is not something that we ordinarily have to prove.”

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55 Faculty of Advocates. Written submission to the Justice Committee.
101. The Committee sought clarification of whether there was a possibility of parents who have sexual intercourse in the presence of their infant child being caught by this provision in the Bill. The Lord Advocate said that this would not happen because the prosecutor’s common sense would be used. However, the Committee considers that there is still the potential, albeit on a strict reading of this provision, that this could be an unintended consequence.

102. The Bill includes three similar offences (although consent is only relevant to the first of these): section 4 coercing a person into being present during a sexual activity; section 17 causing a young person to be present during a sexual activity and section 24, causing an older child to be present during a sexual activity.

103. The Committee seeks clarity on whether in relation to any prosecution under section 4, on the basis that the accused acted for the purposes of obtaining sexual gratification, the prosecution would have to prove that the accused sought sexual gratification from the fact that the victim was present and not just from the sexual activity itself.

104. The Committee also recommends that the Scottish Government consider the wording of sections 4, section 17 and section 24 in order to avoid any ambiguity, or the creation of any unintended consequences, for example criminalising parents for having sexual intercourse in the presence of their infant child.

105. In correspondence received after the conclusion of evidence taking, the Cabinet Secretary for Justice advised that the Government recognises the difficulties that could be created for the Crown to prove beyond reasonable doubt the purpose for which the accused acted, as a matter of subjective fact.

106. The Government proposes to amend the Bill to provide that the accused may be convicted where it can be reasonably inferred from all the facts and circumstances that he or she acted either for the purpose of obtaining sexual gratification or causing humiliation, alarm or distress. The Committee welcomes this undertaking.

PART 2 – CONSENT AND REASONABLE BELIEF

107. Section 9 of the Bill sets out a statutory definition of “consent” as free agreement. The concept of consent was central to the SLC’s considerations of rape and sexual offences and was discussed in great detail in Part 2 of the SLC’s report. Section 9 of the Bill adopts the conclusions and recommendations made by the SLC as set out in its report and draft Bill.

108. Section 12 provides that for the purposes of Part 1 of the Bill, when considering whether a person’s belief as to consent was reasonable, regard is to be had to whether the person took any steps to establish whether there was consent and what those steps were.

Definition of consent
109. In its report, the SLC discussed the difficulties of determining the presence of consent where the words “I consent” (or their equivalent) were not actually said;
that the idea of consent is inherently ambiguous; and that, at present, the focus of attention is not on what the accused did to the victim but on what the victim did with the accused.\footnote{Scottish Law Commission. (2007) \textit{Report on Rape and Other Sexual Offences}, Part 2.}

110. In light of its deliberations, the SLC recommended that for sexual offences there should be a statutory definition of consent, that consent should be defined first by means of a general description of what consent means and that the statutory definition should provide a non-exhaustive list of situations where consent does not exist.\footnote{Scottish Law Commission. (2007) \textit{Report on Rape and Sexual Offences}, Paragraph 2.35.}

111. There is no specific definition in Scots law of “consent”. As stated earlier in this report, rape is currently defined as sexual intercourse with a woman without her consent. The Crown has to prove that the accused knew, or was reckless as to the possibility, that the woman was not consenting. This requirement for the Crown to prove mens rea (the state of mind of the accused), in addition to proving the fact of lack of consent, has been problematic.

112. The move to set out, for the first time, a statutory definition of consent in terms of free agreement, to include on the face of the Bill a number of circumstances in which free agreement will not be present and to exclude from the defences available any unreasonable belief of consent, was generally welcomed by most respondents.

113. For example, the Law Society of Scotland said—

“It is an improvement on the current law. It is difficult to express or draft in an elegant way the concepts that are involved in consent. When taken together, sections 9 and 12 set out clearly what a jury must consider in dealing with the question of consent.”\footnote{Scottish Parliament Justice Committee. \textit{Official Report, 18 November 2008}, Col 1381.}

114. The Lord Advocate said that the definition will be a useful tool for helping juries to understand what consent means—

“The term “free agreement” is readily understood in that context because of its breathtaking simplicity and beauty. The term “consent” is in use, but we know from the authorities and case law that, in developing jurisprudence, people have struggled with the extent to which consent can be inferred.”\footnote{Scottish Parliament Justice Committee. \textit{Official Report, 25 November 2008}, Col 1415.}

115. James Chalmers said—

“The words “free agreement” are preferable to the convoluted definition that has been used in recent English legislation. The correct approach to the definition of consent has been reviewed in a number of countries in recent years and the words “free agreement” are the best that anyone has come up with. Recent evidence suggests that if we continue to use “consent” juries
might enter the jury room with preconceptions of what that means and apply their own understanding."\(^{61}\)

116. However, in relation to the definition of “consent”, Professor Pamela Ferguson said that whilst the Bill was a step forward—

“I would prefer it if we simply used “free agreement” and left “consent” out of the picture all together. Rape would then be defined as penile penetration without the free consent of the other party. Using “consent” in the Bill can only lead to confusion. If, for example, a woman ultimately submitted to intercourse on the basis that she feared that she would be killed or seriously injured if she did not, that would be consent but not free agreement. It would be simpler to leave out “consent” and use “free agreement.”\(^{62}\)

117. Professor Burman saw merit in both views—

“The term has lots of advantages, especially when compared with the situation in England and Wales…I had not thought about the issues that Professor Ferguson raised, but, having listened to her, I feel that there is something to be said for her view.”\(^{63}\)

118. Andrew McIntyre for the Crown Office said—

“I agree that there is something attractive about replacing “consent” with the term “free agreement” throughout the Bill. I have said in the past that that would be better as it would remove one of the layers of definition. The only thing that makes me pause is the extent to which the common law will continue to apply, which we discussed earlier. There is a great deal of common-law interpretation of consent. I do not know authoritatively, but I wonder whether retaining the term “consent” in the Bill will allow us to introduce more easily its interpretation in the circumstances of a case which has assisted us the past.”\(^{64}\)

119. In its written evidence, ACPOS said—

“the definition of consent as “free agreement”, as outlined in Part 2, section 9 of the Bill, may be too simplistic and prove to be insufficient in providing juries with guidance and direction. Expanding the expression “free agreement” to include terms “voluntarily” and “with knowledge of the nature of the act” would provide further clarity.”\(^{65}\)

120. Although there has been no detailed discussion of the meaning of consent at common law, the Committee is of the view that the term is established as part of the definition of the crime of rape, and its retention therefore seems appropriate. The Committee is accordingly content with the

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\(^{65}\) ACPOS. Written submission to the Justice Committee.
continued use of the term “consent” and with it now being defined as “free agreement”.

121. Section 1 makes it clear that a belief in consent does not exclude the responsibility for rape (or any other offence set out in Part 1) unless that belief is reasonable.

122. The Committee asked the Cabinet Secretary for Justice whether this meant that rape could now be committed negligently, for example if A intentionally commits a sexual act against B in the belief that B was consenting, but where that belief has been carelessly formed.

123. The Cabinet Secretary for Justice responded—

“No…for an act to be a crime, it must be committed with the intention to do wrong. I find it hard to think of circumstances in which someone could negligently commit the crime of rape.”

124. In subsequent correspondence, the Cabinet Secretary for Justice explained his position further—

“The wording of the offences at section 1-6 is such that the required mens rea has to be intention or recklessness. The offences cannot therefore be committed “negligently” in the sense of negligence being part of the actus reus for the offence. The accused could be negligent in the sense of being careless as to whether there was consent. The Bill provides that where the accused claims that he or she believed that the other party consented, that belief in consent must be reasonable. Thus, while the physical acts constituting an offence cannot be committed negligently, consideration of whether the accused’s belief that the other party consented was reasonable, when looked at objectively, may include the extent to which the accused acted negligently.”

125. The Bill is clear that an act of penetration cannot be committed negligently, but the Committee is still unclear whether a negligently formed belief in consent would of itself be sufficient to establish criminal responsibility in terms of the Bill. The Scottish Government is asked to confirm its intention.

Circumstances in which conduct takes place without free agreement

126. Despite the wording of subsection 10(1), “for the purposes of section 9, but without prejudice to the generality of the section, free agreement to conduct is absent in the circumstances set out in subsection (2)”, many witnesses felt that it was not clear that the list of circumstances was non-exhaustive and that it should be clearly stated on the face of the Bill that if a situation arises that is not on the list, it could still be the case that consent was not present.

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67 Scottish Government. Letter from the Cabinet Secretary for Justice to the Convener of the Justice Committee dated 22 December 2008.
127. ACPOS said that all the examples in section 10 relate to where consent does not exist and that examples of where consent does exist, with further guidance, would be of benefit to the public, in particular juries and the police, when interpreting the word “consent”.\(^68\)

128. Although supportive of the list of non-exhaustive circumstances, Rape Crisis Scotland was concerned about the operation of section 10—

“For example, we are unclear whether the accused will still able to use the defence of consent if the Crown has proved the existence of any of the circumstances in section 10(2). We – and, indeed, a number of other people – had assumed that that would not be the case but, having looked at the detail of the Bill, we are not so sure.”\(^69\)

129. A number of witnesses suggested that further scenarios should be added to the non-exhaustive list in section 10. For example, Victim Support Scotland considered that consent should be seen as lacking for anyone who has been trafficked to the UK for the purposes of prostitution and any sexual penetration in such circumstances should therefore constitute rape.\(^70\)

130. The issue of people trafficking is not one for this Bill; however, the Committee suggests that the Scottish Government considers Victim Support Scotland’s evidence in this regard in the wider context of ongoing work.

131. Clearly, it was the intention of both the Scottish Law Commission and the Government that this list be non-exhaustive. The Committee believes that this is clear from the current wording of the Bill and is not of the view that there is any need to state this more clearly on the face of the Bill, nor that additional examples, showing where consent does exist, should be included in Section 10. Section 10 is intended to provide some clarification of situations where consent does not exist.

132. The Committee does, however, request that the Scottish Government confirms whether the accused will still be able to claim consent existed if any of the circumstances in section 10 are present.

**Prior consent**

133. More specifically, many witnesses\(^71\) expressed serious concerns about the introduction of the concept of prior consent into statute; specifically the circumstances set out in section 10(2)(b) providing that free agreement does not exist “where at the time of the conduct, B is asleep or unconscious, in circumstances where B has not, prior to becoming asleep or unconscious, consented to the conduct taking place while B is in that condition”.

134. Victim Support Scotland said—


\(^{70}\) Victim Support Scotland. Written submission to the Justice Committee.

\(^{71}\) Zero Tolerance; Rape Crisis Scotland; Scottish Women’s Aid; Victim Support Scotland; the Equality and Human Rights Commission.
“we have a problem with the idea of someone giving prior consent. It is extremely important that consent is given at the time that sexual activity takes place…If one accepts the interpretation that consent is valid until withdrawn, the victim must surely have an opportunity to withdraw it, which he or she would not have if they were asleep, or, indeed, unconscious.”\textsuperscript{72}

135. Rape Crisis Scotland said—

“If the notion of prior consent is introduced, it will make rape even harder to prove – and it is already extremely hard to prove. The crown would need to disprove the existence of prior consent in a rape trial. That goes against the philosophical underpinnings of the Bill which are based on sexual autonomy – that is, a person can withdraw consent at any time.”\textsuperscript{73}

136. In her oral evidence, Professor Michele Burman echoed the view of Rape Crisis Scotland.

137. The Equality and Human Rights Commission argued—

“We must ensure that we do not sweep up in the law people who behave inappropriately but not in a way that should leave them open to a serious criminal charge…The dangers in going down that route are manifold. By its nature, consent, or free agreement, as it is defined in the Bill, implies the ability freely to withhold consent at any time, but that ability is removed if one of the sexual partners is unconscious.”\textsuperscript{74}

138. It is recognised, that difficulties can arise when trying to ascertain whether consent exists, for example, when judging whether someone is too drunk to consent to sexual activity. The Law Society asked whether removing prior consent, could result in criminalising something that could be regarded as a common activity between adults who have had too much to drink but one that would not normally be regarded as criminal activity.\textsuperscript{75}

139. James Chalmers said—

“I suspect that we can only reinforce the general test - that for sexual activity to be lawful there must be free agreement in all cases. That requirement is in no way diminished by the fact that someone has taken a drink – drink is not a licence to exploit someone.”\textsuperscript{76}

140. The Lord Advocate said –

“an issue is the right of individuals under article 8 of the European convention on Human Rights to enjoy a private, sexual and family life as they wish to without undue interference from the state. A danger lies in criminalising conduct that is currently lawful – if people who are in a long-term or even a

short-term relationship agree explicitly or impliedly to such activity, it is not criminal.”

141. The Lord Advocate went on to question whether it was absolutely necessary to have prior consent if a reasonable belief existed. She suggested that the concept of prior consent might need further definition or refinement—

“to ensure that it does not cover a situation in which, for example, someone who makes a casual suggestion in a state of sobriety wishes, five hour later, to exercise some autonomy or even, in sobering up, takes a very different view of what happened when they were sleeping. A person should not be tied to a decision that they might have made earlier.”

142. Professor Maher gave the SLC’s view when it approached this issue—

“My worry is that the notion may get out that the law does not allow prior consent. I take the opposite view: there must always be prior consent. The focus of the Commission’s message is that if no consent is given prior to a sexual act, the sexual act is a criminal act. I am worried about the language of not allowing prior consent. The absence of consent prior to an act is what makes the activity criminal. Unless prior consent is included in the Bill, there is no point in talking about withdrawal of consent, because withdrawal of consent presupposes that consent has been given.”

143. The Law Society of Scotland suggested that a clearer way of expressing the issue of prior consent had been set out at paragraph 2.59 of the SLC’s Report—

“where a person was unconscious or asleep and had not earlier given consent to sexual activity in these circumstances”

144. Professor Maher said that he would be concerned about the removal of section 10(2)(b)—

“Removal of section 10(2)(b) would not solve the problem, but would simply move the focus to section 9. If the Bill were to be passed with section 10(2)(b) absent, this question would arise: is it an offence of rape in Scots law for a man to have intercourse with a woman while she is asleep? The answer should depend on whether she has consented to having sex in that state. In my view, the problem will not go away if we remove the provision in section 10(2)(b).”

145. Given the concerns raised about this particular provision, some witnesses suggested that either 10(2)(b), or the second part of it, be removed from the non-exhaustive list or that it should at least be looked at again to ensure that it does not have some unintended consequences.

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146. In light of the concerns expressed by witnesses, particularly the lapse of time, or the possibility of a change of circumstances between the giving of consent to sexual contact in such circumstances and the act itself, the Committee has some reservations about section 10(2)(b). The Committee recommends that the Scottish Government give further consideration to these particular examples.

**Historic abuse and threats of violence**

147. Another concern raised regarding section 10 was that subsection 10(2)(c) might not clearly cover a situation where someone agrees to conduct because of a history of violence or abuse between the accused and the victim. In its written evidence, Zero Tolerance said—

“In reality, most women who are raped know their attacker and “violence” as juries might understand it is not always present – someone does not have to be wielding a weapon or using physical force to be using violence. Often in domestic abuse cases the violence is more insidious and some rapes in the domestic sphere or in existing relationships can use similar kinds of threat and fear without necessarily using force.”

148. Scottish Women’s Aid suggested—

“(the) presumption of “no consent” should apply in circumstances in which the complainer had been the victim of sexual or physical abuse at the hand of the accused on previous occasions.”

149. The Committee noted from the SLC’s report (paragraph 2.68) and the accompanying draft Bill that—

“An important feature of the definition is that it does not require that the violence occurred or the threat was made at time of the sexual act. In other words the definition covers what is known as historic abuse. However, in cases of historical abuse it may be more difficult for the Crown to establish the causal link between the violence or threat and the agreement or submission to the sexual activity.”

150. In oral evidence, Professor Maher confirmed that it was not the intention of the SLC when bringing forward this proposal, nor the Scottish Government in adopting it, that this section was to be interpreted as requiring that the violence or threat of violence had to take place at the same time as the rape or sexual assault. Professor Maher explained—

“The key point about section 10(2)(c) is that it relates to situations in which there is a causal link between violence and consenting or submitting to sexual activity. If the violence took place far back in time, it may be more

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81 Raised by Victim Support Scotland; the Equality and Human Rights Commission; Scottish Women’s Aid.
82 Zero Tolerance. Written submission to the Justice Committee.
83 Scottish Women’s Aid. Written submission to the Justice Committee.
difficult for the Crown to show that there is such a causal link, but our intention was that the definition would apply to historic violence or abuse.”

151. The Committee recommends that the Scottish Government gives further consideration to the wording of this provision in order to ensure that the stated policy intent is clearly given effect to and that the issues of reasonable or legitimate fear of violence are properly taken account of.

152. More generally, in its written evidence, Zero Tolerance expressed concern about the use of the term “violence” saying—

“We feel that the provision at clause 10(2)(c) is insufficient and would welcome a more broad clarification and understanding of the term “violence” to encompass but not be limited to coercion, force and threat of violence / coercion and force.”

153. Along a similar line, Enable Scotland suggested that—

“what one person sees as a credible threat might not seem so to another. In that respect, people with learning difficulties might be much more suggestible to threats than others…we suggest that if section 10 is to be amended, it should cover not only threats of violence but credible coercion or something like that.”

154. The suggestion to include a specific reference to threats was also supported by the Law Society of Scotland.

155. In light of the evidence received, the Committee recommends that the Scottish Government considers the need to amend the Bill to include a definition of threats in paragraph 10(2)(c) of the Bill and reflect the issue of coercion raised by Enable Scotland.

Deception

156. Section 10(2)(e) provides that where a person agrees or submits to the conduct because he or she is mistaken, as a result of deception by another person, as to the nature or purpose of the conduct, free agreement does not exist. In the view of the Faculty of Advocates this could mean that where a man meets a woman and says that he is 25 when in fact he is 35, and the two engage in sexual intercourse, this could leave the man liable to prosecution for rape, by virtue of his deception.

157. The Law Society of Scotland said that it had discussed that point with the Bill team and that it understood that this provision related to the nature or the purpose of the conduct and that—

“what the Bill team had in mind was the carrying out of a spurious medical examination or something of that sort.” 87

158. It is not immediately clear to the Committee what, in the wording of section 10(2)(e), would support the interpretation placed on it by the Faculty of Advocates; however in light of its comments, the Committee recommends that the Scottish Government look at this wording again in order to avoid the potential of a wider interpretation than what was intended.

Reasonable belief
159. As noted already, section 12 of the Bill makes further provision about “reasonable belief”. It will be for a court or a jury to determine in each particular case what amounts to reasonable belief. In deciding whether a belief was reasonable, regard must be had as to whether the accused took any steps to ascertain whether there was consent and what those steps were.

160. Other witnesses questioned how this would work in practice and what would happen if the accused refused to give evidence. The Equality and Human Rights Commission asked—

“How, without prejudicing a defendant’s right to silence, will section 12 achieve its aim? Will it be made explicit that an inference may be drawn from the defendant’s refusal to outline the steps taken to determine consent? The Commission considers that without such a provision section 12 runs the risk of being meaningless.” 88

161. Professor Michele Burman said—

“I support the move away from the subjective approach that is currently taken to establish mens rea. The introduction of a reasonable belief provision, whereby the accused must have reasonable belief that the victim consented to the act, is welcome. In a sense, the Bill provides for a greater focus on the responsibility of the accused to demonstrate the steps that they took, but for me it is difficult to conceive how the accused could demonstrate that without taking the witness stand to describe those steps.” 89

162. Consequently, Professor Burman said that she supported making it more explicit that some inference could be drawn from an accused’s refusal to outline the steps he or she took to ascertain consent.

163. However the Law Society of Scotland pointed out—

“It seems to me that if an accused person were unwise enough not to give evidence in those circumstances, a jury might very well just bring in a verdict of guilty anyway because there would be no basis for holding that there was a reasonable belief in consent.” 90

88 Equality and Human Rights Commission. Written submission to the Justice Committee.
164. James Chalmers explained what happens at present when an accused refuses to give evidence—

“At present, where the circumstances are crying out for an explanation, the jury can be directed to take into account the accused’s failure to give evidence. However it would be inappropriate simply to direct a jury that it could draw an inference from the fact that the accused had not given evidence, when the accused is entitled to do so. As far as I can tell, the current law on the inferences that may be drawn from silence is not often invoked by judges in charges to the jury. If there were a desire to use it more often, in such cases, it would be helpful to include something specific in the statute.”

165. It was suggested to the Cabinet Secretary that one option might be to consider imposing an onus on the accused to show that he or she had taken steps to ascertain whether there was consent. In response, the Cabinet Secretary said that he would be willing to consider this—

“But it would be contrary to the idea that, in Scotland, people are not required to state their defence and are entitled to hide behind a denial.”

166. This Bill does not change the current position that an accused is entitled to refuse to give evidence at trial. The only change made by the Bill is that there is a move away from an entirely subjective test in relation to belief in consent to a more objective test based on reasonable belief. Therefore, although it is a breach of the European Convention on Human Rights to force an accused to give evidence, the current law leaves open the possibility for a judge to draw the attention of the jury to an accused’s failure to give evidence. The Committee is conscious that some people may be inarticulate when presenting evidence.

167. The Committee notes that the current law leaves open the possibility that a judge may draw the attention of a jury to an accused’s refusal to give evidence. It therefore appears to the Committee that powers do exist to allow inference to be drawn from silence.

Definition of “reasonableness”
168. Another issue raised by James Chalmers about section 12 related to reasonableness—

“It is necessary to give some guidance on how “reasonableness” is to be assessed...The Bill provides no answer. In due course, the High Court may have to decide the position. I am confident that the court would approach the question with great care, but this means that the eventual rule will not have been democratically scrutinised, and it may result in convictions being quashed on the basis that trial judges did not direct juries in accordance with the view eventually reached by the appeal court.”

169. Although the Committee notes this observation, it finds it difficult to see what further guidance the court could give a jury on the issue of “reasonableness” as the question of “reasonableness” will always be one of fact or circumstance. The Committee notes however that the equivalent legislative provision for England and Wales sets out that whether a belief is reasonable is to be determined having regard to all the circumstances, including any steps A has taken to ascertain whether B consents.

170. The Committee recommends that the Scottish Government gives consideration to whether similar wording, setting out clearly that regard is to be had to all the circumstances, including steps taken to establish whether consent existed, should be included on the face of this Bill.

Attempts to commit offences

171. Before moving on from the issues of consent and reasonable belief, the Committee notes that in response to whether the Bill’s provisions are intended to apply to attempts to commit rapes or sexual assaults, Professor Maher responded—

“There is a view that there is a problem with how the English legislation was drafted, in that the consent provisions do not apply to attempts. We had that specifically in mind in instructing our draftsmen about the draft that the committee has. In the light of the provisions of the Criminal Procedure (Scotland) Act 1995, we are quite satisfied that, with respect to talks about attempting to commit crimes, for our purposes we need only define consent in relation to committing the crime, and the provisions on attempts will kick in. In trying to get the drafting right, we had it in mind that those provisions would apply to attempted rape and attempted assault.”\(^93\)

172. In her evidence, the Lord Advocate stated that she did not see a distinction between the complete offence and an attempt to commit that offence—

“If the offence is available for the completed crime, it has to be available for an attempt.”\(^94\)

173. The Committee notes that it is intended that the Bill’s provisions will apply to attempts to commit an offence, however the Bill does not make this explicit or that the provisions will apply to incitement to commit an offence.

174. Section 9 (which provides the definition of consent) refers specifically to Parts 1 and 3 of the Bill, and section 10 (which amplifies the definition of consent) is limited to the interpretation of section 9. Section 11 (which deals with the scope of consent and its withdrawal) refers to sections 1 to 6 of the Bill and section 12 (which deals with reasonable belief) is confined to Part 1 of the Bill.

175. The Committee accepts that in terms of the Criminal Procedure (Scotland) Act 1995 (and at common law) an attempt to commit an offence is itself an offence. However the Criminal Procedure (Scotland) Act does not include any


provision setting out that application of any rule of the common law or any statutory rule applicable to a full offence is available to an attempt. Even if there were such a rule, it would only apply to an attempt to commit the offence, and would not apply to other forms of inchoate offending, such as conspiracy or incitement.

176. In these circumstances, the Committee suggests that the Scottish Government considers this matter and whether it would be prudent for the Bill to include a “for the avoidance of doubt” provision which would make it clear that these provisions will apply to incitement, conspiracy and attempt to commit the full offence.

PART 4 – CHILDREN

177. Part 4 of the Bill contains offences relating to sexual activity involving children.

178. As previously outlined in this report, most of the provisions contained in the Bill are the same or very similar to proposals put forward by the SLC in its 2007 report.\footnote{Scottish Law Commission. (2007) Report on Rape and Other Sexual Offences (Scot Law Com No 209)} However, one significant difference between the SLC proposals and the Bill as introduced, concerns how the law should deal with ‘older children’ aged 13, 14 or 15 who engage in consensual sexual activities with other older children. This change is examined later in this section of the Committee’s report.

Consultation

179. As noted earlier in this report, the Scottish Government undertook a public consultation exercise between December 2007 and March 2008, seeking views on the recommendations contained in the SLC’s final report. The Committee has already expressed its concern at the absence of a published analysis of the responses which the Government received.

180. The Committee received submissions from several organisations which were critical of the lack of any specific consultation with children and young people by the Scottish Government.

181. In her written evidence, Professor Kathleen Marshall, Scotland’s Commissioner for Children and Young People, encouraged the Committee to seek a commitment from the Scottish Government “to engage with children and young people in order to formulate law, policy and practice on underage sexual activity in a way that effectively achieves our common aim and avoids unintended consequences.”\footnote{Scotland’s Commissioner for Children and Young People. Written submission to the Justice Committee.} Professor Marshall also noted that in her response to the Government’s consultation she had called for “sensitive consultation with children.

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\footnote{Scottish Law Commission. (2007) Report on Rape and Other Sexual Offences (Scot Law Com No 209)}
and young people and, indeed, that this was required by article 12 of the United Nations Convention on the Rights of the Child.”

182. When she appeared before the Committee, Professor Marshall confirmed that in relation to the Bill’s provisions on sexual activity between older children, she favoured decriminalisation. And she expressed concern that the Bill was “proceeding on the basis of insufficient information” about the views of young people.

183. Children in Scotland supported Professor Marshall’s position and called for “in-depth research and a meaningful consultation process ... from a national cross-section of children and young people about what messages and measures would really discourage early sexual intercourse, as well as what information and assistance would really encourage behaviours having the fewest and least serious negative consequences.”

184. In its written submission, Children 1st set out the views of some young people it had consulted about the terms of the Bill—

“...some young people spoke about their right to make decisions about their own sexual health and about when they were ready to have sex, whilst others felt that any actual or perceived change in 16 as the age of consent might lead to more early sexual activity and more unwanted pregnancies. Significantly, some young people spoke about using 16 years old as a form of ‘buffer’ or excuse to withstand peer pressure to have sex earlier than this age boundary.”

185. In oral evidence, Children 1st explained that its consultation had been carried out with a group of 12 users of its service in West Lothian.

186. Children in Scotland commended Children 1st for its initiative but reiterated its call for further consultation—

“... we should now do what should have been done by the Government earlier. As commendable as the efforts of Children 1st are, they cannot replace a meaningful full-scale Government-led national consultation of a wide cross-section of children and young people.”

187. Although supportive of the position of other organisations, Barnardo’s Scotland sought to place a caveat on research of this nature—

“It would be good to undertake that research, but you would be asking young people to talk about a situation that they would not be in at that moment in time. Two 15-year-olds, in a moment of passion, might not behave as rationally as they might do when surveyed. I support going ahead with wider

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97 Scotland’s Commissioner for Children and Young People. Written submission to the Justice Committee.
99 Children in Scotland. Written submission to the Justice Committee.
consultation, but we also need to have a reality check and ensure that we understand what is happening on the ground.\textsuperscript{101}

188. The Committee explored these issues with the Scottish Government. The Cabinet Secretary for Justice was asked for his perspective on the need for consultation with young people. He responded—

“We have spoken to various organisations and people, including Scotland’s Commissioner for Children and Young People, Barnardo’s and Children 1\textsuperscript{st}. We went out of our way to ensure that we consulted 13 and 14-year-olds, if not specifically and directly. We consulted organisations that articulate and advocate for them and represent them.”\textsuperscript{102}

189. The Cabinet Secretary stated that he considered that the Government had “acted appropriately and obtained the appropriate information” but that it was happy to listen and make changes if required.\textsuperscript{103}

190. When asked whether the Government would consider extending the period between Stage 1 and Stage 3 of the Bill’s passage to allow for further consultation with young people, the Cabinet Secretary indicated that this would cause difficulty but that he would be happy to facilitate further evidence gathering by the Committee. However, he ruled out further consultation by the Government.\textsuperscript{104}

191. The Committee was surprised by the lack of willingness on the part of the Scottish Government to carry out direct, meaningful and appropriate consultation with young people who have a direct interest in the proposals contained in Part 4 of the Bill.

192. Notwithstanding this, the Committee reluctantly accepts that the legislative process has now reached a point at which a Government consultation with young people in relation to what provisions should be contained in the Bill would no longer be meaningful. The Committee considers this to be a missed opportunity.

193. In order to fully inform young people about the changes to the law which directly affect them, the Committee recommends that following enactment of the Bill the Government should implement an age-appropriate information and publicity campaign after having consulted appropriately with this age group.

Young children

194. Sections 14 to 20 of the Bill contain a set of statutory offences which criminalise sexual activity with a young child.

The SLC proposals

195. The SLC Report sought to draw a distinction between ‘young children’ aged less than 13 and ‘older children’ aged 13, 14 or 15. Various existing sexual offences already recognise such a distinction.\(^{105}\)

196. In relation to sexual activities involving young children, the SLC Report noted that the majority of consultees who responded to its Discussion Paper expressed a preference for the view that offences involving sexual activity with children under the age of 13 should be based on a principle that such children do not have the capacity to consent to sexual activity. The SLC concluded, therefore, that engaging in sexual activity with a young child is always wrong and should be prohibited by the criminal law.\(^{106}\)

Scottish Government approach

197. The Scottish Government made no changes to the SLC’s proposed approach to these offences. Sections 14 to 20 of the Bill are therefore the same as those contained in the SLC’s final report and draft Bill.

198. Part 4 of the Bill contains a range of offences which mirror those provided for in Part 1. Section 14 of the Bill (rape of a young child) provides that it shall be an offence to penetrate with a penis the mouth, vagina or anus of a child under the age of 13. A separate provision (section 15) provides that other forms of sexual assault on a young child constitute an offence. Sections 16 to 19 (“causing a young child to participate in a sexual activity”; “causing a young child to be present during sexual activity”; “causing a young child to view an image of a sexual activity” and “communicating indecently with a young child”) also mirror offences contained in Part 1 of the Bill. The latter three offences only apply where they are done for the purpose of obtaining sexual gratification or alarming, humiliating or distressing the child. The Policy Memorandum states that the offences would not be committed where, for instance, someone engaged in sexual activity in private without being aware of the presence of a young child.\(^{107}\)

Distinction between young and older children

199. The distinction which the Bill draws between offences committed against young and older children was subjected to criticism by Professor Jennifer Temkin, on the following grounds—

“A child is a child. By describing some children as “older”, this undermines the general message that sex with all children under 16 is against the law. We tend to equate older with wiser so that an “older” child invites the perception of a knowing child in less need of protection.”\(^{108}\)

200. The Committee notes, however, that this observation appears to ignore the fact that the Bill does not propose to de-criminalise sexual relations between


\(^{107}\) Policy Memorandum, paragraph 104.

\(^{108}\) Professor Jennifer Temkin. Written submission to the Justice Committee.
children and adults, and only in limited circumstances does it propose de-
criminalisation of sexual conduct between older children.

201. The National Development Group: Working with Children and Young People with Sexually Harmful Behaviour considered that the distinction between young and older children was an arbitrary one as children develop both physically and mentally at very different rates. In relation to the Section 14 offence “Rape of a young child”, the Group quoted from the Explanatory Memorandum to the Bill—

“An offence will be committed irrespective of whether a young child apparently “consented” to the penetration.”

202. The Group questioned whether, in circumstances where two 12 year-olds engaged in a consensual penetrative act, the penetrator could be charged with the rape of a young child while, if the two children were aged 13 years, the consequence would be different. The Group sought clarification of this point.

203. In oral evidence, both Barnardo’s Scotland and Children in Scotland agreed that, although not perfect, drawing a distinction between children under the age of 13 and older children was reasonable and necessary.

Potential criminalisation of young children

204. The Scottish Child Law Centre supported the proposed protective offences against young children contained in sections 14 to 19. However, the Centre suggested that it should be a defence for a child who has committed such an offence, and who is within two years of the age of the victim, that he or she believed that the victim had attained the age of 13 years.

205. Barnardo’s Scotland expressed support for the introduction of protective offences for children under the age of 13 years on the basis that they are deemed never to have the capacity to consent by reason of their age. However, Barnardo’s was concerned that the Bill, as framed, could lead to criminalisation of young children. It expressed concern that admission of sexual activity between two children aged under 13 years old could, even where there was no evidence of coercion, lead to a young child being prosecuted for rape or some other serious sexual offence. Barnardo’s suggested—

“... in this instance there would be merit in jointly remitting the case to both Procurator Fiscal and the Reporter to ascertain where the case should best be heard.”

206. In its written evidence, Children 1st expressed similar concerns to those raised by Barnardo’s. However, unlike Barnardo’s, Children 1st recommended

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109 Explanatory Notes, paragraph 53.
110 National Development Group: Working with Children and Young People with Sexually Harmful Behaviour. Written submission to the Justice Committee.
112 Scottish Child Law Centre. Written submission to the Justice Committee.
113 Barnardo’s Scotland. Written submission to the Justice Committee.
114 Barnardo’s Scotland. Written submission to the Justice Committee.
that the Bill be changed so that a child under 13 years old could not be charged with a sexual offence. In oral evidence, Children 1st submitted that—

“... if young people under the age of 13 are incapable of giving informed consent to sexual activity, a contradiction exists in the Bill, in that they could be charged with a criminal offence. We would argue that young people under 13 are not capable of sexual offences of such a nature.”

207. Children in Scotland expressed concern that the definitions of what constitutes sexual activity for children under 13 years old were imprecise and that there were “various sexual explorations that fall well short of the definition of penetrative sexual intercourse used in other parts of the Bill that would subject younger children to a criminal charge and a criminal record.”

208. Children in Scotland argued that this was “not in children's best interests”, and that—

“The Bill should be clearer that there is no intent to criminalise young children when they engage in sexual explorations that are neither coercive nor exploitative.”

209. Professor Kathleen Marshall expressed concern about the potential for criminalisation of children under 13 for what might be defined as “sexual activity” with each other—

“The definition of “sexual activity” is very broad and could include normal, childish exploration and activities such as kissing. Given the very low age of criminal responsibility in Scotland, this allows for the possibility of children aged 8 to 12 being prosecuted for sexual offences or referred to the children’s hearing on the grounds that they have committed such an offence. It seems strange that children might be charged with offences relating to activities that they are otherwise presumed to be incapable of consenting to. At the very least, this should be mitigated by a provision analogous to that in section 27(7) of the Bill concerning instructions from the Lord Advocate.”

210. The Committee was concerned to avoid a situation where normal tactile actions such as kissing or cuddling were criminalised. However, it noted evidence from the Scottish Children’s Reporter Administration that when a young person under 16 is reported on criminal grounds, only when there was a need for compulsion would a Reporter refer that young person to a Children's Hearing. More commonly, measures of care are put in place to engage the young person and their family voluntarily. The Committee was satisfied that this would, in practice, avoid the potential for inappropriate state intervention in normal teenage activities.

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115 Children 1st. Written submission to the Justice Committee.
119 Scotland’s Commissioner for Children and Young People. Written submission to the Justice Committee.
211. The Lord Advocate was asked by the Committee whether it was correct, as a matter of principle, that offences that are designed to protect young children could also be committed by members of that protected group. The Lord Advocate replied—

“The current position is that I do prosecute children for non-consensual offences against other children when my doing so is in the public interest. However, that is extremely rare because we have a strong system in which most cases of offences by children are reported to the children’s panel.”

212. When asked to consider a hypothetical case in which both the alleged perpetrator and the victim were under 13 and whether both would be guilty of an offence, the Lord Advocate responded—

“A case involving the scenario of a 12-year-old touching another 12-year-old would never see the light of day in the criminal courts. It would possibly not even be reported to the children's panel, because such a scenario probably takes place in numerous neighbourhoods during the summer holidays. There may be some form of exploratory touching by children within a normal childhood.

It would be very different if a 12-year-old was bullying another 12-year-old, aggressively coercing them, and showing conduct that might illustrate a propensity on the part of the aggressive 12-year-old—female or male—to commit sexually aggressive behaviour for the course of their life. In those circumstances, the reporter to the children's panel would consider whether care and protection were necessary under the Children (Scotland) Act 1995 or whether the conduct was so serious that prosecution was merited.”

213. When asked whether the Bill contained a potential anomaly which would allow the prosecution of young children for offences designed to protect them, the Cabinet Secretary for Justice pointed to the prosecutorial discretion of the Crown—

“We must allow the Crown to act on the basis of whether a crime has been committed, whether it can be proved and whether prosecuting it is in the public interest. The Crown has always had to and will always have to answer those three questions. We always fall to the third question: is prosecution in the public interest? That judgment is exercised with great discretion and judiciousness by the Lord Advocate and the Crown. I have great faith in them.”

214. When asked whether the issue could be addressed by an understanding that perpetrators who were under 13 would not be prosecuted but would routinely be referred to a children's panel, the Cabinet Secretary responded positively—

“The intention is that such matters will routinely go to a panel. We must consider the facts and circumstances and trust the Lord Advocate and her successors to act in the public interest.”

215. In a supplementary submission, the Cabinet Secretary for Justice provided further justification for the Government’s position—

“We think it would be inconsistent to provide, on the one hand, that a child under the age of 13 is incapable of consenting to sexual activity and that sexual activity without consent is criminal, but on the other, that certain sexual activity between young children is not a criminal offence.

For young children under the age of 12, the Lord Advocate decides whether prosecution is appropriate and has prepared guidelines to the police on the crimes and offences committed by all children over the age of criminal responsibility up to and including 15 year olds that should be considered for prosecution. In all circumstances the Children's Reporter will be involved in discussions with prosecutors about the most appropriate course of action and whether concerns regarding public safety outweigh the best interests of the child. As a result the wider circumstances affecting the child’s life will always be taken into consideration.”

216. The Committee strongly supports the provisions of the Bill which seek to protect young children from sexual abuse and exploitation.

217. The Committee considers that offences committed by children under the age of 13 are best dealt with via the Children’s Hearings System rather than the criminal courts. However, the Committee notes that under the terms of the Bill, the Lord Advocate will retain the option of criminal prosecution.

Older children

Scottish Law Commission proposals – child protection

218. In its report, the SLC gave detailed consideration to offences involving sexual activity with children aged 13, 14 or 15. The SLC referred to these young people as older children.

219. In relation to offences committed against an older child by an adult, the SLC considered that there was “a clear social need for the protection of children from sexual abuse and exploitation, especially by adults.”

220. The SLC noted that offences based on the lack of a victim’s consent to sexual activity (i.e. those offences such as rape and sexual assault which are now...
set out in Part 1 of the Bill) would apply to older child victims in the same way that they would apply to adult victims.\textsuperscript{127}

221. In addition, the SLC recommended that there should be special protective offences applying to older child victims, in relation to which a conviction would not require evidence of a lack of consent.\textsuperscript{128} These offences are now set out in sections 21 to 26 of the Bill.

\textit{Scottish Law Commission proposals - criminal liability of older children}

222. In its Discussion Paper, the SLC considered whether children under 16 should be exempted from potential criminal liability under the special offences designed to protect older children. The SLC noted that the vast majority (over 99 per cent) of cases involving children under 16 who commit an offence are dealt with through the Children's Hearings system and not in the criminal justice system.\textsuperscript{129}

223. In its Discussion Paper, the SLC proposed that older children should not be exempt from criminal liability under those protective offences aimed at protecting older children. At that stage, the SLC had argued that such cases should be integrated into the general system on the prosecution of children under 16.\textsuperscript{130} In its final report, the SLC explained the rationale for this initial proposal—

“\textit{The advantage of proceeding in this way was that the practical effect would be that criminality would not in the vast majority of cases be attached to consenting sexual activity between under 16 year-olds. Yet at the same time criminal prosecution could be brought against a child under 16 where there were compelling public interest reasons for doing so (for example, in cases involving exploitation); and, further, children under 16 who engaged in sexual activity could, where appropriate, be referred to a children's hearing.}”\textsuperscript{131}

224. The SLC also noted that the proposal in the Discussion Paper that the protective offences for older children should apply to children under 16 who commit them was, “in broad terms supported by consultees”, but that there were noticeable dissents from this position, “especially from bodies which are concerned with the issue of children's welfare.”\textsuperscript{132}

225. However, by the time of its final report, the SLC had changed its position—

“\textit{We have reconsidered our position in the light of the points raised during consultation, and we now recommend that the provisions should not apply

\textsuperscript{127} Scottish Law Commission. (2007) \textit{Report on Rape and Other Sexual Offences} (Scot Law Com No 209), paragraph 4.43.
\textsuperscript{129} Scottish Law Commission. (2007) \textit{Report on Rape and Other Sexual Offences} (Scot Law Com No 209), paragraph 4.53.
\textsuperscript{130} Scottish Law Commission. (2007) \textit{Report on Rape and Other Sexual Offences} (Scot Law Com No 209), paragraph 4.54.
\textsuperscript{131} Scottish Law Commission. (2007) \textit{Report on Rape and Other Sexual Offences} (Scot Law Com No 209), paragraph 4.54.
\textsuperscript{132} Scottish Law Commission. (2007) \textit{Report on Rape and Other Sexual Offences} (Scot Law Com No 209), paragraph 4.54.
where the parties are under 16. We wish to emphasise that these provisions deal only with conduct involving consent. There is no question of removing criminal liability for people under 16 who participate in sexual conduct with someone who does not consent to it. Where there is exploitation by one child of another who is aged 13 to 16, then that conduct should be criminal where there is no consent to it.”

226. The SLC set out the rationale for this approach—

“In making this recommendation we are particularly struck by anomalies which would follow in criminalising consenting sexual activity between teenagers, which would extend to activities such as kissing each other. We are not impressed by the argument that such criminal liability would be theoretical only and in the vast majority of cases there would be no criminal prosecutions. Such an approach fails to take account of the possibility that older children might still be subject to investigation by the police, even if prosecution in the criminal courts is unlikely. More fundamentally, there is an important point of principle involved. If consenting sexual activity between young people is not to attract criminal liability, then the activity should not be criminal.”

227. In reaching its conclusion, the SLC acknowledged that there would be cases where there are issues about the welfare of children who are sexually active and who should be referred to a Children's Hearing. The SLC noted that under current provisions “there is no ground of referral to a hearing of such a child other than that the child has committed an offence.”

228. The SLC, therefore, recommended that the proposed protective offences involving older children “cannot be committed by a person who has not reached the age of 16.”

229. The SLC also recommended that there should be a new ground of referral of a child to a Children's Hearing “that the child has engaged in sexual activity with another person or has been subjected to sexual activity with another person.”

Scottish Government approach
230. In relation to offences against older children, the Scottish Government retained the basic structure of the SLC's approach to offences concerning sexual activity with older children; sections 21 to 26 of the Bill are the same as those contained in the SLC’s draft Bill. However, the Government has brought forward changes to the SLC’s proposed approach in respect of consensual sexual activity

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between older children. The Government’s proposals are contained in sections 27 and 28 of the Bill.

231. Sections 21 to 26 of the Bill provide for a range of protective offences in respect of adults (aged 16 or over) who engage in sexual activity with older children (“intercourse with an older child”; “engaging in sexual activity with or towards an older child”; “causing an older child to participate in a sexual activity”; “causing an older child to be present during a sexual activity”; “causing an older child to look at an image of a sexual activity”; and “communicating indecently with an older child”). Like the young children protective offences, the types of activity covered by these older children offences mirror similar offences in Part 1 of the Bill. However, a prosecution does not require proof that the child victim did not consent.

Older children engaging in penetrative sexual conduct with each other

232. As noted above, the offences in sections 21 to 26 of the Bill can only be committed by someone aged 16 or over. However, section 27 makes it a criminal offence for an older child to engage in penetrative sexual conduct with another older child even though both children consent. In such a situation both children commit an offence.

233. Subsections (1) to (3) of section 27 provide that an older child who intentionally or recklessly penetrates sexually another older child’s vagina or anus commits the offence of “engaging while an older child in certain types of penetrative sexual conduct with or towards another older child”. Subsection (4) provides that an older child who consents to such penetrative sexual conduct will also be guilty of an offence; that offence being “engaging while an older child in consensual penetrative sexual conduct with another older child”.  

234. Subsection 27(7) states that the Lord Advocate has discretion to issue instructions to chief constables of police forces in Scotland about reporting offences under this section. This is a restatement of the current statutory position, as the Lord Advocate already has this power by virtue of section 12 of the Criminal Procedure (Scotland) Act 1995 and section 17 of the Police (Scotland) Act 1967.

235. Section 28 makes further provision as to the meaning of penetration and consent for the purposes of section 27, while section 29 provides for a range of defences which can be invoked by a person who is charged with an offence against an older child.

236. In the Policy Memorandum, the Government set out its reasons for departing from the SLC’s recommended approach—

“Touching, kissing and sexual conversations are considered by most people to be a normal part of growing up for a teenager. The Scottish Government does not propose that the law should interfere with this kind of activity between two young people aged 13 to 15 so long as both parties consent to the activity. We take a different view in relation to sexual intercourse since

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138 Explanatory Notes, paragraphs 95 and 96.
139 Explanatory Notes, paragraphs 99 and 104.
this poses much greater risks to a young person’s welfare and health and the law is an important aspect in guiding young people’s behaviour in approaching sexual intercourse.”

“Having a definitive age in law at which young people are deemed to have the capacity to consent to sexual intercourse is important. That age is currently 16 in Scotland and throughout the rest of the UK. We are concerned that the SLC’s proposals could be perceived as reducing this to 13 in Scotland and are therefore concerned about the potential for damaging consequences for young people. Retaining 16 as the age at which the law recognises that young people have sexual autonomy is consistent with existing legal provision. Decriminalising sexual intercourse between teenagers under the age of 16 may make it more difficult for young people to resist peer pressure to engage in sexual intercourse and therefore risks more and earlier sexual activity amongst young people in Scotland.”

237. The Policy Memorandum also explained that the Government decided that the offence of engaging in penetrative sexual conduct will apply both to the person who penetrates and the person who consents to being penetrated because it believes “that the way in which the law currently acts to criminalise only boys (where the activity is consensual and both are of similar age) is discriminatory.”

238. A further consequence of the approach adopted by the Government is that the new ground of referral to the Children’s Reporter proposed by the SLC does not appear in the Bill as the Government considered that it was no longer necessary.

Criminalisation of older children for consensual sexual conduct

Evidence from stakeholders
239. A number of respondents to the Committee’s call for evidence commented extensively on the provisions in the Bill relating to older children and section 27 in particular.

Churches and Christian organisations
240. The Church of Scotland stated that it was “not persuaded” by sections 27 to 29 of the Bill and argued in favour of “reversion to the original proposal from the Scottish Law Commission that evidence of sexual activity be grounds for referral to the Children’s Reporter.”

241. The Catholic Parliamentary Office supported the provisions in the Bill, and argued that—

140 Policy Memorandum, paragraph 113.
141 Policy Memorandum, paragraph 119.
142 Policy Memorandum, paragraph 120.
143 Policy Memorandum, paragraph 122.
144 Church of Scotland. Written submission to the Justice Committee.
“Sex between consenting children under the age of consent cannot be seen as being condoned and a legal prohibition must remain.”

242. CARE expressed support for the Scottish Government’s proposals and noted that, in most cases, children and young people found engaging in sexual activity will be referred to a Children’s Panel on welfare grounds. CARE considered that “this strikes the right balance between upholding the law, acting with compassion and seeking to address potentially harmful behaviour patterns.”

243. The Christian Institute considered that the proposals in the Bill unduly limited the scope of the criminal law in this area (e.g. oral sex would not be covered by the offences in section 27) and would lead to “a severe weakening of the law”. It called for Part 4 of the Bill to be revisited in order to properly protect children.

Providers of sexual health services

244. The Family Planning Association was concerned that the Bill, as drafted, would criminalise young people and potentially deter them from accessing sexual health services.

245. The British Medical Association (BMA) also expressed concern at the proposals in the Bill to criminalise some consensual sexual activities between older children—

“Whilst the threat of criminal prosecution may send out a clear message that under age sex is wrong and that society does not condone the idea of children consenting to have under age sex with one another, it is also highly likely to deter young people from seeking the advice of health professionals on sexual health matters.”

246. Brook, a leading sexual health organisation for young people, was opposed to the potential criminalisation of children and young people of a similar age engaged in genuinely consensual and non-exploitative activity, even under the age of 13. Its written submission explained that—

“Brook believes that it is inappropriate and unnecessary to criminalise young people who are genuinely capable of giving consent to sexual activity including sexual intercourse. We would advocate that all genuinely consensual sexual activity, between young people of a similar age and similar physical and emotional maturity should be decriminalised. This approach has been taken in other European countries such as Finland where young people who have sexual contact with others of a similar age and stage of development are exempted from sexual offences by the Finnish penal code.”

145 Catholic Parliamentary Office. Written submission to the Justice Committee.
146 CARE for Scotland. Written submission to the Justice Committee.
147 The Christian Institute. Written submission to the Justice Committee.
148 Family Planning Association. Written submission to the Justice Committee.
149 British Medical Association. Written submission to the Justice Committee.
150 Brook. Written submission to the Justice Committee.
247. Sandyford, the sexual and reproductive health services provided by NHS Greater Glasgow and Clyde, considered that where a consensual relationship is demonstrated, there should be “no prosecution for young people engaging in sexual activity with each other.”

Other stakeholders
248. The Commission for Equality and Human Rights recognised the need to take a different approach to consensual activity between older children aged 13 to 15. The Commission considered that there was a “need to retain a criminal justice response to sexual offences committed by older children on other older children”, but that “care must be taken to determine where a criminal justice response should take precedence over other interventions better able to reflect the needs and circumstances of individual children.”

249. The submission from Community Planning Partners in Highland urged the removal of section 27 from the Bill in favour of the Scottish Law Commission’s proposal that the Children’s Hearing system could be utilised as an alternative to criminalising young people.

Issues with criminal procedure
250. The Sheriffs’ Association confirmed that it “remains unusual for children to be the subject of prosecution in the sheriff court.” It did, however, raise significant practical issues about the potential prosecution of older children in the sheriff court for consensual sexual penetrative conduct with each other. The Sheriffs’ Association pointed out that section 27 will, potentially, make both children guilty of an offence in respect of their consensual behaviour for the first time and highlighted some associated issues—

“Evidential difficulties are likely to result where both children are prosecuted for a consensual act. If both children face charges, warnings against self-incrimination will require to be given to them both. If one is prosecuted and the other gives evidence for the Crown, the child giving evidence for the prosecution will have immunity from prosecution.”

251. The Committee recognised the evidential difficulties highlighted by the Sheriffs’ Association but noted that the Crown already deals with circumstances where the successful prosecution of one person involved in a crime can only be achieved by using someone else involved in that crime as a prosecution witness rather than seeking to prosecute both. However, the Committee would welcome assurances that, in the particular situation raised in the Bill, the Crown will be able to demonstrate cogent and fair reasons for prosecuting one child but not the other.

252. The Sheriffs’ Association also pointed out a potential issue with the notification requirements of the Sexual Offences Act 2003 (“the 2003 Act”)—

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151 Sandyford, NHS GGC. Written submission to the Justice Committee.
152 Equality and Human Rights Commission. Written submission to the Justice Committee.
153 Community Planning Partners in Highland. Written submission to the Justice Committee.
154 The Sheriffs’ Association. Written submission to the Justice Committee.
“Once convicted, sentencing options may be limited and in any event the sheriff may require advice from the Children’s Hearing prior to sentence. It should be noted that such children on conviction will be subject to notification requirements in respect of the so-called Sex Offenders’ Register ... At present the sheriff would have no discretion as to whether or not to make the child subject to notification requirements.”

253. Children 1st argued that the need for registration of a child on the Sex Offenders’ Register should be reviewed by an expert panel.

254. The Committee noted that schedule 3 of the 2003 Act contains a substantial list of sexual offences. In relation to Scotland, common law offences currently listed in Schedule 3 include: (a) rape; (b) indecent assault; and (c) lewd, indecent or libidinous behaviour or practices. Statutory offences currently listed in Schedule 3 include various offences relating to children, for example: (a) indecent images of children (eg sections 52 and 52A of the Civic Government (Scotland) Act 1982); (b) sexual activities with children (e.g. section 5 of the Criminal Law (Consolidation) (Scotland) Act 1995); and (c) abuse of trust (e.g. section 3 of the Sexual Offences (Amendment) Act 2000).

255. In addition to setting out a long list of specific offences, schedule 3 of the 2003 Act also provides in relation to Scotland that a conviction for any other offence will lead to the offender being subject to the notification requirements of the 2003 Act if the court determines that “there was a significant sexual aspect to the offender’s behaviour in committing the offence” (paragraph 60).

256. The Committee is aware that a number of the offences in Schedule 3 of the 2003 Act are subject to age and/or sentence thresholds beneath which the offence will not trigger the notification requirements. Some also provide the court with a degree of discretion. For example, a conviction under section 9 of the Protection of Children and Prevention of Sexual Offences (Scotland) Act 2005 (paying for sexual services of a child under 18) will trigger the notification requirements if either of the following apply:

- the victim was under 16 and the offender was: (a) 18 or over; or (b) is sentenced to imprisonment of at least 12 months
- in disposing of the case the court determines that it is appropriate for the notification requirements to apply

257. However, the Committee noted that some of those offences in schedule 3 of the 2003 Act which always trigger the notification requirements could, in terms of seriousness, cover a broad range of offending behaviour (e.g. the common law offence of indecent assault). In such cases, the fact that a particular conviction involves a less serious example of an offence does not mean that notification requirements do not apply.

258. In relation to the issues surrounding the operation and application of the Sex Offenders’ Register, the Committee noted that, currently, sheriffs

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155 The Sheriffs’ Association. Written submission to the Justice Committee.
156 Children 1st. Written submission to the Justice Committee.
and judges have only limited discretion as to whether or not to make a child convicted of a sexual offence subject to notification requirements.

259. The Committee, therefore, invites the Scottish Government to commission an expert review of the notification requirements of the Sexual Offences Act 2003 as it applies to offenders under the age of 16. Following the outcome of that review, the Committee considers that the Scottish Government should act swiftly to implement all appropriate recommendations.

Lord Advocate’s power to issue instructions to chief constables

260. Children 1st welcomed the inclusion in section 27 of the statement of the Lord Advocate’s discretion to give guidance to the police about reporting offences. Children 1st suggested that “this guidance is intended to avoid unnecessary investigations of consensual sexual activity between 13-15 year olds.”

261. When asked about the need for this subsection, the Lord Advocate conceded that it was not necessary—

“It states what my powers are already. I think that it is in the Bill to acknowledge explicitly the Lord Advocate’s powers when Parliament passes provisions that create a new offence for girls between the ages of 13 and 16.

... I do not think that section 27(7) in any way compromises the Lord Advocate’s independence; it simply restates what is in section 12 of the Criminal Procedure (Scotland) Act 1995 and section 17 of the Police (Scotland) Act 1967. The provision is harmless; it is simply a signpost to what the Parliament intends, but it is not necessary.”

262. The Cabinet Secretary for Justice defended the inclusion of the subsection in the Bill—

“It seems to me appropriate to include the subsection, and I do not see why it should set a precedent. There is no clear evidence that it will undermine previous legislation in any way. If it is appropriate for the bill, we should do what is right.”

263. The Committee notes that the inclusion of reference to the Lord Advocate’s power to issue instructions to chief constables in section 27(7) simply restates existing statutory provisions. The Committee invites the Scottish Government to provide a more comprehensive justification for the inclusion of this provision.

Underage sexual activity – multi-agency guidance

264. Responding to concerns expressed by a number of witnesses as to how the provisions concerning sexual activity between children under the age of consent will operate in practice, in a supplementary written submission, the Cabinet Secretary for Justice provided the Committee with information about the work of

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157 Children 1st. Written submission to the Justice Committee.
the Short Life Working Group on Reporting and Handling Disclosures of Underage Sexual Activity.

265. The Cabinet Secretary explained that the Group had developed multi-agency guidance for professionals working with children to assist decision making—

“The guidance is drafted to allow professionals to make confident, careful and robust assessments in individual cases. The principal point is that the guidance calls for a proportionate response from professionals, in keeping with meeting the needs of the young person in question. The guidance is in draft at the moment, and will be subject to further revision and consultation.”

266. The Committee welcomes the work of the Short Life Working Group and notes the explicit linkages in the guidance to the Scottish Government’s strategies Getting it right for every child and Respect and Responsibility: Strategy and Action Plan for Improving Sexual Health. The Committee acknowledges the importance of agencies such as health, education, police and social work responding appropriately and in a co-ordinated manner when they become aware that a child is engaging in sexual activity.

267. In addition to the guidance, the Committee considers that there is a pressing need for the Scottish Government to bring forward, as expeditiously as possible, a comprehensive framework for multi-agency co-operation to provide effective support to a child or children involved in underage sexual activity.

Symbolic use of the criminal law

268. The Committee explored with witnesses whether it was appropriate to create in statute, offences which would be rarely prosecuted in practice.

269. In his written submission, James Chalmers commented on the Government’s decision to depart from the Scottish Law Commission’s proposals on sexual activity between older children. He pointed out that when the Scottish Law Commission reviewed the law on the age of criminal responsibility at an earlier stage it found that, from 1994-1999, only 31 children were prosecuted for sexual offences (a figure which would encompass consensual and non-consensual activity, and activities involving both older and younger children). Mr Chalmers submitted that this low figure suggested that prosecutions are not brought for consensual sexual activity between older children, and that the Policy Memorandum to the Bill “does not indicate any desire that this position should change”. He concluded—

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160 Scottish Government. Letter from the Cabinet Secretary for Justice to the Convener of the Justice Committee dated 22 December 2008.
“... it is inappropriate to pass criminal laws unless we are prepared to enforce them. The criminal law is too serious a tool to be used simply to “send a message” ... It seems to me strange that any Parliament would pass criminal laws which it wished prosecutors to refrain from enforcing.”

270. In his oral evidence, James Chalmers discussed the difficulties which could arise from using the criminal law in this way—

“Criminal law is perhaps viewed as an easy educational tool, but we must be wary of patronising young children and assuming that they are not well aware that particular offences are not prosecuted. If children see that people regularly engage in certain activities and are not regularly prosecuted, they are not likely to take the legal message seriously. The danger is that they then might start to take other legal messages less seriously than they ought to.”

271. In its oral evidence, the Equality and Human Rights Commission provided a helpful summary of the issue—

“It is a case of weighing up the pros and cons of changing the law and decriminalising such offences, or proceeding on the basis that has been advocated by several witnesses, who believe that, on balance, it is better to ensure that we continue to have a criminal law response in our armoury while recognising that that response is unlikely to be used frequently. I realise that such an approach is unsatisfactory to some members, who will think that laws that will not be enforced should not be passed. However, organisations in the children's sector have stated that we must be mindful of the complexities of the law in this area and of the unintended consequences of sending out messages that the law has been relaxed or the penalties lowered.

The issue is not clear cut or easy, but a number of witnesses have advocated the best balance, which involves moving forward on the basis that the law exists with the understanding that when and how to proceed will be up to the wisdom and judgment of the Lord Advocate.”

272. The Committee strongly supports the retention of 16 as the age of consent in Scotland. The Committee acknowledges the evidence it has received which confirms the potentially serious consequences for the health and welfare of young people who engage in sexual activity below this age. The Committee considers that safeguarding the welfare of these young people is of paramount importance.

273. The Committee supports the continued use of the Children’s Hearings System to address offending behaviour by children in the overwhelming majority of cases. However, the Committee is satisfied that the decision by the Scottish Government to retain in the Bill the option of criminal

163 James Chalmers. Written submission to the Justice Committee.
prosecution for consensual penetrative sexual conduct between older children, at the discretion of the Lord Advocate, is appropriate.

**Gender neutrality**

274. The Policy Memorandum to the Bill states that the Bill’s provisions provide “greater gender neutrality than the current common law and statutory sexual offences, many of which can only be committed against girls or boys.”

275. A large number of written responses to the Committee’s call for evidence expressed support for the gender neutral drafting of the Bill.

276. Children in Scotland supported this general intent with the exception of the provisions of section 27 which, in its view, would—

> “expose … young women to a new set of potential criminal charges for consensual sexual intercourse with other older children. While this would make their legal status/vulnerability equal to that of young men of their age, we do not share the view that either males or females of this age should be treated as criminals for engaging in consensual sexual intercourse with each other.”

277. The Committee explored with the Lord Advocate whether there was a justification for treating girls aged under 16 differently from boys. The Lord Advocate replied—

> “The provisions in the Bill suggest that there should be equality in relation to gender. In contrast with the law that we had in the past, when we consider how to legislate, we now have to ensure that the law complies with article 14 of the European Convention on Human Rights and is non-discriminatory. We can justify a departure from that only where there are good reasons to discriminate between the genders.”

278. The Cabinet Secretary for Justice confirmed that the Scottish Government considered that there was a “requirement for gender neutrality” under the terms of the ECHR. He noted, however, that—

> “… it could be argued that perhaps many of those girls should be referred to the children’s panel so that we can look after their care and welfare, because teenage pregnancy is a considerable problem for our society and it causes great difficulty and distress for the girls and their families.”

279. The Committee is supportive of the gender neutral approach taken in the drafting of the Bill and understands the need to ensure compliance with the terms of the ECHR in this respect. However, the Committee notes the evidence from the Lord Advocate that a departure from this approach can be justified if there are good reasons to do so.

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166 Policy Memorandum, paragraph 173.
167 Children in Scotland. Written submission to the Justice Committee.
280. The Committee considers that in relation to the provisions of section 27 there is an objective justification to treat the genders differently. For example, in circumstances where two older children engage in consensual penetrative sex and the girl becomes pregnant, the Committee believes that it would be highly undesirable and potentially damaging to subject that girl to a criminal prosecution. The Committee agrees with the Cabinet Secretary that referral to the children’s panel would be a more appropriate response.

281. The Committee, therefore, recommends that the Scottish Government gives further consideration to the provisions of section 27 of the Bill in order to address this issue.

Older children engaging in consensual oral sex with each other

282. Several respondents to the call for evidence pointed out that consensual oral sex between older children is specifically excluded from the provisions of section 27. The concerns raised were that there was insufficient justification offered for drawing the distinction between oral sex and other forms of penetrative sex.\(^{169}\)

283. Although clear that it did not believe that criminalising consenting sexual activity between young people was appropriate, the Family Planning Association was concerned about the possible messages which the exclusion of oral sex from section 27 could send to young people—

“the exclusion of oral sex from this clause could serve to send a message to young people that as consensual oral sex is not illegal, it is risk-free, which is not necessarily the case. Although the risk of contracting an STI from unprotected oral sex is much lower than through unprotected vaginal or anal sex, there is still a small risk … We are also concerned that young people could feel under some pressure to have oral sex, even if they do not want to, because it is seen as being ‘okay’ or ‘allowed’ because it has been treated differently in the legislation.”\(^{170}\)

284. The Christian Institute pointed out that sexual activities other than full sexual intercourse carried a number of risks for the participants, including the risk of sexually transmitted infection. The Christian Institute considered that “the failure to prohibit any under-age sexual activity except penetration of the vagina or anus otherwise than by the mouth, and the inclusion of the proximity of age defence, will dismantle key aspects of the age of consent law.”\(^{171}\)

285. The Lesbian and Gay Christian Movement (LGCM) and the Reformed Churches Caucus of LGCM also raised concerns about the exclusion of oral sex from the offences set out in section 27 due to the associated health risks—

“Preserving the personal sexual health of children seems to us an adequate justification for seeking to discourage risky behaviour through the law.”\(^{172}\)

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\(^{169}\) Children 1st and Sandyford NHS GGC. Written submissions to the Justice Committee.

\(^{170}\) Family Planning Association. Written submission to the Justice Committee.

\(^{171}\) The Christian Institute. Written submission to the Justice Committee.

\(^{172}\) Lesbian and Gay Christian Movement and the Reformed Churches Caucus of LGCM. Written submission to the Justice Committee.
286. ACPOS also raised concerns about the drafting of section 27—

“The inclusion of activity using the mouth would require careful drafting because we would not want to criminalise kissing between older children, but by explicitly excluding it from the section we are allowing some types of sexual behaviour, such as oral sex, that we feel should be included.”

287. The Cabinet Secretary for Justice was asked to explain the Government’s reasons for treating oral sex differently from other penetrative sexual activity between older children. He replied that the Government was willing to reflect on the matter, but—

“it seems to us that many such matters are best dealt with through education and health counselling. We must take into account the difficulties in locating such activity, proving it in court and progressing such cases. It is about striking the right balance.”

288. The Committee shares the concerns expressed by many stakeholders at the exclusion of oral sex from the provisions of section 27. The Committee is concerned that this could send an inappropriate message to young people that society considers such activities to be acceptable and risk free.

289. The Committee does not believe that the Scottish Government has provided sufficient justification for treating oral sex differently from other penetrative sexual conduct and recommends that the section should be amended to include oral sex within the scope of the offence provisions. In so doing, however, the Government must ensure that normal teenage consensual activities such as kissing are not made criminal.

Privacy and sexual acts between older children

290. Article 8(1) of the European Convention on Human Rights guarantees the right to respect for private life. The European Court of Human Rights has held that this protects the establishment of relationships with others, including sexual relationships. The Convention does not, in this regard, draw a distinction between adults and younger people.

291. However, the right to privacy is not absolute. Article 8(2) of the Convention provides that the State may interfere with the right to privacy provided that such interference is “necessary” in order to achieve or protect certain important social interests. These include the prevention of crime, the protection of health or morals and the protection of the rights and freedoms of others.

292. The Committee explored with the Lord Advocate and the Cabinet Secretary for Justice whether the provisions of section 27 of the Bill which would criminalise consensual penetrative sexual conduct between older children would infringe the right of these young people to a private life.

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293. The Lord Advocate acknowledged that Article 8 protects privacy and the rights of the family, but pointed out that the European Court of Human Rights “gives a margin of appreciation to states” to “consider protection of their most vulnerable citizens”. The Lord Advocate explained that “the Court had not put in place a high threshold for interference; there is a low common denominator on the extent to which the state can interfere with private lives, family choices or individuals’ sexual lives.” The Lord Advocate concluded, therefore, that it was “perfectly legitimate to take a welfare approach” in this instance.\(^175\)

294. The Cabinet Secretary for Justice set out the Government’s position on the matter—

“We must protect the rights of children between 13 and 16, who we believe are not in a position properly to consider their own interests on such matters. It is a question of balance. Of course children have rights under the ECHR, but, as the Lord Advocate said, there is a margin of appreciation. Society has a choice about where to set the parameters and we have decided to make provision for 13 to 16-year-olds. Other jurisdictions take a different approach, but I do not think that anyone is suggesting that we change our approach.”\(^176\)

295. The Cabinet Secretary stated that the Government’s position relied upon the advice of its legal team and consultation with the Lord Advocate. He concluded—

“It would be incompetent of the Government to ask the Parliament to pass a bill that was not ECHR compliant. The best advice that we have is that it is ECHR compliant.”\(^177\)

296. The Committee is satisfied that the Scottish Government has given consideration to the potential conflict between the provisions of section 27 of the Bill and Article 8 of the European Convention on Human Rights and notes its conclusion that the provisions are compliant in this respect.

Section 29 – Defences in relation to offences against older children

297. The Committee examined the defences set out in section 29 relating to sexual activities with older children.

298. The first of these defences covers all of the older child offences (i.e. those set out in sections 21 to 28). It provides that it is a defence if the accused reasonably believed that the complainer had attained the age of 16 years. A similar defence exists under the current law in relation to the offence of having sexual intercourse with a girl who has reached the age of 13 but who has not attained the age of 16.

299. Although this defence did not raise significant objections in principle from the majority of respondents to the Committee’s call for evidence, the Sheriffs’ Association pointed out a potential unintended consequence arising from the drafting of this defence—


“The only defence available to a child under 16 (“child A”) who sexually penetrates another child (“child B”), is that child A thought that child B was over 16. The only defence available to child B who is penetrated in a consensual act is that child B thought that he or she was being penetrated by a person over 16. It will therefore be a defence to a charge under clause [sic] 27(1) and (4) that rather than having consensual penetrative sex with another child, the child thought that he or she was having consensual sex with an adult.”

300. The Committee invites the Scottish Government to respond to the issue raised by the Sheriffs’ Association.

301. A number of respondents to the call for evidence noted that the defence was not available if the accused had “previously been charged by the police with a relevant offence”. This raised two issues. Firstly, the absence of a definition of “relevant offence” on the face of the Bill and, secondly, whether it was appropriate for the defence not to be available if an accused person had “previously been charged by the police” as opposed to prosecuted or convicted.

302. The Committee noted that in relation to the existing offence of sexual intercourse with a girl aged under 16, as set out in section 5 of the Criminal Law (Consolidation) Scotland) Act 1995, where the girl is aged over 13 it shall be a defence, subject to certain conditions, that the accused believed on reasonable grounds that the girl was 16 years old or over. One of those conditions is that the accused had not previously been charged with “a like offence”. The definition of “a like offence” is provided at subsection (6) rather than being left to subordinate legislation.

Definition of “a relevant offence”

303. Section 29(5) provides that the definition of “a relevant offence” will be specified in subordinate legislation which would be subject to the negative procedure.

304. The Sheriffs’ Association pointed out the absence of guidance in the Bill as to what constitutes “a relevant offence” and invited the Parliament to consider whether the use of the negative procedure was appropriate.

305. The Subordinate Legislation Committee considered this delegated power as part of its scrutiny of the Bill. It concluded that the use of subordinate legislation to specify “relevant offences” for the purpose of Section 29(2) is appropriate “in order to provide flexibility to address future changes in the law.”

306. However, the Subordinate Legislation Committee recommended that the Government “consider further whether the Bill can be amended to restrict the
scope of the power to a power to specify offences or circumstances involving conduct of a sexual nature involving children as "relevant offences".\footnote{Subordinate Legislation Committee. \textit{Report on Sexual Offences (Scotland) Bill.}}

307. The Committee is not content to endorse the recommendation of the Subordinate Legislation Committee in relation to this matter. The Committee considers that, in keeping with the example of the Criminal Law (Consolidation) Scotland) Act 1995, “relevant offences” should be defined in the Bill.

\textit{Availability of defence if “previously charged by police”}

308. As previously stated, the defence is not available to someone previously charged by the police with a relevant offence.

309. ACPOS noted that in accordance with its recommendation, the Government had restricted the application of this defence to those not previously charged with a like offence.\footnote{ACPOS. Written submission to the Justice Committee.}

310. The Scottish Child Law Centre expressed concern about this provision, pointing out that it was not uncommon for charges to lead to no action due to lack of evidence. It submitted that “being charged with an offence is not equivalent to being found guilty of an offence.”\footnote{Scottish Child Law Centre. Written submission to the Justice Committee.}

311. The Lesbian and Gay Christian Movement was also unhappy that the defence was ruled out on the basis that the accused had previously been charged by the police with a similar offence as it believed that this did not protect the basic freedoms of the citizen.\footnote{Lesbian and Gay Christian Movement. Written submission to the Justice Committee.}

312. On balance, the Committee supports the restricted application of this defence in keeping with the example of the Criminal Law (Consolidation) Scotland) Act 1995.

\textit{Proximity of age defence}

313. Significant concerns were raised in some written submissions about the defence set out in section 29(3). This defence applies to—

- the offence under section 21, to the extent that it takes the form of a male offender penetrating the mouth of the other party with his penis (section 29(4)(a));

- the offence under section 22, to the extent that the charge is founded on A penetrating B’s mouth with his penis, or where other forms of penetration were achieved by A’s mouth, tongue or teeth (section 29(4)(b)(i));

- any of the other offences created by section 22(2)(b), (c) or (d) (sexual touching, sexual activity causing physical contact with the complainer and ejaculating semen onto the complainer) (section 29(4)(b)(ii));

\footnote{181 Subordinate Legislation Committee. \textit{Report on Sexual Offences (Scotland) Bill.}\hspace{1em}182 ACPOS. Written submission to the Justice Committee.\hspace{1em}183 Scottish Child Law Centre. Written submission to the Justice Committee.\hspace{1em}184 Lesbian and Gay Christian Movement. Written submission to the Justice Committee.}
any of the offences created by sections 23 to 26.

314. The Committee understands that the defence created by section 29(3) introduces a new concept into Scots criminal law - that of a defence based on the age difference between the offender and the other party. Under section 29(3), for the offences to which it applies (as set out above), it will be a defence that at the time when the conduct to which the charge relates took place, the difference between the accused’s age and that of the other party did not exceed two years.

315. The Committee noted that the offences to which section 29(3) applies all involve a situation in which the alleged offender has reached the age of 16 while the other party is an older child. The effect of section 29(3) would then be that, for example, if a seventeen year old boy were to sexually touch his fifteen year old girlfriend, with her consent, there would be no offence. If however, an eighteen year old youth were to engage in the same kind of conduct with his fifteen year old girlfriend there would be an offence.

316. Importantly, the Committee also noted evidence from the Cabinet Secretary for Justice that the defence set out in section 29(3) does not apply in any case to an offence which consists of vaginal or anal penetration.\(^{185}\)

317. In a supplementary submission, the Cabinet Secretary for Justice also informed the Committee that the Government intended to amend the Bill so as to provide that the defence of ‘age proximity’ does not apply in respect of sexual intercourse with a child under the age of consent under any circumstances. He explained that his would ensure that “the Bill does not discriminate according to gender or sexuality.”\(^{186}\)

318. Concerns about this defence essentially replicated the more general concerns about de-criminalisation of some forms of consensual sexual conduct between older children.

319. The Christian Institute was strongly opposed to the inclusion of this defence in the Bill—

“Allowing 15 or 16-year-olds to engage in a range of sexual activities short of full intercourse with 13 or 14-year-olds respectively could be highly exploitative and abusive. The younger party is unlikely to fully comprehend the physical, emotional or moral implications of the activities, or the health risks, and is therefore in no position to be able to give genuine consent. Consequently, the criminal law has a clear duty to intervene by prohibiting this conduct.”\(^{187}\)

320. Another more specific concern was raised that this defence was novel and unfamiliar, and would thus lead to confusion. It was argued that a formerly clear rule about age – namely that sexual activity was prohibited with girls who had not

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\(^{186}\) Scottish Government. Letter from the Cabinet Secretary for Justice to the Convener of the Justice Committee dated 22 December 2008.

\(^{187}\) The Christian Institute. Written submission to the Justice Committee.
reached the age of 16 – was to be replaced by a more complex set of rules which depended on age difference.

321. In its written submission, Children 1st stated that it understood the rationale behind the defence in section 29(3) and agreed that it made “no sense to criminalise normal and non-exploitative relationships between a 16-17 year old and for example a 14-15 year old.” However, Children 1st argued that the creation of this defence was “confusing, unworkable and difficult to communicate clearly to the young people who may be in these circumstances.” It suggested, therefore, that this aspect of the Bill be withdrawn and replaced by guidance, including guidance from the Lord Advocate to the police about the situations where prosecution of sexual activity between a 16-17 year old and a 14-15 year old would or would not take place.  

322. There were, however, other witnesses who welcomed the introduction of this defence, largely for the same reasons as were put forward in support of a broader policy of decriminalisation in this area.

323. ACPOS supported the proposed defence and commented that it contained “straightforward, unambiguous parameters that are easily understood, not least of which by older children themselves.”

324. The Committee is concerned that the proximity of age defence would effectively decriminalise a wide range of sexual activity between young adults and older children as young as 14 years old. The Committee invites the Scottish Government to consider the scope of this defence in light of the recommendation which the Committee has made in this report regarding oral sex between older children.

Older children - Conclusion

325. The Committee noted the differing views about the legislative approach chosen by the Government to address consensual penetrative sexual conduct between older children.

326. The Committee acknowledges the detailed work of the Scottish Law Commission (SLC) in this area and notes that, in the course of its deliberations, the SLC changed its position from favouring integration of these offences with the general system on the prosecution of children under 16 to a final recommendation that consenting sexual activity between older children should not be criminal.

327. The Committee also noted the SLC’s recommendation that there should be a new ground of referral of a child to a children's hearing, “that the child has engaged in sexual activity with another person or has been subjected to sexual activity with another person.”

328. As previously stated, the Committee strongly supports the retention of 16 as the age of consent in Scotland. In relation to consensual sexual conduct between older children, the Committee believes that the Scottish

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188 Children 1st. Written submission to the Justice Committee.
189 ACPOS. Written submission to the Justice Committee.
Government’s general approach is appropriate and makes clear that society does not condone underage sexual intercourse. The Committee has made several recommendations designed to strengthen the Bill in this regard.

329. The Committee strongly favours a welfare based approach to address underage sexual activity between older children in order to safeguard their health and wellbeing. The Committee considers that Scotland’s Children’s Hearings System provides a strong and effective mechanism to deal with the vast majority of such cases. However, the Committee supports the retention of the option of criminal prosecution in the Bill for consensual penetrative sexual conduct subject to the discretion of the Lord Advocate.

PART 5 – ABUSE OF POSITION OF TRUST

330. Section 31 creates an offence of “sexual abuse of trust” in relation to child victims under the age of 18. A person commits sexual abuse of trust if they are aged 18 years or older and intentionally engage in sexual activity with a person who is under 18 and in respect of whom the older person is in a position of trust. It is not necessary, for conviction, to prove that the victim did not consent to the activity.

331. This offence replaces a number of existing offences contained in the Criminal Law (Consolidation) (Scotland) Act 1995 and the Sexual Offences (Amendment) Act 2000. It covers circumstances where a sexual breach of trust occurs in a family setting and where it occurs in respect of someone who has a position of trust over a child in their care, for example in a school or hospital.

332. Section 32 contains detailed provisions on when a position of trust can be said to exist. In addition to setting out five sets of circumstances in which there is a position of trust, it gives Scottish Ministers the power to specify (by way of subordinate legislation) additional circumstances in which there is a position of trust.

333. Four specific defences to the offence of sexual abuse of trust are set out in section 34. Firstly, that the accused reasonably believed that the person in relation to whom they were in a position of trust was 18 or older. Secondly, that the accused reasonably believed that they were not in a position of trust in relation to the person they were engaging in the sexual conduct with. Thirdly, that the accused and the other person were married or in a civil partnership. Fourthly, that immediately before the position of trust was created, a sexual relationship already existed between the two people. The first two defences are available in relation to all the positions of trust set out in section 32 of the Bill. The other defences are not available in relation to the family type situations set out in section 32(6).

334. In written evidence, ACPOS said—

“ACPOS welcomes the provision in the Bill to extend the offences relating to abuse of trust from under 16 year olds to those under 18 years olds. However, persons who have attained the age of 18 but who are nevertheless
extremely vulnerable within society will not benefit from the overarching protective principle the Bill endeavours to achieve.\textsuperscript{190}

335. In its supplementary written evidence, ACPOS drew attention to section 25(3) of the Children (Scotland) Act 1995. This states that a local authority may provide accommodation for any person within their area who is at least eighteen years of age but not yet twenty one, if they consider that to do so would safeguard or promote that person’s welfare. ACPOS advised that those in local authority provided accommodation in these circumstances would not be protected by the provisions in this Bill, despite the fact that placement in local authority accommodation is intended to safeguard the person’s welfare.

336. ACPOS also drew attention to the fact that—

“the structures of many contemporary family units do not necessarily represent the stereotype of a “traditional household” and are often fragmented and complex. Parental functions are now commonly discharged by persons such as those referred to in section 32(6) of the Bill. Abuse often begins when the victim is under the age of 16 and continues into adulthood. The lack of control and inability to escape the influence of the abuser, as experienced by victims of extensive abuse, can be exacerbated by issues such as financial dependency or emotional loyalty to the natural parent, thereby making the individual extremely vulnerable.”\textsuperscript{191}

337. ACPOS proposed that the Bill should be amended to provide that an offence would be committed where there was a position of trust between the parties and the sexual activity took place as a result of a position of trust.

338. The Committee recommends that the Scottish Government considers this issue and advises the Committee of its view prior to the Stage 1 debate.

**Delegated powers**

339. As commented on above, section 32(1) confers a power on Scottish Ministers to make an order, subject to negative procedure, specifying what other conditions, in addition to those already set out in section 32, will constitute a “position of trust”.

340. In its report, the Subordinate Legislation Committee noted that Ministers can specify any condition by which a position of trust would be established for the purposes of creating an offence, that there are no apparent restrictions on this and that there is no provision for any qualitative test to be applied by the Ministers in exercising this power so as to narrow its scope. As the power is one which will have the effect of amending primary legislation, this has the potential to widen the scope of the offence.

341. After taking evidence, the Subordinate Legislation Committee accepted the use of delegated powers in principle but asked the Scottish Government to

\textsuperscript{190} ACPOS. Written submission to the Justice Committee.

\textsuperscript{191} ACPOS. Written submission to the Justice Committee dated 6 January 2009.
consider further whether the power could be framed more narrowly. The Subordinate Legislation Committee concluded—

“Given the potential impact of the exercise of this power to widen the scope of the offence of the sexual abuse of trust the Committee recommends that affirmative procedure is the appropriate level of parliamentary scrutiny.”

342. The Committee endorses the recommendation of the Subordinate Legislation Committee and draws it to the attention of the Scottish Government.

Sexual abuse of trust of a mentally disordered person

343. Section 35 of the Bill creates an offence of “sexual abuse of position of trust of a mentally disordered person”. It is not necessary, for conviction, to prove that the victim did not consent to the activity. Section 36 sets out a number of defences which are specific to the offence.

344. It will be an offence for a person to intentionally engage in any sexual activity with a mentally disordered person, where the perpetrator of the offence is in a position of trust in relation to the victim. The offence is aimed broadly at anyone whose work involves providing care services to a mentally disordered person or anyone who is employed by (or contracted to provide services in, or who manages) a hospital in which a mentally disordered person is receiving treatment.

345. Sense Scotland said that although rape, sexual assault and sexual coercion are all clearly defined, it was not clear in the Bill how “sexual activity” is to be defined.

346. In its written submission, the Law Society of Scotland raised more general concerns about this section—

“The Society would envisage difficulties with regard to the definition of when individuals are in a position of trust such as health professionals and would suggest that the definition be widened to include those in a voluntary role. The Society would also question whether individuals can, or should be defined mainly in relation to the service they are receiving rather than on the capacity to consent and would welcome suitable clarification. As well as widening the definition to include those in a voluntary role as referred to above, the Society would respectfully suggest that there are other categories of individuals which may well be in a position of trust such as advocates, employers and employment support workers.”

347. The Law Society drew particular attention to individuals being defined in the Bill in relation to the service they receive. In its view, any move towards self-directed support would result in the person who receives the service being the employer. This would make it difficult to regulate any relationship formed between carer and the person receiving the care. The Law Society also said that it would welcome information with regard to prosecutions and convictions under the current

192 Subordinate Legislation Committee. Report on Sexual Offences (Scotland) Bill, Paragraph 31
193 Sense Scotland. Written submission to the Justice Committee.
194 Law Society of Scotland. Written submission to the Justice Committee.
legislation in order to establish whether the law with regard to sexual abuse of trust of mentally disordered persons is effective.\textsuperscript{195}

348. \textbf{In the view of the Committee, the issue raised by the Law Society about a person receiving care becoming an employer is one that requires further consideration. The Committee draws this matter to the Scottish Government and requests a response prior to the Stage 1 debate.}

349. The Bill’s Policy Memorandum states that section 35—

“replaces the existing provisions at section 313 of the Mental Health (Care and Treatment) (Scotland) Act 2003 (the 2003 Act) which, though not referring to the term “breach of trust” clearly have this concept at their core. The provisions are wider in their application than those at Part One of the Bill, in that they apply in respect of a person with a mental disorder, regardless of whether that person’s mental disorder is such as to negate their ability to consent to sexual conduct. However, in another sense, the provisions are narrower, insofar as they apply only to those in providing care services to the mentally disordered person.”\textsuperscript{196}

350. In its written and oral evidence, Enable said that the Bill did not represent an improvement on the 2003 Act—

“Enable Scotland has changed its view...We in no way wish to give the impression that we condone any breach of trust by people who are there to care for and support people with learning difficulties, but the criminal law is not helpful in trying to resolve that situation. We note in our submission that there have only been four referrals under the 2003 Act, none of which has resulted in prosecution. There were only a handful of referrals under the previous provisions in the 1983 Act. Criminalising such a breach of trust does not seem to work, which is why we have revisited the issue.”\textsuperscript{197}

351. Enable also stated that such breaches of trust usually take place in private and that people are not coming forward with such information because of the implications of it being a criminal offence.\textsuperscript{198}

352. Enable made it clear that in formulating its view, it was referring to people with learning disabilities who have the capacity to consent, and not people who are judged incapable and who are covered by legislation elsewhere. Enable suggested—

“If a support worker finds themselves getting into an improper relationship, we want them to come forward, but they are less likely to do so if they think that it is a criminal offence...There are, of course, other sanctions that can be applied. If the support worker was employed, their behaviour would be inappropriate in their employment situation, and if they were a registered

\textsuperscript{195}Law Society of Scotland. Written submission to the Justice Committee.

\textsuperscript{196}Policy Memorandum, Paragraph 151


worker, their registration might need to be terminated. However, we do not think that the criminal law is the best way to deal with the situation.”

353. In support of Enable’s view, the Equality and Human Rights Commission said—

“Enable raises a very important point about how we can address the difficult area of ensuring that we extend all the protection that we should to people with learning disabilities while not using the criminal law as a means of regulating how consenting adults have sexual relationships.”

354. The Scottish Commission for the Regulation of Care (SCRC) said that it broadly supported Enable’s comments with regard to section 35 of the Bill, particularly the need for differentiation between people with a learning difficulty who have capacity to make decisions and people who do not have capacity to make decisions. In its view, some issues that arise should not be treated as criminal matters but would be more a matter of misconduct which could be acted upon through employers etc. The SCRC gave the example of a teacher having a relationship with a 17 year old pupil which presently would not necessarily be treated as a criminal matter but would be viewed as misconduct.

355. The Committee notes however that under section 31(1) of the Bill, it will become an offence for a teacher to engage in sexual activity with a pupil aged 17 because sections 32(5) and 32(7) provide that the teacher will be in a position of trust with regard to the pupil.

356. Norman Dunning, for Enable, summarising its position, said—

“It is a question of how best to help people with learning disabilities. Rather than “protecting” them – as I said, there is no evidence that the current law does that, and the new measures are very similar – we need to educate them and give them the confidence to be ordinary citizens. A lot of the information that we receive from people with learning difficulties with capacity is that they want to be treated like other citizens – like everybody else…Giving those people the right support to deal with complex matters in their lives is much more important than having a criminal sanction. Criminal sanctions tend to work the other way round – they mark them out as being different and encourage overprotective attitudes.”

357. Initially in its evidence, the Law Society said that having considered the submission from Enable, it agreed that the matters raised should be given further consideration. However, in a supplementary written submission, the Law Society advised that its Mental Health and Disability Sub-Committee had reconsidered its position. It confirmed that it agreed with the Bill’s intention that it should be an offence for a person to engage in sexual activity with a mentally disordered person where that person is providing a care service to the mentally

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201 Scottish Commission for the Regulation of Care. Written submission to the Justice Committee.
disordered person or works in, or is the manager of, a hospital where the mentally
disordered person is being given treatment.  

358. Dr Donald Lyons, The Mental Welfare Commission for Scotland, said—

“While understanding the position of Enable, there is an inherent danger in
persons with learning disability engaging in sexual relationships with people
in a professional caring role. The risk of this being an exploitative
relationship is greater than if an “ordinary” relationship develops. I therefore
think the wording of the Bill (being very similar to the 2003 Act) is
appropriate.”

359. The Lord Advocate said that she had been successful in prosecuting a
number of such cases and that she did not see a distinction between those without
and those with capacity—

“In those circumstances, one person would be in a position of care, and
exploiting that position in a sexual way or allowing a romance to develop
would be a failure of duty. If the person in the position of care sees that a
relationship may be about to occur, they must desist. There are means by
which they can get themselves out of the situation, so that they are no longer
in a position of care or trust, and so that they are able to pursue a lawful
relationship.”

360. The Cabinet Secretary for Justice, said that he was not persuaded that this
provision required to be looked at again—

“We feel that some protection is necessary. These issues are a matter of
balance. We have to ensure that we do not cast the net too widely and
interfere with organisations and individuals who are acting legitimately and
thereby jeopardise a variety of aspects of the care and wellbeing of
individuals but we have to protect those who have mental disabilities. We
believe that we have struck the right balance.”

361. The Committee understands that the position adopted by Enable
Scotland may not be consistent with article 8 of the European Convention on
Human Rights. That aside, the Committee agrees that protection of people
with learning difficulties should be paramount and is content that the option
of using the criminal law is available.

Defences
362. Section 36 sets out circumstances which give rise to a defence to a charge of
sexual abuse of trust of a mentally disordered person. Subsection 36(2) provides
that it shall be a defence if the parties are married, civil partners or involved in a
sexual relationship. Scottish Women’s Aid expressed concern—

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204 The Law Society of Scotland. Written submission to the Justice Committee dated 15 December 2008.
205 Mental Welfare Commission for Scotland. Email communication from Dr Donald Lyons, Director.
“it is perfectly possible for the spouse, civil partner or sexual partner to exploit and abuse the other person, which can happen in relationships where the person does not have a mental disorder, as highlighted in Recommendation 6 of the 2007 consultation which states, “The giving of consent to one sexual act does not by itself constitute consent to a different sexual act.”

363. Scottish Women’s Aid said that it would like to see something on the face of the Bill to reflect this particular recommendation and that it would welcome further discussions with the Government and the Crown.

364. The Committee recommends that the Scottish Government considers this concern and advises the Committee of its view prior to the Stage 1 debate.

PART 6 - PENALTIES

365. Part 6 and schedule 1 of the Bill set out the relevant penalties. A number of witnesses noted that schedule 1 stated that the penalty for “rape” and “rape of a young child” could be a fine – the maximum penalty is stated as being life imprisonment or a fine (or both). The Committee was concerned that a person could potentially receive only a fine for this type of crime.

366. The Lord Advocate stated that the Bill replicates the current law which provides that a fine is available on conviction for rape but the reality is that no fine has been imposed for rape in the last decade. The Lord Advocate said that she found the prospect of only a fine being imposed as extraordinary and that her understanding was that any fine would be cumulative and not an alternative penalty. She suggested that in the context of cumulative penalties, consideration should also be given to compensation orders.

367. Professor Maher advised that the SLC’s drafting instructions were to ensure that the courts had the power to fine in addition to the power to imprison, in order to clarify an anomaly whereby there are certain offences for which there is no option of a fine. The SLC did not envisage that a fine would be a sole penalty, rather that it would be an additional penalty, where for example, a rapist was very wealthy.

368. The Cabinet Secretary confirmed—

“It is our understanding that the fine was to be cumulative; it was not meant to be an alternative. There was a great deal of merit in what the Lord Advocate had to say about that, particularly in relation to compensation orders. We will ensure that there is no ambiguity about these matters.”

369. The Committee looks forward to this provision being clarified by the Government in order to ensure that there is no possibility of a fine being imposed as a sole penalty for the offence of serious sexual assault or rape.

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208 Scottish Women’s Aid. Written submission to the Justice Committee.
370. Victim Support Scotland questioned the disparity between the penalties for penile penetration, depending on the age of the victim – and the creation of a grade of severity of the attack based on the age of the victim.

371. The Bill provides that the offences of “rape” and “rape of a young child” can only be tried under solemn procedure in the High Court and can attract a maximum custodial sentence of life imprisonment or a fine (or both).

372. In contrast, a charge of “having intercourse with an older child” can be heard in both summary and solemn courts, and the maximum custodial sentence under solemn procedure is imprisonment for a term not exceeding 10 years. The Committee noted that where it is possible to prove that an older child did not consent, the accused could be charged with rape. In Victim Support Scotland’s view, the offence of “having intercourse with an older child” should be heard in the High Court and attract the same penalties as “rape” and “rape of a young child.”

373. Victim Support Scotland also raised the issue of equal opportunities. It pointed out that as rape, rape of a young child and having intercourse with an older child can only be by penile penetration, only men can commit these offences. Females can be charged with the offence of sexual assault, sexual assault of a young child and engaging in sexual activity with an older child. As cases of sexual assault can be raised in the lower courts with lesser maximum summary conviction penalties, it may be that penetration by an object (by either male or female offenders) could be given a lower penalties than an offence committed by penile penetration (in which the offender can only be male).

374. In its written evidence, Victim Support said —

“Victims of female offenders are hence given a different legal setting within which to gain recognition and restoration compared to victims of male offenders, regardless of the circumstances in the case or the damages caused by the penetration. The same is applicable for victims who have turned 13 but not yet 16, since the offences “intercourse with an older child” and “engaging in sexual activity with or towards an older child” can be raised in a lower court with a significantly lower range of penalties.”

375. The Committee is concerned that there may be an inconsistency in this provision and asks that the Scottish Government considers the position and reports its views to the Committee prior to the Stage 1 debate.

PART 7 – MISCELLANEOUS AND GENERAL

Continuity of law on sexual offences
376. Section 41 “for all purposes not relating to offences committed before the coming into force of this section” abolishes the common law offences of rape, clandestine injury to women, lewd, indecent or libidinous practice or behaviour and sodomy.

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212 Victim Support Scotland. Written submission to the Justice Committee.
213 Victim Support Scotland. Written submission to the Justice Committee.
214 Victim Support Scotland. Written submission to the Justice Committee.
377. The Faculty of Advocates, when discussing the issue of withdrawal of consent, suggested that—

“if the common law is abolished, there will be no precedent to follow and the appeal court will be inundated with challenges to the interpretation of a statute. Therefore, the whole area of law will have to be revisited and matters will have to be discussed and argued at length.”

378. The Faculty of Advocates suggested that a provision should be included to the effect that the common law precedent would remain insofar as it was compatible with the Bill. This would allow the courts to continue to have regard to decisions made on particular matters.

379. However the Law Society of Scotland did not share the Faculty’s view on the continued availability of precedent, saying—

“I do not think it necessarily follows that we need a provision in the Bill stating that the pre-existing law still applies where appropriate…I rather assumed that the existing law would still apply if the circumstances, offences and themes of the Bill were the same as the common law.”

380. The Lord Advocate advised—

“I appreciate that section 41 suggests that the common law will be abolished at the time of commencement, in so far as the provisions relate to offences that take place post-commencement. I am not convinced that that is absolutely necessary. It is for the Committee to decide whether to remove law, or simply to allow it to fall into desuetude as we begin to use the new statutory offences.”

381. The Lord Advocate went on to say that the jurisprudence on the common law would still require to be used for some time as many cases would still fall to be prosecuted under the “old law” and that in her view there would be no bar to the courts applying the old jurisprudence to the new law in so far as it was relevant and coincided with that jurisprudence.”

382. However the Lord Advocate concluded—

“The beauty of the common law is its flexibility. There may be wisdom in retaining some of that, at least in the initial stages after the commencement of the new legislation.”

383. In light of comments made by witnesses, the Committee recommends that the Scottish Government considers the continuity of the law on sexual offences and the consequences of section 41.

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Ancillary provisions

384. Section 45 of the Bill enables Scottish Ministers to make ancillary provision by statutory instrument where it is necessary or expedient, or in consequence of giving full effect to the Bill.

385. In its report, the Subordinate Legislation Committee noted that this is a wide power which could be used to amend or repeal primary legislation (including the Bill once enacted). In the view of the Subordinate Legislation Committee, justification is required for any power to amend or modify the effect of primary legislation, when the power is not subject to affirmative procedure.

386. In response, the Scottish Government said that it would bring forward amendments to ensure that any direct modification of primary legislation, whether textual or otherwise, would be subject to affirmative procedure.

387. The Committee notes this undertaking and the Subordinate Legislation Committee’s intention to consider the relevant amendment(s) at Stage 2.

SCHEDULE 5

388. The Equality Network raised a number of issues in relation to the repeal of section 13 of the Criminal Law (Consolidation) (Scotland) Act 1995 which is intended to reflect the replacement of offences in that section with gender neutral offences. In the view of the Equality Network, the repeal will leave some definitions remaining which will either require consequential updates or are deemed offensive to gay men.

389. The Committee notes that the Cabinet Secretary for Justice has agreed to consider the points raised in this regard and looks forward to his response prior to the Stage 1 debate.

EQUALITY IMPACT ASSESSMENT

390. The Scottish Government prepared an Equality Impact Assessment for this Bill which was clear and helpful.

391. The Committee welcomes the adoption by the Scottish Government of this approach for assessing the potential equality impact of legislation. The Committee would therefore encourage the Scottish Government to produce Equality Impact Assessments (EIAs) for all future Bills.

392. Notwithstanding the Committee’s view on the clarity of the Equality Impact Assessment, some equalities issues did arise during the Committee’s evidence taking and have been highlighted previously in this report.

FINANCE COMMITTEE CONSIDERATION OF THE FINANCIAL MEMORANDUM

393. The Finance Committee examined the financial implications of the Bill through scrutiny of the Financial Memorandum. It adopted level one scrutiny and received four written submissions. It is noted that the Scottish Children’s Reporter

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Administration questioned the figures in the Financial Memorandum and stated that it was not possible for the SCRA, on the basis of the provisions now in the Bill, to predict the financial costs, as the proposals differ from those originally proposed by the SLC. In this regard, it should be noted that this Committee has highlighted the need for welfare interventions and that there may well be financial implications as a result of this.

CONCLUSION

394. The Committee has made several recommendations including that a further category of offence be created - rape with an object or with another part of the body, limited to vaginal or anal penetration, and with the same penalties as rape. The Committee is also concerned about the details of several proposals in the Bill. Nonetheless, subject to the response of the Scottish Government to the recommendations and concerns, the Committee is content to recommend that the Parliament agrees to the general principles of the Bill.
ANNEXE A: REPORTS FROM OTHER COMMITTEES

Subordinate Legislation Committee

Sexual Offences (Scotland) Bill

The Committee reports to the Parliament as follows—

Introduction

At its meetings on 9 September\textsuperscript{220}, 7 October\textsuperscript{221}, 28 October\textsuperscript{222} and 4 November\textsuperscript{223} 2008 the Subordinate Legislation Committee considered the delegated powers provisions in the Sexual Offences (Scotland) Bill at Stage 1. The Committee submits this report to the Justice Committee as the lead committee for the Bill under Rule 9.6.2 of Standing Orders.

The Scottish Government provided the Parliament with a memorandum on the delegated powers provisions in the Bill.

The Committee’s correspondence with the Scottish Government is reproduced in the Annexe.

Delegated Powers Provisions

This Bill provides a statutory framework for sexual offences in Scots law. The Bill contains 9 delegated powers to make subordinate legislation, the majority of which are subject to negative resolution procedure.

The Committee considered each of the delegated powers provisions in the Bill.

The Committee determined that it did not need to draw the attention of the Parliament to the delegated powers in the following sections: 30, 38, 42, 43, 46 and 49.

Section 29: Power to specify “relevant offences” for the purpose of Section 29(2)

Background

Section 29(1) provides that it shall be a defence for an accused person who is charged with an offence under sections 21 to 27 (sexual activity involving or directed towards a child aged 13-15) that he or she reasonably believed that the child, with whom he or she engaged in sexual activity, had attained the age of 16 years at the time the conduct took place. Section 29(2) provides that such a defence is not available to an accused if that accused has previously been charged by the police with a “relevant offence”.

\textsuperscript{220} \textit{Official Report} 9 September
\textsuperscript{221} \textit{Official Report} 7 October
\textsuperscript{222} \textit{Official Report} 28 October
\textsuperscript{223} \textit{Official Report} 4 November
Subsection (5) of section 29 confers a power on the Scottish Ministers to specify by order, subject to negative procedure, which offences will constitute a “relevant offence” for the purpose of section 29(2). (Those offences can be specified individually or can be identified by describing the type of offences which are “relevant offences”.)

The Committee wrote to the Scottish Government raising concerns about the scope of this power as well as the parliamentary procedure attached to it. The Committee also subsequently took oral evidence from officials on this issue.

In particular, the Committee wished to examine whether “relevant offences” for this purpose should be specified “on the face” of the Bill. The Committee believed that the scope of the power merited careful consideration given that the exercise of the power determines whether a defence of mistaken belief as to age is available. The Committee notes that there is no limitation on Ministers in specifying offences for this purpose – Ministers are not restricted to specifying offences in relation to sexual behaviour for example. The Committee also wished to explore whether the exercise of such a power should be subject to affirmative rather than negative procedure.

**Evidence**

In evidence to the Committee Gery McLaughlin of the Scottish Government Criminal Justice Directorate stated that it was felt to be more appropriate for the list of “relevant offences” to be provided in a single order rather than in a mix of primary and secondary legislation. In addition, while the absence of such a power had caused no difficulties in the past, listing the “relevant offences” in an order gave Ministers flexibility to respond quickly to any changes in the law both in Scotland and in other parts of the UK. (Col 393)

The Committee also asked for further explanation as to why negative procedure was considered to be an appropriate level of scrutiny. The Government explained that the use of negative procedure reflects the approach taken by the Scottish Law Commission in relation to order making powers in general its Report on Rape and Other Sexual Offences. Mr McLaughlin stated that, in his interpretation, the Scottish Law Commission had adopted an approach which favoured the use of affirmative procedure only where there is to be a substantial change in the law. (Col 397)

**Conclusions and Recommendations**

The Committee acknowledges that the argument that a complete list of “relevant offences” should be kept in one place is valid in that it is important that the criminal law should be clear and easily accessible. The Committee notes that it would be possible to achieve this objective through a list of “relevant offences” in the Bill itself. The Committee also recognises that the requirement to ensure flexibility to respond to new and changing legislation north and south of the Border is a legitimate aim and that there is a strong public interest in keeping the law up to date.

The Committee considers therefore that, on balance, there are arguments which support the use of subordinate legislation in these circumstances.
However concerns remain about the breadth of this power. The Committee must have regard to the fact that without any limitation on what may be specified, Ministers under this, or any future administration, could greatly expand the number or types of offences specified and therefore the availability of the defence.

The Committee did not consider that it had received a full explanation as to why the power to specify “relevant offences” cannot be framed more narrowly, to reflect the stated policy intention that “relevant offences” would be offences committed against children which had a sexual element.

The Committee therefore considers that the use of subordinate legislation to specify “relevant offences” for the purpose of Section 29(2) is appropriate in order to provide flexibility to address future changes in the law.

However, the Committee recommends that the Government consider further whether the Bill can be amended to restrict the scope of the power to a power to specify offences or circumstances involving conduct of a sexual nature involving children as “relevant offences”.

The Committee also continues to have concerns about the use of negative procedure for this power. While there is a need for flexibility to respond to changes in the law, it was not suggested by officials that there was a need to respond so quickly to developments that the use of affirmative procedure would be ruled out. The need to exercise this power will be preceded by legislative change and this can be anticipated in sufficient time to timetable an affirmative order. As this power was not contained in the draft bill annexed to the Scottish Law Commission’s report, the Committee considers that it does not have the benefit of the Commission’s view on which procedure it would have proposed to attach to such a power. As Ministerial involvement in specifying when the defence is available would be a change to the current law, the Committee is not persuaded that it can be assumed the Commission would have proposed negative procedure.

Given the significance of the effect of the exercise of the proposed power in determining when a defence of mistaken belief as to age is available to an accused, the Committee considers that specification of “relevant offences” should be subject to Parliament’s approval through affirmative procedure.

The Committee therefore recommends that the specification of “relevant offences” should be subject to affirmative procedure. The Committee draws the attention of the lead committee to these concerns.

Section 32: Power to amend the definition of what constitutes a “position of trust” in respect of the offence of sexual abuse of trust at section 31

Background
Section 31 creates an offence of sexual abuse of trust. It provides that a person commits an offence of sexual abuse of trust if they are aged 18 years or older and intentionally engage in a sexual activity with, or directed at, a person who is under 18 and in respect of whom the perpetrator is in a position of trust. Section 32 defines “position of trust” for the purpose of the offence in section 31 by setting out conditions which, if fulfilled, denote a person being in a “position of trust”.

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Five situations which are “positions of trust” are set out in the Bill. In addition section 32(1) confers a power on Ministers to make an order, subject to negative procedure, specifying what other conditions, in addition to those already set out in section 32, will constitute a “position of trust”.

Members noted that Ministers can specify any condition by which a position of trust would be established for the purpose of the offence. There are no apparent restrictions on this and the section does not provide for any qualitative test to be applied by the Scottish Ministers in exercising this power so as to narrow its scope. The power is also one which will have the effect of amending primary legislation, albeit not by textual amendment - this has the potential to broaden the scope of the offence.

Evidence
The Committee wished to explore whether Ministers’ unlimited discretion to define new situations of trust to which the criminal offence would apply could be restricted in some way. The Committee also wished to probe further the Scottish Government’s reasons for proposing negative procedure.

Therefore, following its meeting on 9 September the Committee wrote to the Scottish Government with a number of questions about the scope of this power and the fact that the Bill proposes that it be subject to negative procedure and the Committee also considered oral evidence on this issue at its meeting on 28 October.

The response received by the Committee stated that framing the power at section 32 more narrowly would risk losing the flexibility to respond quickly to changes in the arrangements for the care and education of young people in Scotland, without the need for primary legislation. In oral evidence Mr McLaughlin stated that it was difficult to speculate at this stage what future changes may involve. (Col 398)

Conclusions and Recommendations
The Committee agrees that it is appropriate to have the flexibility to amend the law to reflect change in care arrangements and that these are likely to alter over time. However, the power available to Ministers is much broader than one which permits them to update references to reflect changes in care arrangements. It permits them to specify any conditions which are new positions of trust and which concern a relationship between persons one of which is over 18 and the other is under 18. The Committee notes that the law does not interfere with sexual relationships between consenting persons over the age of 16 without good cause. In its view the exercise of this power is therefore of significance.

Accordingly, the Committee finds the use of a delegated power acceptable in principle. However, members wish to ask the Scottish Government to consider further whether the power could be framed more narrowly in such a way that would allow for flexibility in responding quickly to any changes in the arrangements for the care and education of young people in Scotland.

In evidence to the Committee Mr McLaughlin stated that the choice of negative procedure was consistent with the Scottish Law Commissions’ approach. (Col 398) However, the Committee disagrees with this view. In the Scottish Law
Commission’s report and draft Bill this power is subject to affirmative procedure (see s 31(7) of the draft Bill annexed to the Scottish Law Commission Report)–this is consistent with the existing law as set out in section 4(1) of the Sexual Offences (Amendment) Act 2000.

Given the potential impact of the exercise of this power to widen the scope of the offence of the sexual abuse of trust the Committee recommends that affirmative procedure is the appropriate level of parliamentary scrutiny.

Section 35: Power to specify circumstances which are to be regarded as constituting the provision of care services for the purpose of the offence of sexual abuse of trust of a mentally disordered person

Background
Section 35 creates the offence of sexual abuse of trust of a mentally disordered person. Subsection (1) provides that a person commits an offence under this section if they fall within the class of persons specified in subsection (2) and intentionally engage in sexual activity with, or directed at, a mentally disordered person. Subsection (2) sets out the classes of person who are subject to the offence provisions in subsection (1). It provides that they are those who provide a care service to a mentally disordered person and those who are employed in, or contracted to provide services in, or who manage, a hospital in which a mentally disordered person is receiving treatment.

Subsection (4) lists what constitutes the “provision of care services”. In addition it confers a power on the Scottish Ministers to make an order, subject to negative procedure, specifying other circumstances which constitute the provision of care services.

Evidence
At its meeting on 9 September the Committee agreed to write to the Scottish Government to seek an assurance that this power is framed more narrowly than that in section 32(1).

The Scottish Government’s response confirmed that the power at Section 35 of the Bill is framed in such a way that it is only the manner of provision of care services as defined that can be amended and that this can be done only by addition rather than deletion of any part of Section 35(4).

In light of the assurance provided the Committee considers that this power is acceptable.

Section 45: Ancillary provision

Background
Section 45 of the Bill confers on the Scottish Ministers a power to make by order such incidental, supplemental, consequential, transitional, transitory or saving provision as they consider necessary or expedient for the purposes of, or in connection with, or in order to give full effect to, the Bill. Subsection (2) provides that the power extends to the modification of any enactment, instrument or document.
Section 46(3) provides that any order under this section which contains provisions that add to, replace or omit any part of the text of an Act will be subject to affirmative procedure. Otherwise, it will be subject to negative procedure.

The Committee noted that this is a wide power which could be used to amend or repeal primary legislation, (including the Bill once enacted). Such powers are commonly sought as the full range of amendments to the statute book necessary to give effect to a Bill cannot always be identified, or may change, in the course of the passage of the Bill. However, the Committee considers that justification is required for any power to amend or modify the effect of primary legislation which is not subject to affirmative procedure.

The Committee therefore agreed to ask the Scottish Government—

- whether it would be prepared to agree that any modification of primary legislation however effected should be subject to affirmative procedure; and

- if not, whether it would give an undertaking that any significant or permanent modifications made to enactments using this power would be effected through textual amendment and so subject to affirmative procedure.

In its response, the Government stated that it did not consider that it would be appropriate to give an undertaking, in abstract, as to the way in which any modifications using this power will be effected, however, it stated that in the particular circumstances of this Bill, it would be willing to bring forward amendments to ensure that any direct modification of primary legislation, whether textual or otherwise, will attract affirmative procedure.

The Committee welcomes this response and will consider the proposed amendments at Stage 2.
ANNEXE

Response from Scottish Government

Sexual Offences (Scotland) Bill at stage 1

At its meeting on 9 September 2008 the Committee asked for explanation of the Scottish Government’s thinking on a number of matters relating to the powers to make subordinate legislation contained in the Bill.

Section 29: Power to specify “relevant offences” for the purpose of Section 29(2)

The Committee asks the Scottish Government—

- what type of offences it intends to specify as “relevant offences”;
- to explain why it is considered appropriate that the availability of the defence under section 29(1) should be dependent on whether or not a person has previously been charged with a relevant offence rather than convicted of such an offence, given that a person charged may subsequently not be convicted;
- why relevant offences could be not be listed in the Bill at this stage in combination with a restricted power to amend that list to reflect changes in the law on sexual offences within the UK;
- alternatively whether the Bill could be amended to clarify the nature of offences that could be specified using this power; and
- given the significance of the effect of the exercise of the proposed power, in that it determines the availability of a statutory defence to a serious criminal offence, why specification of relevant offences should not be subject to Parliament’s approval through affirmative procedure.

Section 32: Power to amend the definition of what constitutes a “position of trust” in respect of the offence of sexual abuse of trust at section 31

The Committee asks the Scottish Government—

- whether the open discretion to Ministers to provide for additional conditions constituting positions of trust could be framed more narrowly; and
- if not, whether it would agree that given the potential impact of the exercise of this power to widen the scope of the offence of sexual abuse of trust affirmative procedure would be the appropriate level of parliamentary scrutiny.
Section 35: Power to specify circumstances which are to be regarded as constituting the provision of care services for the purpose of the offence of sexual abuse of trust of a mentally disordered person

The Committee asks for an assurance from the Government that the power in section 35 is framed more narrowly than section 32(1), in that it is only the manner of provision of care services as defined that can be amended and that only by addition rather than deletion of any part of section 35(4).

Section 45: Ancillary provision

The Committee asks the Scottish Government—

- whether it would be prepared to agree that any modification of primary legislation however effected should be subject to affirmative procedure; and

- if not, whether it would give an undertaking that any significant or permanent modifications made to enactments using this power would be effected through textual amendment and so subject to affirmative procedure.

The Scottish Government responds as follows—

Section 29: Power to specify “relevant offences” for the purpose of Section 29(2)

Section 29(1) provides that it is a defence to an offence concerning sexual activity with an ‘older child’, that is a child aged between 13-15, that the accused reasonably believed that the child had attained the age of 16 years. Section 29(2) places a restriction on the availability of this defence by providing that the accused may not use the defence if he or she had previously been charged with a ‘relevant offence’. Section 29(5) gives Scottish Ministers power to prescribe by order the definition of a ‘relevant offence’.

The policy intention is that ‘relevant offences’ would be offences committed against children which had a sexual element. These will be likely to include the offences contained at sections 14 to 26 of the Bill, in addition to a number of existing provisions, such as those contained at sections 6 and 7 of the Criminal Law (Consolidation) (Scotland) Act 1995. The Government did not include these on the face of the Bill as it considered that it would be more appropriate that these be listed in a single Order, rather than being contained only on the face of the Bill or in a mix of primary and secondary legislation. It did not consider it either necessary or desirable to specify on the face of the Bill the nature of the offences that might constitute a “relevant offence”.

Committee members have asked why this defence should be restricted to those not previously charged with a relevant offence, as opposed to being restricted only to those not previously convicted of a relevant offence. If the test was that the accused had previously been convicted of a relevant offence it would not be possible to convict, as the accused would be able to rely, on each occasion, on the fact that he or she had not previously been convicted. The fact that an accused
person has been previously charged means that he, or she, is on notice that in the future more caution has to be exercised. Furthermore, it should be noted that section 5(5) of the Criminal Law (Consolidation) (Scotland) Act 1995, which criminalises intercourse with a girl aged 12-15 and is replaced by the provisions of this Bill also restricts the use of the defence of mistaken belief as to the girl’s age to those not previously charged with a like offence. This is not therefore a new approach.

It is the Government’s view that the negative resolution procedure will provide the appropriate level of scrutiny for an order specifying the offences to be included in the definition of ‘relevant offences’ for the purpose of the offences in Part 4 of the Bill. In the event that any Member had significant concerns about the terms of any such Order, or the offences included within the definition of ‘relevant offence’, it would be open to that Member to pray against the Order in Committee.

Section 32: Power to amend the definition of what constitutes a “position of trust” in respect of the offence of sexual abuse of trust at section 31

The Committee asks whether the power to amend the definition of what constitutes a “position of trust” in respect of the offence at section 31 of the Bill could be framed more narrowly. As outlined in the Delegated Powers Memorandum, the power is intended to allow sufficient flexibility to respond to changes in the arrangements for the care and education of young people in Scotland without the need for primary legislation. In the Government’s view, framing the power at section 32 more narrowly would risk losing the flexibility to respond quickly to such changes. As with the power at section 29, the Government’s view is that the negative resolution procedure provides the appropriate level of scrutiny for such an Order.

Section 35: Power to specify circumstances which are to be regarded as constituting the provision of care services for the purpose of the offence of sexual abuse of trust of a mentally disordered person.

The Committee asks for an assurance that the power at section 35 is framed in such a way that it is only the manner of provision of care services as defined that can be amended, and that this can be done only by addition rather than deletion of any part of section 35(4). The Government confirms that this is the case.

Section 45: Ancillary provision

The Committee asks whether the Scottish Government would be prepared to agree that any modification of primary legislation should be subject to affirmative procedure or, alternatively, to give an undertaking that any significant or permanent modifications made to enactments using this power would be effected through textual amendment and so subject to affirmative procedure.

The Scottish Government does not consider that it would be appropriate to give an undertaking, in abstract, as to the way in which any modifications using this power will be effected. The Bill provides for textual modification of primary legislation to attract affirmative procedure. Normally, non-textual modification is confined to modifying particular pieces of text for certain limited circumstances, application or
adaptation - thus negative procedure would usually be appropriate in relation to such modifications. However, in the particular circumstances of this Bill, the Government is willing to bring forward amendments to ensure that any direct modification of primary legislation, whether textual or otherwise, will attract affirmative procedure.
Dear Bill

Sexual Offences (Scotland) Bill – Financial Memorandum

As you are aware, the Finance Committee examines the financial implications of all legislation, through the scrutiny of Financial Memoranda. At its meeting on 24 June 2008, the Committee agreed to adopt level one scrutiny in relation to the Bill. Applying this level of scrutiny means that the Committee does not take oral evidence or produce a report, but it does seek written evidence from affected organisations.

The Committee received four submissions, from the Association of Chief Police Officers in Scotland, the Crown Office and Procurator Fiscal Service, the Scottish Court Service and the Scottish Children’s Reporters Administration. I would draw your Committee’s attention to the comments made by the SCRA.

If you have any questions about the Committee’s consideration of the Financial Memorandum, please contact Allan Campbell, Assistant Clerk to the Committee, on 0131 348 5451, or email: allan.campbell@scottish.parliament.uk

Yours sincerely

Andrew Welsh MSP
Convener
ACPOS was involved in the consultation process for the Bill and also had the opportunity to provide comment in respect of the subsequent financial implications. That said, the latter response was particularly challenging within the limited time frame provided as the information in question referred to potential costs to be met by 8 forces and was not retained centrally.

In general, the Bill does not propose to criminalise any conduct not currently included within legislation and therefore additional costs in relation to reported crime should be minimal. Notwithstanding, the Bill is a significant piece of legislation, the contents of which require to be adequately communicated to staff in the form of training and awareness, in order to ensure comprehensive understanding prior to implementation. Whilst some of the necessary training can be absorbed into existing delivery mechanisms, there will be a requirement for supplementary training for existing officers which will be a single rather than recurring cost.

In keeping with the introduction of new legislation, it is anticipated that issues, such as legal precedent and supplementary legislation, will influence the need to develop any further guidance and direction as required, the extent and frequency of which is challenging to predict.

Every effort was made to ensure the accuracy of the ACPOS response as detailed in the Financial Memorandum; however a degree of flexibility is requested in this regard.

Harry Bunch
General Secretary
September 2008
SUBMISSION FROM COPFS

Consultation
1. Did you take part in the consultation exercise for the Bill, if applicable, and if so did you comment on the financial assumptions made?
   Yes

2. Do you believe your comments on the financial assumptions have been accurately reflected in the Financial Memorandum?
   Yes

3. Did you have sufficient time to contribute to the consultation exercise?
   Yes

Costs
4. If the Bill has any financial implications for your organisation, do you believe that these have been accurately reflected in the Financial Memorandum? If not, please provide details.
   Yes

5. Are you content that your organisation can meet the financial costs associated with the Bill? If not, how do you think these costs should be met?
   Yes

6. Does the Financial Memorandum accurately reflect the margins of uncertainty associated with the estimates and the timescales over which such costs would be expected to arise?
   Yes

Wider Issues
7. If the Bill is part of a wider policy initiative, do you believe that these associated costs are accurately reflected in the Financial Memorandum?
   N/A

8. Do you believe that there may be future costs associated with the Bill, for example through subordinate legislation or more developed guidance? If so, is it possible to quantify these costs?
   Yes, there is the prospect of future costs. The Court’s interpretation of the provisions may in time require further training and guidance for prosecution staff. It is not possible to quantify accurately at this stage what those costs might be. In the event that a further one day course would be required it is
likely that that would incur an additional cost of between £50,000 and £60,000 as estimated for initial training.

Fiona Holligan
Principal Depute
Victim Policy Team
COPFS
September 2008
1. Did you take part in the consultation exercise for the Bill, if applicable, and if so did you comment on the financial assumptions made?

SCRA took part in the Scottish Government’s consultation exercise on the Scottish Law Commission’s (SLC’s) report on rape and sexual offences, and responded on 26 March 2008.

This consultation did not include financial assumptions. However, at the request of the Scottish Government, on 2 May 2008 SCRA provided general views on areas where costs may be incurred if the SLC’s recommendations were introduced.

2. Do you believe your comments on the financial assumptions have been accurately reflected in the Financial Memorandum?

The provisions of the Sexual Offences (Scotland) Bill differ in some important respects from the SLC’s recommendations, most notably that the Bill does not create a new ground for referral to the Reporter. SCRA’s comments to the Scottish Government on possible costs related solely to the SLC’s recommendations and are not reflected in the Financial Memorandum.

3. Did you have sufficient time to contribute to the consultation exercise?

SCRA had sufficient time to contribute to the Scottish Government’s consultation exercise on the SLC’s report on rape and sexual offences.

Costs

4. If the Bill has any financial implications for your organization, do you believe that these have been accurately reflected in the Financial Memorandum? If not, please provide details.

At this stage it is not possible to accurately predict the costs that SCRA would incur for two main reasons:

- It is not known what the final provisions will be; and
- Any changes to the numbers of children referred to the Reporter will be dependant on the practices of referring agencies. It is not known at this early stage, how referring agencies will interpret the provisions of the Bill.

It is therefore not possible to predict if there will be changes in the numbers of children referred and if these will result in increased workloads for Reporters. SCRA would question the figures included in the Financial Memorandum based on estimates of costs and predicted increases in numbers of children referred. In addition, SCRA would question the validity of average costs per referral given in
the Financial Memorandum, when cases of children referred vary greatly in terms of complexity and their process within the Children’s Hearings System.

However, SCRA is likely to incur costs in making changes to incorporate the new legislation into its practices. These include, but are not restricted to:

- Scoping and implementing changes to SCRA’s Referrals Administration Database to allow effective case management and the reporting of management information.
- Developing and delivering training for Children’s Reporters.
- Support training for Panel Members.

5. Are you content that your organization can meet the financial costs associated with the Bill? If not, how do you think these costs should be met?

At present it is not possible to predict the financial costs to SCRA. However, if these are significant, SCRA will explore with the Scottish Government how best to meet them.

6. Does the Financial Memorandum accurately reflect the margins of uncertainty associated with estimates and the timescales over which such costs would be expected to arise?

No, for the reasons given above.

**Wider Issues**

7. If the Bill is part of a wider policy initiative, do you believe that these associated costs are accurately reflected in the Financial Memorandum?

N/A

8. Do you believe that there may be future costs associated with the Bill, for example through subordinate legislation or more developed guidance? If so, is it possible to quantify these costs?

As explained in the answer to question 4, the impact on SCRA of any changes in referrals to the Reporter will largely be determined by the practice of referring agencies. Referral practices will be based on guidance from Scottish Government and/or the agencies themselves.

Dr Gillian Henderson  
Head of Policy  
SCRA  
September 2008
SUBMISSION FROM SCS

Consultation

Did you take part in the consultation exercise for the Bill, if applicable, and if so did you comment on the financial assumptions made?

No.

Do you believe your comments on the financial assumptions have been accurately reflected in the Financial Memorandum?

Not Applicable

Did you have sufficient time to contribute to the consultation exercise?

Yes.

Costs

If the Bill has any financial implications for your organisation, do you believe that these have been accurately reflected in the Financial Memorandum? If not, please provide details.

Yes. The figures provided in the Financial Memorandum reflect the submissions made to the Scottish Government.

Are you content that your organisation can meet the financial costs associated with the Bill? If not, how do you think these costs should be met?

We are content that the estimates set out in the Financial Memorandum are sufficient to deal with the level of increase as estimated by the Scottish Executive.

Does the Financial Memorandum accurately reflect the margins of uncertainty associated with the estimates and the timescales over which such costs would be expected to arise?

Yes

Wider Issues

If the Bill is part of a wider policy initiative, do you believe that these associated costs are accurately reflected in the Financial Memorandum?

Not Applicable

Do you believe that there may be future costs associated with the Bill, for example through subordinate legislation or more developed guidance? If so, is it possible to quantify these costs?
No.

Jane MacDonald  
Policy and Legislation Branch  
Policy and Strategy Directorate,  
Scottish Court Service, September 2008
ANNEXE C: CORRESPONDENCE FROM THE EQUAL OPPORTUNITIES COMMITTEE

Bill Aitken MSP
Convener
Justice Committee
Room M2.07
Scottish Parliament
EH99 1SP

Sexual Offences (Scotland) Bill

At its meeting of 9 September, the Equal Opportunities Committee agreed to invite written evidence from various organisations on whether the Sexual Offences (Scotland) Bill provides adequate protection from abuse to prostitutes and trafficked women. On 30 September, the Committee considered three responses it had received and agreed to pass this evidence to the Justice Committee for its consideration as part of Stage 1 scrutiny. Responses from the Cabinet Secretary for Justice; Glasgow City Council, on behalf of the Routes Out Partnership and the Trafficking Awareness Raising Alliance Project; and the Scottish Trades Union Congress (STUC), are attached.

The Committee further agreed to highlight a number of specific issues raised in the written evidence, namely:

Section 10
The Cabinet Secretary for Justice draws attention to Section 10 of the Bill, which provides a “non-exhaustive list of factual circumstances under which consent is never present, may be of particular relevance to those trafficked for sexual exploitation or otherwise forced into prostitution”. The STUC, however, believes that the experiences of trafficked women should be included within the list of “circumstances in which conduct takes place without free agreement” in Section 10. Glasgow City Council also suggests that the list in Section 10 be extended to include “where a complainer has been subject to behaviour consistent with grooming for the purpose of sexual exploitation”.

Other issues
Glasgow City Council had further concerns that the issue of sexual history and character evidence is not adequately addressed within the Bill, whilst the STUC seeks assurances that the Bill provides sufficient protection against sexual abuse and violence for those children and young people who have been trafficked.
The Committee understands that the Justice Committee is due to take oral evidence on the Bill from women’s and children’s organisations on 28 October and 4 November and hopes that the attached evidence and comments will be useful in informing these evidence sessions.

Margaret Mitchell MSP
Convener
Equal Opportunities Committee
Equal Opportunities Committee

13th Meeting, 2008 (Session 3), Tuesday 30 September 2008

Sexual Offences (Scotland) Bill – written evidence

Background

1. The Committee has agreed to seek written evidence on whether the Sexual Offences (Scotland) Bill provides adequate protection from abuse to prostitutes and trafficked women, with a view to identifying whether there are any issues it would like to highlight to the Justice Committee to inform its consideration of the Bill at Stage 1.

2. The Committee agreed to request written evidence from the following organisations:
   - Children 1st;
   - British Red Cross;
   - Say Women;
   - Barnardo’s Scotland; and
   - Glasgow City Council, on behalf of the Routes Out partnership and the Trafficking Awareness Raising Alliance project.

3. The Convener further invited Kenny MacAskill MSP, Cabinet Secretary for Justice, to provide written evidence.

4. At the suggestion of the Routes Out partnership, Strathclyde Police agreed to provide views, based on experiences of working with prostitutes and trafficked women. After reading the Committee’s minutes of 9 September, the Scottish Trades Union Congress also submitted comments.

5. Written submissions, which are contained in the Annexe, have been received from:
   - Kenny MacAskill MSP, Cabinet Secretary for Justice, Scottish Government;
   - Glasgow City Council, on behalf of the Routes Out partnership and the Trafficking Awareness Raising Alliance project; and
   - the Scottish Trades Union Congress.

Summary of comments

6. In his response, the Cabinet Secretary for Justice highlights certain provisions within the Bill that “may be relevant to victims of trafficking or those forced into prostitution”. In particular, he draws attention to Section 10, which provides a “non-exhaustive list of factual circumstances under which consent is never

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224 The Justice Committee is the lead Committee on the Bill.
present, which may be of particular relevance to those trafficked for sexual exploitation or otherwise forced into prostitution”.

7. Other responses, whilst welcoming the Bill, raise a number of issues. For example, the STUC believes that the experiences of trafficked women should be included within the list of “circumstances in which conduct takes place without free agreement” in Section 10. Glasgow City Council also suggests that the list in Section 10 be extended to include “where a complainant has been subject to behaviour consistent with grooming for the purpose of sexual exploitation”.

8. Glasgow City Council has further concerns that the issue of sexual history and character evidence is not adequately addressed within the Bill. The STUC also seeks assurances that the Bill provides sufficient protection against sexual abuse and violence for those children and young people who have been trafficked.

Decision

9. The Justice Committee is due to take oral evidence on the Bill from women’s and children’s organisations on 28 October and 2 November.

10. Members are invited to consider the written evidence received and to decide whether to highlight any issues to the Justice Committee, in order to inform its consideration of the Bill.

Terry Shevlin  
Clerk to the Committee  
September 2008
Thank you for your letter of 16 September concerning the Equal Opportunities Committee’s consideration of the Sexual Offences (Scotland) Bill. You ask for the Government’s comments on the question of whether the Sexual Offences (Scotland) Bill provides adequate protection from abuse to prostitutes and trafficked women.

The Bill is intended to reform the current law on sexual offences, creating a range of new statutory offences which criminalise sexual conduct which takes place without consent and replacing a complex mix of common law and statute with a clear legal framework which more accurately reflects the values of modern society.

The Bill is therefore not specifically concerned with prostitution or trafficking but certain of the Bill’s provisions may be relevant to victims of trafficking or those forced into prostitution and the existing offence provisions concerning trafficking, brothel-keeping and controlling prostitution will continue to apply where relevant. The offences of rape, sexual assault and other coerced sexual activity contained in the Bill criminalise sexual activity with another person without that person’s consent, and without any reasonable belief that they consented, and will apply equally where the victim has been trafficked or is engaged in prostitution.

Consent is central to the Bill’s approach to sexual offences and it therefore provides for a statutory definition of ‘consent’ as ‘free agreement’ (section 9). It supplements that definition of consent by explicitly providing that consent to one form of sexual activity does not of itself imply consent to any other form or instance of sexual activity. It also makes clear that consent may be withdrawn at any time and that if conduct takes place, or continues to take place after consent has been withdrawn, it takes place without consent (section 11). This sends a clear message that consent is active and may be withdrawn at any time.

Those trafficked for sexual exploitation are likely to be victims of sexual offences and we recognise that those involved in prostitution are often particularly vulnerable to sexual victimisation. As such, it is important that the Bill provides protection to these groups in a way similar to that in which it protects other victims. In addition, there are a number of specific provisions which may be of relevance where someone has been trafficked for sexual exploitation or otherwise forced into prostitution.

It is known that traffickers and others who force women into prostitution often commit acts of rape and sexual assault against their victims themselves. As well as defining consent, the Bill also provides a non-exhaustive list of factual circumstances under which consent is never present (section 10) which may be of particular relevance to those trafficked for sexual exploitation or otherwise forced into prostitution.
Section 10(2)(c) provides that consent is not present where the victim agrees or submits to the conduct because of violence used against the victim, or against any other person, or because of threats of violence against the victim, or against any other person. Section 10(2)(d) provides that consent is not present where the victim agrees or submits to the conduct because he or she has been unlawfully detained by the accused and section 10(2)(g) provides that consent is not present if the only expression or indication of agreement to the conduct is from a person other than the person with whom sexual activity takes place.

The Bill also contains an offence of sexual coercion (section 3) which may also be relevant to someone trafficked for sexual exploitation or otherwise forced to engage in prostitution. This provides that it is an offence for a person to intentionally cause another person to participate in a sexual activity without that person’s consent and without any reasonable belief that they consent. This offence would criminalise a trafficker or other person who knowingly forces or coerces another to engage in sexual activity.

I hope this information is helpful.

Kenny MacAskill MSP
Cabinet Secretary for Justice
Scottish Government
September 2008
1. Response from Glasgow Community and Safety Services

1.1 Routes Out and Trafficking Awareness Raising Alliance are based in Glasgow Community and Safety Services, a joint partnership between Glasgow City Council and Strathclyde Police which was set up to prevent crime, tackle antisocial behaviour and promote community safety in the city. Prostitution is recognised as harmful, survival behaviour resulting from a lack of real choices for women and the male demand for prostitution. Few women are so disadvantaged and marginalised. This response aims to assess whether the Sexual Offences (Scotland) Bill provides adequate protection from abuse for women involved in prostitution and trafficking.

Introduction

1.2 Glasgow Community and Safety Services welcomes the Scottish Government’s intention to reform the law on rape and other sexual offences and also the opportunity to comment on whether the Bill provides adequate protection from abuse for women involved in prostitution and victims of trafficking. Women’s accounts of involvement in prostitution are harrowing and involve a range of abusive behaviour by men.

1.3 Currently people who have been raped or sexually assaulted do not report positive experiences of the criminal justice process in Scotland. Additionally, figures suggest that only 4% of rapes reported to the Police results in a conviction. There is clearly a need for legislative reform.

1.4 We are concerned that the issue of sexual history and character evidence is not addressed in the Bill. Although the Scottish Government has previously legislated on this issue, a recent evaluation commissioned by the Scottish Government found that 7 out of 10 women in rape trials will be questioned about their sexual history or character. Complainers of sexual offences do not speak highly of their experience of the criminal justice system: many women describe giving evidence in particular as akin to retraumatisation or being raped again. This type of questioning adds to their distress, is potentially prejudicial to juries and acts as a deterrent to women coming forward to report rape in the first place. This is a particular barrier for women engaged in prostitution in reporting incidents of rape; due to fear that their background will affect their case and that the harm experienced will be taken less seriously. It is completely unacceptable that women in Scotland continue to be treated in this way.

1.5 It remains unclear whether it is the law itself or the way in which it is being implemented which is the cause of the inappropriate questioning of women who have been raped. The Crown Office has issued new guidance on this issue which may improve the situation. What is crucial, however, is that this aspect of the law remains under regular review to determine whether or not further legislation is
required. It is strongly recommended that a further evaluation of the impact of the legislative provision relating to sexual history and character evidence is carried out in 2009 to ascertain whether or not there has been any improvement in the ability of the law to protect women from intrusive, humiliating and irrelevant questioning.

2. Response

Part 1 – Rape

2.1 Glasgow Community and Safety Services welcome the extension of the definition of rape to include oral and anal rape as this is increasingly in line with what women are experiencing. We also support the introduction of a gender neutral legal framework whereby men can also now be the victims of rape. From our perspective this is important, as we are aware of the often hidden but equally vulnerable population of men who engage in prostitution in our city. However the number of women exploited through the sex industry continues to be significantly higher than the number of men.

2.2 We are pleased that emphasis now is on the lack of consent as opposed to the use of force, as the previously narrow definition of rape coupled with the evidential requirement of corroboration, presented a major challenge for women wanting to report an incident of rape. The creation of a new crime of “sexual assault” is useful, and having these offences set out in a clear and concise way is undoubtedly helpful.

2.3 The new offence of “sexual coercion” set out in Section 3 may be of relevance in the case of women who have been trafficked for the purpose of commercial sexual exploitation as often trafficked women are forced to have sex with their trafficker first so he can “test” her out before she is made more widely available to men wishing to purchase sex. We welcome the recognition that such actions are a serious invasion of the victim’s autonomy and bodily integrity and thus merit the possibility of a maximum life imprisonment penalty.

Part 2 - Consent and Reasonable Belief

2.4 Glasgow Community and Safety Services strongly support the development of a statutory definition of consent given the myths and prejudices which surround female sexuality and rape. It is essential that the law provides as clear a framework as possible as to what is meant by consent. The issue of consent can be a contentious issue as in many trafficking cases there appears to be “initial consent or co-operation between victims and traffickers, followed later by more coercive, abusive and exploitative circumstances”. Indeed, often lured with the false promise of legitimate work the victim of trafficking is unaware they are consenting to what will in effect amount to enslavement in the destination country. It is for this reason that the element of consent should always be considered irrelevant in trafficking cases. We continue to believe that a rape prosecution should always be considered in circumstances where it can be shown that the accused knew or was reckless to the fact that the complainer was being held against her will by a third party.
2.5 Certain provisions of Section 10 which outlines “circumstances in which conduct takes place without free agreement” are particularly relevant to women involved in prostitution and trafficking.

(c) where B agrees or submits to the conduct because of violence used against B or any other person, or because of threats of violence made against B or any other person.

2.6 This provision may apply in cases of trafficking as victims often submit to the sexual exploitation due to threats of violence from the trafficker against them or threats that if they do not obey harm will happen to their family back home. Similarly women involved in street prostitution are often subject to physical abuse from men purchasing sex and although they may have agreed to perform one particular sex act, violent behaviour or threats may force them to go beyond what was agreed. Women often engage in prostitution to fund drug use, their own and sometimes that of their partner and/or families. Street prostitution is survival behaviour and the root causes can involve violence, experiences of multiple forms of abuse, poverty, homelessness and addiction. Arguably, there is no free choice in prostitution apart from that of the purchaser who chooses when, where and how he buys sex from a vulnerable woman.

(d) where B agrees or submits to the conduct because B is unlawfully detained by A

2.7 Provision (d) clearly applies to a situation whereby a woman has been trafficked and held against her will, or in the case of street prostitution where a woman is held in e.g. a flat or car against her will. The detention should not have to involve any force or violence in order to fall under this provision, the key thing is that it is an unlawful detention and against her will. We wholly support this provision and hope that it will improve the chances of successful prosecution against traffickers and those that buy sex from trafficked women. In circumstances where consent is clearly void we would welcome a charge of rape if the accused knew or was reckless to the fact the woman was being detained unlawfully.

(g) where the only expression or indication of agreement to the conduct is from a person other than B.

2.8 In some cases of prostitution and trafficking, the negotiation to buy sex is done purely between the client and trafficker/pimp so at no point does the women “consent” to the arrangement. For this reason, we believe buying sex from a trafficked woman effectively amounts to paid rape.

2.9 Finally, although Section 10 does cover a fairly wide range of circumstances we would suggest this additional provision to be one circumstance which shows an absence of consent:

Where a complainer has been subject to behaviour consistent with grooming for the purpose of sexual exploitation.
2.10 Section 11 (Consent: Scope and Withdrawal) contains a useful provision highlighting that consent can be withdrawn at any time and that consent to conduct does not of itself imply consent to another conduct.

2.11 We strongly support this approach and welcome it being written into the Bill. It is a commonly held myth that a woman, having consented to engage in some level of intimate activity, loses the right to refuse consent to sex and it is vital that this is challenged directly within statute as well as elsewhere. This is particularly relevant for women involved in prostitution – although they may give consent to one particular sex act e.g. oral sex; this does not of itself imply consent to other sexual conduct such as penetrative sex. We welcome the prime purpose of this rule which is to prevent any implied escalation of consent. People, irrespective of involvement in prostitution, should be free to choose to engage in certain types or levels of sexual activity without that consent being implied to cover other types/levels of sexual activity.

Glasgow Community and Safety Services
September 2008
WRITTEN SUBMISSION FROM THE SCOTTISH TRADES UNION CONGRESS (STUC)

Introduction

The Scottish Trades Union Congress welcomes the opportunity to respond to the Equal Opportunities invitation for specific comment on the question 'Does the Bill provide adequate protection from abuse to prostitutes and trafficked women?'

The STUC is Scotland’s trade union centre, bringing together over 640,000 workers and linking with their communities, families, and with people not in work. Our organisation includes representative structures for women, for black and ethnic minorities, and for young workers. The STUC affiliated trade union membership organises workers in many different environments in the public and in the private sector.

In recent years, the STUC Women’s Conference and the STUC Women’s Committee have discussed issues of violence against women, of prostitution, and trafficking of women and children. A multi-agency conference hosted by the STUC Women’s Committee in October 2007, looked at the extent of trafficking of women and children in Scotland and considered a number of policy initiatives that could be taken to tackle the growing problem.

The STUC annual Congress in April 2008 expressed strong concern at the increase in the trafficking of women and young people into the UK for purposes of sexual exploitation. The STUC is committed to supporting those projects and initiatives, such as the Trafficking Awareness Raising Awareness project in Glasgow, which challenge the practice of trafficking but also support women who have come into the UK by this means, and seek to provide alternatives for these women to make choices about their lives.

Submission on Sexual Offences (Scotland) Bill - with regard to prostitution and trafficking.

The STUC has already welcomed the progress made in the Sexual Offences Bill, to bring together disparate pieces of legislation and to clarify the definitions of rape, of consent ('free agreement'), and of coercion. This is long overdue in Scotland. We also share the Government’s view that legislation alone will not tackle the unacceptable level of rape and violence against women, and that campaigns and suitable services are also needed to change attitudes, and to bring equality.

With that framework in mind, we understand that the Sexual Offences (Scotland) Bill is not the only route through which protection can be improved for prostitutes and trafficked women.

However, that is not a reason for avoiding looking at how to use every option that arises. Each step that is taken will add to the change in culture and attitude that will be required throughout society, if we are to see an end to the violence against women in prostitution and in the trafficking trade.
The Criminal Justice (Scotland) Act 2003 made clear that trafficking itself was a criminal offence. But this legislation does not address the question of responsibility resting with any other party, namely those who then abuse and exploit those who have come into the country via trafficking.

The Sexual Offences (Scotland) Bill already provides the opportunity to clearly state a range of circumstances in which sexual abuse or rape could occur, with no free agreement.

Section 10 of the Sexual Offences (Scotland) Bill lists some of the ‘circumstances in which conduct takes place without free agreement’.

We think that the experiences of trafficked women should be reflected in specific clauses in Section 10.

Trafficked women are held against their will; all options removed regarding their place of residence or income, having had their documents retained; no access to independent income; facing language barriers; in an abusive relationship with their trafficker; or living in fear of deportation – all factors which contribute to sexual exploitation and abuse.

We would suggest that:

a) it should be made clear on the face of the Bill that this list is non-exhaustive, rather than simply in the Policy Memorandum.

b) specific clauses could be added i) which consider behaviour consistent with grooming for the purpose of sexual exploitation ii) which consider protecting the position of trafficked women (or women involved in prostitution) where it can be shown that the accused knew or was reckless to the fact that the complainer was being held against her will by a third party.

We do not believe that arrangements made with the involvement of a third party are at all likely to be based on ‘free agreement’, and the legislation should be more explicit in providing protection to a complainant in a position of vulnerability.

There may also be other sections of the Bill where appropriate amendment could be made to take account of this view.

**Children and Young People**

We would also be keen to seek some assurances that the provisions of the Bill relating to young people and children also provided sufficient protection against sexual abuse and violence for those children and young people who have been trafficked.
Summary

Previous Parliamentary debates have referred to the dreadful crime of trafficking and the illegality of the trade. This is to be welcomed, but does not sufficiently speak up for those women who cannot speak freely for themselves, nor does it place enough responsibility on those who abuse the women.

The Sexual Offences (Scotland) Bill will make a significant difference in clarifying definitions, and placing responsibility regarding free agreement and reasonable belief, and will hopefully see an increase in successful convictions for rape and sexual assault.

We understand that providing protection for trafficked women and for prostitutes against abuse and sexual exploitation requires complex and varied measures, and that the issues will not always be exactly the same for prostitutes as for trafficked women – but the Sexual Offences (Scotland) Bill provides an opportunity to put down another marker that our society respects and values women’s lives, giving the most vulnerable women another way of beginning to challenge the abusive situation in which they find themselves.

STUC
September 2008
ANNEXE D: EXTRACTS FROM THE MINUTES

JUSTICE COMMITTEE
EXTRACT FROM MINUTES
17th Meeting, 2008 (Session 3)
Tuesday 24 June 2008

Work programme (in private): The Committee considered its work programme and agreed its approach to its scrutiny of the Scottish Government's draft budget 2009-10. In addition, the Committee agreed its Stage 1 approach to the Damages (Asbestos-related Conditions) (Scotland) Bill and the Sexual Offences (Scotland) Bill. The Committee also agreed its preferred candidates for appointment as advisers in connection with its scrutiny of the draft budget and the Sexual Offences (Scotland) Bill.

JUSTICE COMMITTEE
EXTRACT FROM MINUTES
25th Meeting, 2008 (Session 3)
Tuesday 28 October 2008

Decision on taking business in private: The Committee agreed to take item 6 in private.

Sexual Offences (Scotland) Bill: The Committee took evidence on the Bill at Stage 1 from—Sandy Brindley, National Co-ordinator, Rape Crisis Scotland; Louise Johnson, National Legal Issues Worker, Scottish Women's Aid; Susan Gallagher, Head of Policy and Research, and Frida Petersson, Policy Executive, Victim Support Scotland.

JUSTICE COMMITTEE
EXTRACT FROM MINUTES
26th Meeting, 2008 (Session 3)
Tuesday 4 November 2008

Decision on taking business in private: The Committee agreed to take item 3, and all future consideration of the main themes arising from the evidence sessions on the Sexual Offences (Scotland) Bill, in private.

Sexual Offences (Scotland) Bill: The Committee took evidence on the Bill at Stage 1 from—Jan McClory, Assistant Director, Children and Family Services, Children 1st; Dr Jonathan Sher, Director of Research, Policy & Practice Development, Children in Scotland; Martin Crewe, Director, Barnardo's Scotland; Kathleen Marshall, Scotland's Commissioner for Children and Young People; Netta Maciver, Principal Reporter, and Karen Brady, Head of Practice, Scottish Children's Reporter Administration.

JUSTICE COMMITTEE
EXTRACT FROM MINUTES
27th Meeting, 2008 (Session 3)
Tuesday 11 November 2008

Decision on taking business in private: The Committee considered the main themes arising from the evidence session.

JUSTICE COMMITTEE
EXTRACT FROM MINUTES
28th Meeting, 2008 (Session 3)
Tuesday 18 November 2008

Decision on taking business in private: The Committee agreed to take item 6 in private.
Sexual Offences (Scotland) Bill: The Committee took evidence on the Bill at Stage 1 from—
Euan Page, Senior Parliamentary Affairs Officer, The Equality and Human Rights Commission;
Mhairi Logan, Manager, LGBT Domestic Abuse Project;
Tim Hopkins, Policy and Legislation Officer, Equality Network;
Norman Dunning, Chief Executive, Enable Scotland;
Rev Graham Blount, Scottish Churches Parliamentary Officer;
Alistair Stevenson, Public Policy Officer, Evangelical Alliance;
Dr Gordon Macdonald, Parliamentary Officer, CARE for Scotland.

Sexual Offences (Scotland) Bill (in private): After discussion, the Committee agreed to accept
two late written submissions into evidence. In so doing, the Committee expressed its
disappointment that these submissions had been received so long after the stated deadline. The
Committee agreed that, in future, late submissions would only be considered in exceptional
circumstances.

Sexual Offences (Scotland) Bill (in private): The Committee considered the main themes arising
from the evidence session.

JUSTICE COMMITTEE
EXTRACT FROM MINUTES
28th Meeting, 2008 (Session 3)
Tuesday 18 November 2008

Sexual Offences (Scotland) Bill: The Committee took evidence on the Bill at Stage 1 from—
Temporary Deputy Chief Constable Bill Skelly, Family Protection Portfolio, and Detective Chief
Inspector Louise Raphael, ACPOS;
Professor Pamela Ferguson, School of Law, University of Dundee;
James Chalmers, School of Law, University of Edinburgh;
Professor Michele Burman, The Scottish Centre for Crime and Justice Research, University of
Glasgow;
Professor Gerry Maher QC, Former Commissioner, Scottish Law Commission;
Bill McVicar, Convener of the Criminal Law Committee, and Alan McCreadie, Secretary to the
Criminal Law Committee, Law Society of Scotland;
Ian Duguid QC, and Ronnie Renucci, Faculty of Advocates.

Sexual Offences (Scotland) Bill (in private): The Committee agreed to defer consideration of the
main themes arising from the evidence session to its next meeting.

JUSTICE COMMITTEE
EXTRACT FROM MINUTES
29th Meeting, 2008 (Session 3)
Tuesday 25 November 2008

Decision on taking business in private: The Committee agreed to take item 4 in private. The
Committee also agreed to take future consideration of draft reports on the Sexual Offences
(Scotland) Bill in private. Finally, the Committee agreed to take consideration of written evidence
submitted in response to the call for evidence and its approach to oral evidence on the Offences
(Aggravation by Prejudice) (Scotland) Bill in private at its next meeting.

Sexual Offences (Scotland) Bill: The Committee took evidence on the Bill at Stage 1 from—
The Rt Hon Elish Angiolini QC, Lord Advocate;
Fiona Holligan, Principal Procurator Fiscal Depute, and Andrew McIntyre, Head of Victim Policy,
Crown Office and Procurator Fiscal Service;
Kenny MacAskill MSP, Cabinet Secretary for Justice;
Gery McLaughlin, Sexual Offences Bill Team Leader, Patrick Down, Sexual Offences Bill Team,
and Caroline Lyon, Legal Directorate, Scottish Government.
Sexual Offences (Scotland) Bill (in private): The Committee agreed not to accept written evidence received after the deadline for submission of evidence.

Sexual Offences (Scotland) Bill (in private): The Committee considered the main themes arising from the evidence session.

JUSTICE COMMITTEE
EXTRACT FROM MINUTES
30th Meeting, 2008 (Session 3)
Tuesday 2 December 2008

Sexual Offences (Scotland) Bill (in private): The Committee considered the possible contents of a draft Stage 1 report.

JUSTICE COMMITTEE
EXTRACT FROM MINUTES
31st Meeting, 2008 (Session 3)
Tuesday 16 December 2008

Sexual Offences (Scotland) Bill (in private): The Committee considered a draft Stage 1 report and agreed to continue consideration at its next meeting.

JUSTICE COMMITTEE
EXTRACT FROM MINUTES
1st Meeting, 2009 (Session 3)
Tuesday 6 January 2009

Sexual Offences (Scotland) Bill (in private): The Committee considered a draft Stage 1 report and agreed to continue consideration at its next meeting.

JUSTICE COMMITTEE
EXTRACT FROM MINUTES
2nd Meeting, 2009 (Session 3)
Tuesday 13 January 2009

Sexual Offences (Scotland) Bill (in private): The Committee agreed its Stage 1 report. In so doing, various changes were agreed to.
On resuming—

Sexual Offences (Scotland) Bill: Stage 1

The Convener: Item 4 is our first evidence session for the Sexual Offences (Scotland) Bill. The committee will take evidence from Rape Crisis Scotland, Scottish Women’s Aid and Victim Support Scotland.

I welcome the first witness panel: Sandy Brindley, national co-ordinator of Rape Crisis Scotland; and Louise Johnson, national legal issues worker for Scottish Women’s Aid. We are grateful that you have already made written submissions, which we have found particularly useful. That being the case, we will go straight to questions.

Cathie Craigie (Cumbernauld and Kilsyth) (Lab): Good morning. In their evidence on section 1 of the bill, both your organisations agree that there should be an offence of sexual assault by penetration. What sort of conduct would be covered by such an offence?

Sandy Brindley (Rape Crisis Scotland): It would be penetration by objects. Committee members will remember that, in its first consultation report, the Scottish Law Commission proposed a separate offence along such lines. However, the commission changed the proposal in its final report and subsumed the offence within an offence of sexual assault. We would prefer to revert to the original proposal.

Louise Johnson (Scottish Women’s Aid): Scottish Women’s Aid agrees with Rape Crisis Scotland’s interpretation.

Cathie Craigie: Is your view based on your experience of supporting women through difficult times?

Louise Johnson: Women have commented that violation of their person by an object is as distressing as penile penetration. Although we clearly wish to differentiate between penile penetration and penetration by an object, they are equal in severity. When someone’s personal integrity has been transgressed and abused by someone else in either of those ways, the trauma is equal. From what women have told us, that has to be acknowledged.

Cathie Craigie: Those were very clear answers. Thank you.

The Convener: We will now turn to the questions of consent and reasonable belief.

Robert Brown: Good morning. I think that everyone would accept that these are tricky areas. Rape Crisis Scotland has suggested that it is “absurd” to argue that advance consent given at 6 o’clock in the evening should still apply at 1 o’clock in the morning after people have got drunk. Will you elaborate on that, bearing in mind the indefinite nuances of human behaviour?

Sandy Brindley (Rape Crisis Scotland): It would be penetration by objects. Committee members will remember that, in its first consultation report, the Scottish Law Commission proposed a separate offence along such lines. However, the commission changed the proposal in its final report and subsumed the offence within an offence of sexual assault. We would prefer to revert to the original proposal.

Louise Johnson (Scottish Women’s Aid): Scottish Women’s Aid agrees with Rape Crisis Scotland’s interpretation.

Cathie Craigie: Have you had any discussions with the Government on possible amendments to the bill to incorporate your proposal?

Sandy Brindley: The Government’s position seems to be that it would prefer to keep the offence within sexual assault. I think that the Government thinks that it would be too complicated to have three types of charge—rape, sexual assault, and penetration by an object.

Cathie Craigie: But have you had discussions with the Government on this?

Sandy Brindley: Yes, we have had some discussions.

Cathie Craigie: What advantages would there be if your proposal were included in the bill?

Louise Johnson: It would emphasise the severity of the behaviour and of the act perpetrated on someone’s personal integrity. We are talking in particular about violence against women, but the violation of someone’s person by an object should be acknowledged as being equal in severity to rape. If that offence were enshrined as a separate offence, and not subsumed among other offences, it would give weight to that view of the severity of the offence.

Cathie Craigie: Is your view based on your experience of supporting women through difficult times?

Louise Johnson: Women have commented that violation of their person by an object is as distressing as penile penetration. Although we clearly wish to differentiate between penile penetration and penetration by an object, they are equal in severity. When someone’s personal integrity has been transgressed and abused by someone else in either of those ways, the trauma is equal. From what women have told us, that has to be acknowledged.

Cathie Craigie: Those were very clear answers. Thank you.

The Convener: We will now turn to the questions of consent and reasonable belief.

Robert Brown: Good morning. I think that everyone would accept that these are tricky areas. Both of you have made observations on the question of advance consent. Rape Crisis Scotland has suggested that it is “absurd” to argue that advance consent given at 6 o’clock in the evening should still apply at 1 o’clock in the morning after people have got drunk. Will you elaborate on that, bearing in mind the indefinite nuances of human behaviour?

Sandy Brindley: We are really concerned about the introduction of the concept of prior consent into legislation. At the moment, if someone says that they were asleep, the Crown has to prove that they were asleep. If the notion of prior consent is introduced, it will make rape even harder to prove—and it is already extremely hard to prove. The Crown would need to disprove the existence of prior consent in a rape trial. That goes against the philosophical underpinnings of the bill, which are based on sexual autonomy—that is, that a person can withdraw consent at any time. The notion of prior consent is problematic.

If the bill is passed as it stands, it is not hard to imagine that every single accused person in rape trials will be considering a defence of prior consent. How can the Crown disprove a negative? I suppose that the Crown already has to do that, but we would have concerns about giving it another negative to disprove.

Robert Brown: Is this a question of principle, or a question of where the burden of proof should
lie? If the burden of proof lay with the defence, the proposition might be different.

**Sandy Brindley:** I think that, as drafted, the bill does not put the burden on the accused—although I could be wrong about that. However, it is unclear how the question of advance consent would be proved in court.

**Robert Brown:** I presume that whether people have consented is raised from time to time anyway. Often, that goes to the heart of the offence. Is it possible by however the thing is defined to avoid that being raised by the accused in such cases?

10:30

**Sandy Brindley:** Our experience with legislation on sexual offences is that we need to be cautious about unintended consequences. For example, the legislation on sexual history, which was supposed to improve protection, has had the opposite effect. That is why we are cautious about the wording of paragraphs (a) and (b) of section 10(2). We are concerned that introducing the concept of prior consent could have the unintended consequence of worsening the situation.

**Robert Brown:** One way or the other, does the law not have to deal with the huge practical issues that arise from such situations? That gives everybody problems. What arrangement would you prefer for dealing with the matter?

**Sandy Brindley:** I would not say that we have an absolute solution to propose. The concept is problematic. We feel that prior consent has no place in any legislation that is based on sexual autonomy. However, I understand the intention behind including it, which is not to criminalise consenting behaviour, such as that between a long-standing couple. Prior consent is problematic and we are interested in what solutions are possible.

**Robert Brown:** The committee is interested in any further views from you on alternatives that might be developed, because pulling all that out is important.

I will take the issue further. Consent is important in many other circumstances. One example that has been given to us is that people give consent to anaesthesia before an operation, although it is obvious that that is not quite the same situation. Given that advance consent is used in other realms of the law for perfectly legitimate purposes, why should it be considered “absurd”?

**Sandy Brindley:** The concept goes against the bill’s principles that consent is not a contract and that consent can be withdrawn at any time. In our submission, we gave the example of someone who gives consent at 6 pm to sex at midnight but who is so drunk at midnight that they cannot withhold their consent. In that situation, the provisions would be contrary to the principle of sexual autonomy, because if that person was drunk to that extent, they could not withhold their consent.

**Robert Brown:** The difficulty is that people do not analyse matters in the legal way that we are trying to apply. We are dealing with a serious crime that leads to serious consequences for someone who is convicted of it. I still have difficulty in getting to the heart of what advance consent means. A common example, which you gave, is of someone who is all set for sex later in the evening but who becomes drunk. In those circumstances, is the conduct rape? Consent has not been withdrawn, but it has not been renewed, either. Where does the balance lie for the definition of the offence?

**Sandy Brindley:** I appreciate that the question is complex. Our view is that if somebody is so drunk by midnight that it is clear that they have no capacity to consent, any prior indication should not hold. Such consideration of sexual matters and how they are negotiated is difficult but, if somebody is almost unconscious, do we really think that it is acceptable for somebody to have intercourse with them because of something that they said at 6 pm? That approach is not helpful.

**Robert Brown:** The problem is that the matter often boils down to difficulties with the burden of proof rather than with the principle, which is—oddly—sometimes a little more straightforward.

Section 10(2)(c) concerns violence that has been used against the complainant, which is a tortuous subject for the same sorts of reasons. Under that provision, “free agreement to conduct is absent” when someone “agrees or submits to the conduct because of violence ... or ... threats of violence”.

Rape Crisis Scotland says that it is not convinced that that will cover agreement or submission because of earlier violence or threats of violence. In a slightly different way, we are dealing with the same issue as before. Why should that not apply? Obviously, under the bill, the submission or agreement has to be a consequence of the violence. Why is that unsatisfactory?

**Sandy Brindley:** The Scottish Law Commission made it very clear that it did not intend what it proposed to be interpreted as the violence or threat of violence having to take place at the same time as the rape. I am not clear that is the message that we get from the bill. That may be the intention, but it is not our reading of the bill. In
asking whether the drafting has the same effect as the intent behind the legislation, we are being cautious.

Robert Brown: So, your proposition is that account should be taken of the threat of violence or actual violence, whether committed contemporaneously with the crime or at an earlier point, provided that it caused the result. Is that fair?

Sandy Brindley: Yes.

Robert Brown: That may be a matter of tinkering with the wording.

Sandy Brindley: Exactly.

Robert Brown: Do you have any suggestion as to how that could be done or is the question one for the lawyers to take forward?

Sandy Brindley: It is for the lawyers.

Louise Johnson: We would like there to be a presumption of no consent should apply in circumstances in which the complainer had been the victim of sexual or physical abuse at the hands of the accused on previous occasions.

For clarification, are you referring to previous convictions or allegations? What is the cut-off point for those?

Louise Johnson: That is an interesting point. Finding evidence of such abuse is one of the main difficulties. If there were evidence of a pre-existing relationship in which there was a history of one party—in our case, obviously, it will be the woman—being subject to violence or domestic abuse, and perhaps a history of complaints being made about coercion, it should be possible to use that. The problem is finding evidence of that and proving it. We are looking for a presumption that takes account of prior offences or behaviour.

Robert Brown: Is any qualification needed? Clearly, it is one thing for someone to have committed 10 offences of violence over the previous two years, but what if they had committed one such offence 10 years ago? What is the cut-off point? What would lead to the presumption that you propose?

Louise Johnson: A number of organisations raised the question of a cut-off point. I cannot say what it would be; the interpretation would have to be made by the Crown in prosecuting the offence. The Crown would have the evidence and it would have to take the decision.

It could be dangerous to put time limits on offences. Even if given evidentially, prior convictions do not fully reflect the fact that a relationship involved violence and sexual abuse—after all, we are talking only about someone who has been caught or reported to the police. Obviously, concrete evidence is required. The concept that we propose is incoherent and difficult to get across. As I said, we would like to see the bill reflect historical violence or sexual abuse.

Sandy Brindley: Obviously, the Crown would need to prove consequence. As Louise Johnson said, it would have to prove that the offence was a direct effect of previous violence. Ultimately, without the qualification of consequence, one would be saying that, where there is domestic abuse, there is no possibility of consensual sex. We are not saying that; we are saying that there are times when direct consequence can be considered.

Robert Brown: One has to be very careful about including things other than formal court convictions because, as with everything else in such cases, they would be subject to uncertainty.

Louise Johnson: We do not want to persecute women who, although experiencing domestic abuse, still have a consensual sexual relationship, but we want to cover the women who—frequently, I have to say—do not. As Sandy Brindley said, the Crown is probably the best source of advice on this matter.

Robert Brown: Bearing in mind that they are "without prejudice" to the general proposition in section 9, are the circumstances that are set out in section 10(2) adequate? Should anything be added or removed?

Sandy Brindley: We are concerned about the operation of section 10. For example, we are unclear whether the accused will still be able to use the defence of consent if the Crown has proved the existence of any of the circumstances in section 10(2). We—and, indeed, a number of other people—had assumed that that would not be the case but, having looked at the detail of the bill, we are not so sure. The point requires consideration because, after all, there is not much point in having such a list if the whole thing comes
back to the question whether the accused had a reasonable belief in consent. As a result, section 10(2) needs to be clarified.

Nigel Don (North East Scotland) (SNP): I wanted to come in much earlier, but I must say that I was interested in your comments about the presumption against consent in an on-going relationship in which there has been violence. I think that your responses have highlighted my own concern not only about the difficulty of knowing how much weight to give to evidence of something that is to an extent—however small—present in many relationships and how on earth we balance such considerations but about whether the presence of such evidence means that consent is impossible. Taking such a position might make good law but is actually a social nonsense.

I am not sure that I have even got a question for you. It is clear from what you have said that it is very difficult to be black and white on this matter. Given that this is a grey area, we must ensure that the provision is written in such a way that the court and the prosecution can, between them, consider the right issues and are forced to use their own judgment to sort out what is and is not substantial. We cannot do that for them.

I see that the witnesses agree with me.

The Convener: I think that they very fairly accept that fact.

Louise Johnson: We do.

The Convener: Paul Martin has some questions on reckless behaviour.

Paul Martin (Glasgow Springburn) (Lab): Why has Scottish Women’s Aid recommended that a number of offences in the bill be extended beyond intentional wrongdoing to include reckless behaviour?

Louise Johnson: In examining this issue, we focused in particular on children. In cases of domestic abuse, a child might be present when other things such as the presentation of sexual images, indecent communication and sexual activity are going on. The person responsible might in certain circumstances not have any deliberate intention, but we feel that their recklessness in not considering the consequences of their behaviour on a child and whether their actions are incorrect should be enough with regard to these offences.

Paul Martin: Does existing legislation not cover that kind of behaviour?

Louise Johnson: I believe that the bill refers to intentional behaviour, which means that a person intends their actions to have certain consequences for a child. However, the bill should also recognise situations in which, without necessarily intending it, people recklessly participate in certain activities without being concerned that a child might be present or, indeed, recklessly encourage them to be present at a viewing of or to view pornography, for example.

Paul Martin: Do you feel that the matter should be dealt with through the various sentencing tariffs and that the available tariffs should be increased?

10:45

Louise Johnson: The problem is that recklessness is not included in the wording. You would have to speak to the Crown Office and draftspeople to do this, but we would suggest changing the wording to cover recklessness, in addition to intentional behaviour. We have not considered sentencing, but if a child was affected as a consequence of the behaviour, there would be a case for the sentencing to reflect that.

Paul Martin: Would you refer only to children in that?

Louise Johnson: Children are powerless in a number of situations. They can be in a situation—in front of a television or other people—that they cannot take themselves out of, and they can be prevented, intentionally or otherwise, from leaving. While they are unable to protect themselves, we have the responsibility to protect them by ensuring that people are held accountable for the consequences of their reckless behaviour on a child. That should be covered.

Sandy Brindley: We would be keen to consider the matter in relation to both children and adults. At the moment, the barrier of proof is set quite high, and the Crown Office would need to prove both intent and purpose. The purpose could be problematic to prove, so the concept of recklessness—or just removing the provision dealing with purpose—could deal with the concerns.

The Convener: We move now to the issue of sexual abuse of a position of trust with reference to mentally disordered persons.

Nigel Don: Scottish Women’s Aid has expressed concerns about the availability of the defence under section 36(2) that the accused was the complainer’s spouse or civil partner. Do you believe that it should never be a defence in such a case that the accused was married to the complainer at the time?

Louise Johnson: That question probably takes us to a discussion that is similar to our earlier discussion on consensual sexual relations in a relationship where abuse is present, and our argument is the same. We are concerned about a situation in which a mentally disordered person is not coerced but persuaded into a sexual
relationship that is not in their interest and in which they are abused.

I do not know how the issue of consent could be covered; you would need to ask the Crown how it would prosecute and what the best wording would be. However, we need to consider situations in which the original sexual relationship was not consensual. Again, proof might be an issue, but we are back to the same situation as with domestic abuse: a broad-brush presumption would not necessarily be the way forward, but the eventuality must definitely be covered.

**Nigel Don:** In all the situations that I can get my mind around, the partnership will surely have been of long standing.

**Louise Johnson:** Not necessarily.

**Nigel Don:** Is it really likely that people will form a partnership in which one party is mentally disordered? Are we not dealing with situations in which one party probably has a degenerative disease, which by definition takes time?

There is a serious risk of situations developing in which one party in a long-standing couple develops some kind of dementia—given the nature of human life these days—with the other party to that marriage of decades suddenly being told that sex is off limits because their partner can no longer give the consent that they gave before. Is there not that risk?

**Louise Johnson:** You would probably have to consider the nature of the relationship beforehand. If someone had a degenerative disease, the issue of on-going consent would have to be considered, including what the person was consenting to and their general relationship with the person with whom they were engaging in a sexual relationship.

We are more concerned about someone who has had a mental disorder from childhood and who is being preyed on. The situation that we envisage is that of a woman who, for whatever reason, is being preyed on by someone in a position of trust such as a friend or acquaintance—they are abusing that position for the sole purpose of sexually abusing that woman. In that situation, we would have to consider whether the person, when they entered into the sexual relationship with the person with a mental disorder, had checked what was going on with that individual and whether there seemed to be acquiescence or consent. That can be explored. Obviously, the issue depends on how the Crown can prosecute. Again, that comes down to checking consent and reasonable belief.

**Nigel Don:** Does the provision not presume that there is a marriage or civil partnership? That is what section 36(2) says.

**Louise Johnson:** It actually mentions spouses, civil partners and, I think, sexual partners. Is that right? I think that there is wording about sexual partners so, off the top of my head, I do not think that a formal relationship needs to be involved.

**Nigel Don:** I confess that that is not my reading. To me, section 36(2) says that person B is person A’s spouse or civil partner.

**Louise Johnson:** It would be a defence if they were a spouse or civil partner. However, we are also talking about situations in which people are in sexual relationships and are not spouses or civil partners. We are back to the situation of rape in marriage—that is a parallel. A civil partner or spouse has the same protection as anyone else, whether or not they have a mental condition. I think that the section is trying to refer to people who are in a long-standing relationship. As I said, we would need to consider abuse within such relationships, which could be comparable to rape in marriage. However, we are mostly concerned about people who are having improper sexual relations with women who did not have the capacity to consent when the relationship started in the first place.

**Nigel Don:** In your defence, I point out that section 36(2)(b)(i) seems to cover sexual relationships. I think that that is what you were referring to.

**Louise Johnson:** Thank you.

**Nigel Don:** I correct myself—I see where you are coming from.

Now that we have had that discussion, I would still like to know how, in general terms, you want the provision to be modified. The text is a matter for lawyers, so we will not consider that, but what would you like to be added or perhaps taken away to deal with your concerns?

**Louise Johnson:** Somewhere along the line, we would like a statement to the effect that the giving of consent to one sexual act does not by itself give consent to a different sexual act. If I remember correctly, that was mentioned in the Scottish Law Commission’s recommendation. Our submission on the bill states:

“However, it is perfectly possible for the spouse, civil partner or sexual partner to exploit and abuse the other person, which can happen in relationships where the person does not have a mental disorder, as highlighted in Recommendation 6 of the 2007 consultation which states, “The giving of consent to one sexual act does not by itself constitute consent to a different sexual act.”

We perhaps need reference to consent. We probably need to speak to the Crown and perhaps the draftspeople about the precise wording that we could use. That would be a good idea.
Nigel Don: I accept entirely the general point about consent to one thing not being consent to another—I suspect that that applies throughout. Forgive me, but I am still slightly confused about how that relates to section 36(2), because that is about defences to charges under section 35, which, as I read it, is about abuse of trust, rather than consent to one thing or another.

Louise Johnson: Let us take rape in marriage as a parallel to a situation in which there is an abuse of trust. Just because someone is a spouse or civil partner, that does not mean that their partner cannot commit an offence against them if they did not consent on a particular occasion. Off the top of my head, I cannot tell you the exact wording that we are looking for in sections 35 and 36. However, I would welcome additional discussions with the Crown and the draftspersons about the wording that we could use to cover all the bases, as you said, but not in a way that would be overly restrictive and therefore penalise people who did not have intent. Part of the wording should address intention—when the Crown considers prosecuting a case, it should ask what the person’s intention was. Mens rea would be very important in that regard. I hope that that answers your question.

Nigel Don: I do not think that we can take it any further at the moment, but thank you for the discussion.

The Convener: Stuart McMillan has a question about relationships between older children.

Stuart McMillan (West of Scotland) (SNP): Good morning. In its evidence to the committee, the Church of Scotland said:

“We believe that the law is brought into disrepute if legislation is passed which is not intended to be enforced.”

Rape Crisis Scotland says in its submission that it supports the Scottish Government’s policy of continuing to criminalise sex between older children

“as long as this is supported by a policy of non-prosecution in cases which are genuinely consensual.”

What value is there in enacting criminal laws that everyone knows will not result in criminal proceedings?

Sandy Brindley: We have taken a pragmatic approach to the provisions. Our concern about moving to the decriminalisation of consensual sex between older children is based on the question whether there is a difficulty with the current position, which is that such sex is criminalised but cases are not actively prosecuted when there is genuine consent. We are not aware of evidence that there is significant difficulty with the current position.

In being pragmatic, we are aware of the conviction rate for rape. As it is almost impossible to get a conviction, having a possible charge of unlawful sexual intercourse at least gives prosecutors an option in cases in which, although there might not be enough evidence for rape, the sex was not consensual but coercive.

Louise Johnson: I agree with Sandy Brindley. Our view is that there should be a case-by-case approach and that prosecution would take place where it had to take place, as it were. We cannot move away from protecting children. If the relevant provisions were not in the bill, children would be at risk. We have to protect children from situations in which consent is not present. There is a great debate about what consent means to young teenagers who are under pressure from the media and their peers to acquiesce, be grown up and engage in a sexual relationship with someone. There has to be the opportunity to protect children in such circumstances, which is why the provisions would be used when they had to be used—if that makes sense.

Sandy Brindley: The area is difficult. I get the impression that England and Wales really struggled with it and have not come up with a helpful solution. Having weighed up the policy’s implications against the proposal from the Scottish Law Commission to decriminalise, our pragmatic view is that the policy in the bill takes the best approach, although there are arguments on both sides.

Stuart McMillan: The bill extends the criminal law to bring young women within its ambit as offenders. For example, a 15-year-old girl who allows or encourages her 15-year-old boyfriend to have intercourse with her does not, under the current law, commit an offence; however, she would commit an offence under section 27(4) of the bill. Does Rape Crisis Scotland support the extension of criminal liability to include young women?

11:00

Sandy Brindley: It depends what the prosecution policy is. I certainly would not support prosecution in situations in which activity was genuinely consensual. I do not think that that would be in anyone’s interests. It all depends on the circumstances. I see the provision being used in cases in which there are questions about whether the activity was genuinely consensual.

The Convener: If we were not to prosecute in such circumstances, what would you consider to be the appropriate response?

Sandy Brindley: It would depend very much on the circumstances. It would not necessarily be helpful for every single case to be referred to the
children’s panel. For a start, the children’s panel would struggle to cope with the level of referrals. We would need to respond on a case-by-case basis, depending on whether there were concerns about the behaviour.

**The Convener:** You may well be right—that is a sad commentary on our times.

**Nigel Don:** Ms Brindley said that the section on older children should be used when it needed to be used—it should be available. Can you envisage circumstances in which that section would need to be used but in which the use of section 1, section 2 and the following sections would be inappropriate? Most of the things that I conceive of as being non-consensual would be covered by the general principles in section 1, section 2 and the following sections.

**Sandy Brindley:** At the moment, the Crown has the option of going for a conviction of unlawful sexual intercourse where it is not able to prove rape. There could be an alternative charge in such cases.

**Nigel Don:** Section 2 covers unlawful sexual intercourse without consent. Are we talking about considering prosecuting older children in circumstances in which consent was present? That seems to be the only circumstance in which section 1 and section 2 would not apply.

**Sandy Brindley:** Although those sections might apply, the question is whether the offence can be proved. We know that in Scotland the conviction rate for rapes reported to the police is 2.9 per cent. There might be circumstances in which using section 27 is another option for prosecutors.

**Nigel Don:** Section 2 covers unlawful sexual intercourse without consent. Are we talking about considering prosecuting older children in circumstances in which consent was present? That seems to be the only circumstance in which section 1 and section 2 would not apply.

**Sandy Brindley:** Although those sections might apply, the question is whether the offence can be proved. We know that in Scotland the conviction rate for rapes reported to the police is 2.9 per cent. There might be circumstances in which using section 27 is another option for prosecutors.

**Nigel Don:** Forgive me, but I still do not see why that is another option. I do not think that the burden of proof for offences under section 1 and section 2 is different from the burden of proof for offences under section 27, which covers older children. I am struggling to see why we need the provisions in section 27 as well as the provisions in section 1 and section 2 if we are dealing with cases in which the behaviour is non-consensual.

**Louise Johnson:** The difficulty is proving when activity between children who are over 13 and under 16 is consensual and when it is non-consensual. I do not know whether the policy intention was to say to children who are engaged in such conduct that we are not going to charge them with rape. I have no idea whether the policy intention was not to stigmatise such behaviour.

**Sandy Brindley:** This is about questions of consent. With rape, it is obvious that lack of consent needs to be proved. Rape is incredibly difficult to prove, and that will continue to be the case if the bill is passed as drafted. The provisions in section 27 would provide another option in cases in which there were serious concerns about non-consensual behaviour. The way that we formulate the offence of rape makes it very hard to get a conviction.

**Nigel Don:** I will put my teenage hat on at this point. If I were a teenager in circumstances in which there was consent, as I saw it, I would think that you were generating an offence that was specifically designed to penalise me. It would seem to me that you could not prove lack of consent, but you were going to get me anyway.

**Sandy Brindley:** We are taking a pragmatic approach. Ideally, we would have a formulation for rape that was provable in more than 3 per cent of cases. Prosecutors are being offered another option in cases in which there are serious concerns about a pattern of behaviour around non-consensual or coercive sex, to which our law cannot currently respond because of the way in which it is formulated.

**Nigel Don:** If I may, I will play devil’s advocate for a little bit longer. As I understand it, we are proposing that the law should be a convenient tool for the prosecution to use in cases in which there are serious concerns—those are your words—leading to a criminal conviction and record, but that we will turn a blind eye in the majority of cases. If I could turn the clock back to when I was a teenager, that would seem a tad unfair to me. I am not sure that I am desperately happy that we should be writing the law of the land in that way.

**Sandy Brindley:** Both options have significant consequences, such as criminalising or decriminalising, or having a policy of non-prosecution. I understand why the Scottish Law Commission has recommended not legislating for an offence when there is no intent to prosecute in most cases. We support the bill’s approach for a pragmatic reason. There are real concerns about coercive sex and the pressure on young people to have sex, and there are also worries about what decriminalising consensual sex would mean for children under the age of 16.

**Nigel Don:** I am not sure how we write the law; perhaps we should let the people who use the words worry about that. Could the law say that, in some sense, it is unlawful to have sex in such circumstances and, if someone does, they will be liable to be referred to the children’s panel—although I take the point about resources—and leave sections 1 and 2 as the criminal part? In other words, we would still have the adult law on rape and sexual assault, but we could make sure that it is understood that sex between the ages of 13 and 16 has consequences, albeit not criminal ones. That was all very convoluted, but does it sound like a way forward?
Sandy Brindley: I think that the Scottish Law Commission’s proposal has been changed in the bill.

Louise Johnson: If I remember correctly, the Scottish Law Commission’s original proposal in its draft bill was that such cases should be referred to the children’s hearings system, about which there were a number of concerns. For example, people were concerned about the possibility of the children’s hearing making an order to send a child to a residential establishment. What would that mean? Are we going to lock up young people for having sexual relations, whether consensual—obviously, the cases that we are discussing involve consent—or otherwise?

Sandy Brindley and I acknowledge that this is a very difficult area of law. How do we deal with making sure that children are protected, that the Crown has discretion to decide when to prosecute and when not to prosecute, but that young women—with whom we are concerned—are protected when consent might not necessarily be what we, as adults, would recognise as consent? As adults, we would consider the pressures that are put on young children.

Unfortunately, I do not think that we have any answers. I agree with Sandy Brindley that the situation is difficult and that neither of the two options is ideal, but what do we do? It is dangerous to give out a carte blanche, which would not protect young people at all; it would also remove the consequence of young people looking at and taking responsibility for their behaviour.

The Convener: It is fair to say that under schedule 2 to the bill there is the facility for alternative charges—if, of course, the Crown is disposed to prosecute in the first place—on the basis that one cannot change in an indictment any allegation about what the accused person has done. Interpretation would be a matter for the court and subject to judicial direction.

Robert Brown: Could the discretion of the Lord Advocate and the children’s reporter in such circumstances square the circle? The bulk of cases in which there was no real concern—beyond the fact that underage sex had taken place—would not go any further. However, in cases in which there were extra elements, such as an age gap or other causes of concern, people could be prosecuted or taken to the children’s panel. Would discretion for the prosecution not square the circle in those circumstances?

Sandy Brindley: I agree. Each case would have to be considered according to its circumstances, but if there is genuine consent, no cause for concern and no pattern of behaviour, it is hard to see how it would be in the public interest to prosecute. There might be other cases in which it would be in the public interest to prosecute.

Cathie Craigie: I am concerned by part 4 of the bill, and in particular by the suggestion that neither the option of reporting someone to the children’s hearings system nor what is proposed in the bill is ideal. Given that we are talking about a very important group of young people, is it right that the Parliament should legislate when the situation that the legislation would create is not ideal? We may have an opportunity to consider the matter more widely. Children 1st points out in its evidence to the committee that sex before the age of 16 is not the norm—a minority of young people engage actively in sexual activity before the age of 16.

Sandy Brindley: Both the Scottish Law Commission and the Government, in its consideration of the SLC’s proposals, have given the issue significant consideration. I am not aware of a better formulation. The formulation in the bill is far better than the legislation down south, which criminalises all sexual activity between older children. That is not helpful. I am not sure that there is a better formulation, as long as we square the circle, as Robert Brown said, through giving the prosecution discretion.

Louise Johnson: I agree with Sandy Brindley. Prosecution discretion and the guidelines from the Lord Advocate are probably the way to ensure that the approach will work.

The Convener: Angela Constance has some final catch-all questions.

Angela Constance (Livingston) (SNP): Ms Brindley said in previous answers that the conviction rate for rape in Scotland is 2.9 per cent. I understand that Rape Crisis Scotland has intimated that the bill’s proposals will not change that significantly. What measures would change the conviction rate for rape?

Sandy Brindley: The bill, which represents a welcome tidying up of the law, is important. It is positive that it broadens the definition of rape, particularly to include male victims, but we must be clear about its limitations. It does not look at evidence at all. We are particularly concerned about sexual history and character evidence. As I said, the evaluation puts it beyond doubt that the current legislation fails to protect complainers from such evidence. We still need to give serious consideration to issues of evidence in sexual offence trials. Medical records are increasingly being brought up in such trials. If someone has had a mental health problem in the past and has been on anti-depressants, that is often used to suggest that they are not a reliable witness. We are concerned that women are increasingly deterred from reporting rape because of the use of sexual history evidence and medical records. We
must consider such issues, which cause us grave concern.

We need much better information about why cases are dropping out and where in the system that is happening. We need a full attrition study for Scotland. The data are currently so poor that we do not even know how many cases fall because of complainer withdrawal as opposed to prosecution decisions. We need much better data about what is happening.

Angela Constance: Is the bill the place to make those changes? What you describe is essentially court practice. Does that require action elsewhere or could the issues be addressed in the bill?

Sandy Brindley: I would be reluctant to suggest that sexual history and character evidence should be dealt with in the bill, because in Scotland we have now tried twice to legislate on the matter and we have failed. We should not try quickly to resolve the problem as the matter requires serious consideration.

We are unclear at this stage whether the referral to the Scottish Law Commission included consideration of sexual history and character evidence, but that would be a helpful way forward. We need to consider how to address the difficulties that exist with rape trials in Scotland and why it is difficult to get a causal link. Is our conviction rate so low because of the use of medical records and sexual history evidence? We know that most cases do not get to court.

Our priority is for the bill to address the issue of prior consent—that is the thing that we are most worried about. I believe that it will make rape harder to prove, and I do not think that any of us wants the conviction rate to fall any further.

Louise Johnson: We are concerned about the prior consent issue, and we are also concerned about expanding the definition of violence or threat of violence. We need to concentrate on what is going on. I defer to Sandy Brindley’s superior knowledge of which legislative provisions should be considered, but I echo her comments on the attempts that have been made so far to deal with character evidence. Unfortunately, the legislation has not worked. That is a shame, because there is nothing to prevent it from working. Perhaps the committee will investigate that further.

The Convener: Thank you for your evidence this morning. We are dealing with sensitive matters that are also difficult and complex. Issues of human behaviour will always be difficult and complex, but your evidence has been welcome and useful. Thank you.

11:16

Meeting suspended.

11:17

On resuming—

The Convener: The second panel of witnesses is from Victim Support Scotland. I welcome Susan Gallagher, head of policy and research, and Frida Petersson, policy executive. Thank you for your written submission. The fact that you provided it in advance enables us to move straight to questioning, which will be led by Nigel Don.

Nigel Don: Good morning, ladies. Thank you for waiting patiently. I hope that we will continue to get an appropriate balance between the sensitivity of the subject and the robust debate that we recognise we need, because this is difficult stuff.

My reading of your submission is that you want all forms of non-consensual sexual penetration to be defined as rape. Your nods suggest that that is the case. Why do you believe that penetration with something other than the penis should be regarded as rape?

Frida Petersson (Victim Support Scotland): Although we accept that the penis is a sexual organ, we do not accept that that fact alone adds another dimension of severity to the attack. Along with Children 1st, we question the distinction that is made between vaginal, anal and oral penetration and ask how the separation has been made. In our experience, victims experience the same distress and psychological impact regardless of what is used to penetrate. In some situations, the victim might not even know what is used. That is the case if, for example, a blindfold is used, or the victim is in such a position that they cannot see the attacker.

Furthermore, penetration with an object has potential to cause more internal damage. Due to physical proportion, the damage that can be done by penile penetration is limited, whereas in the case of penetration with objects, longer and sharper objects can be used.

Extending the definition of rape to include objects and other body parts would create a gender-neutral crime. We are happy to note that both men and women can be recognised as victims of the crime, but the crime can currently be committed only by men. If objects and body parts other than the penis are included in the definition, the crime will be completely gender neutral. That would also remove the need for an overlap between the current offence of sexual assault and that of rape. We find it somewhat confusing that the same act can be tried under two different sections. The offence is fairly easy to define if we encompass the non-consensual penetrative acts.

We discussed whether to include oral penetration. There are many situations in which oral penetration by an object or by any other body
part might not be seen as a crime at all, especially not a sexual crime. We propose to keep that in, because it is already included in the bill, under sexual assault in section 2. Oral penetration is already included in the same offence as penile penetration, and it gives access to the same range of penalties. We do not choose to argue for the removal of that offence, but we do not argue for the addition of anything new to the offences. We simply wish to collect all non-consensual penetrative acts into one section.

Nigel Don: Do you agree that everything that you wish to be considered as criminal is covered by sections 1 and 2, and that your concern is more about where those offences are put and how they are described?

Frida Petersson: Yes.

Nigel Don: One of the defences that has been used by those who drafted the bill—the people who put the words together—is that some overlap or uncertainty is almost inevitable. The analogy that springs to my mind comes from sailing. It is easy for someone to say that they are sailing on the sea, or up a river, but it is relatively difficult for them to say at what point they penetrate the river. Sometimes it is pretty obvious, but the precise location of the mouth of a river can be uncertain. Without wishing to overdo it, I suggest that that describes some of the relevant body parts. If it is not known in court, as a matter of fact, quite what happened, some uncertainty and overlap in the law is surely useful. Is there a particular value in segmenting the various offences in that regard?

Frida Petersson: We understand that comment, and a case may be heard under either section 1 or section 2, but it would usually be known whether there had been penetration. We believe that it would be more difficult to know what was used to penetrate. Therefore, it would be beneficial to have all penetrative acts under one section.

Nigel Don: If we accept that everything is covered by sections 1 and 2, and that the maximum penalty is the same for offences under sections 1 and 2, then why worry, why distinguish and why fret about it? In section 1, we have simply codified the law of what we have historically called rape. We have covered absolutely everything else that we want to worry about as sexual assault in section 2. Why is it an issue? I understand that it is, but I would like to clarify why you feel that it is an issue. It seems to be only a matter of words.

Frida Petersson: We do not want to make a judgment that all non-penetrative acts are necessarily less serious. However, we would like the law to distinguish between penetrative and non-penetrative acts and we would like such acts not to be assembled in the same section, as they are currently, as sexual offences, in section 2. We listened to our colleagues from Rape Crisis Scotland and Scottish Women’s Aid speaking earlier, and they suggested an alternative, particular crime of penetration by objects being specified. We would be quite happy with that, too.

The Convener: I have some slight difficulty with what you are suggesting. Some years ago, there was an appalling case in Aberdeen, in which a man inserted a police baton into a woman’s vagina. That was an appalling offence. Suppose that that offence had been carried out by a woman: would you define that as rape?

Frida Petersson: Under our definition, yes. Our definition would make the crime completely gender neutral, which would have the effect that women, too, could be convicted of rape.

The Convener: Fine.

Stuart McMillan: Your submission suggests that the law should be changed so that the crime of rape might be committed when a person forces their tongue into a victim’s mouth. Is there a danger that that could be seen to downgrade the crime of rape? Would juries be willing to convict a person of rape in such circumstances?

Frida Petersson: Absolutely. We acknowledge that oral penetration both with body parts other than the penis and with objects is an extremely difficult area of consideration. We thought long and hard about whether to recommend that it be included in section 1. We decided to do so because it is covered under section 2 on sexual assault. We have simply suggested moving the offence into section 1. The danger that you mention exists, but the range of penalties that is available under section 1 would enable the severity of the act to be mirrored.

Stuart McMillan: Do you have anything to add, Ms Gallagher?

Susan Gallagher (Victim Support Scotland): I concur with what Ms Petersson said.

Stuart McMillan: Does Victim Support Scotland think that there is a role for an offence of sexual assault by penetration that is different from rape and non-penetrative sexual assault?

Frida Petersson: We do not see a need for such an offence.

The Convener: We turn to the issue of consent and reasonable belief.

Robert Brown: I think that you heard some of the previous witnesses’ evidence on a difficult area. You take issue with the bill’s definition of consent as “free agreement”. Will you elaborate on that? In your submission, you suggest that “free agreement”, involving understanding and knowledge of the other person’s will (as opposed to indifference),
expressed through dialogue or actions, would be the most suitable definition.”

What would be the advantages of such a definition? Your proposed definition sounds more complex, without adding much.

Frida Petersson: We are happy to see the introduction of the reasonable belief provision, whereby the accused must have had reasonable belief that the victim consented to the act. It would be interesting to consider what different steps the accused took to ascertain that there was consent. That is what we are referring to—the steps that were taken, which are mentioned in section 12 on reasonable belief. Section 12 states that it is important to establish what steps the accused took to ascertain that there was consent to the act.

Robert Brown: Is that not a different aspect of consent, which the bill deals with quite adequately in section 12, which objectifies the issue?

Frida Petersson: Yes. We are happy with that section.

Robert Brown: So what would be the advantage of extending the definition of “free agreement” in section 9?

Frida Petersson: We believe that the issue is covered—we are quite happy with the definition in the bill and the steps that the accused must take to ascertain that the other person has given consent.

Robert Brown: So you are not seeking a change in the terms of section 9, notwithstanding what you said in your submission.

Frida Petersson: No. We are happy with the bill.

Robert Brown: Okay.

On section 10, in general, you welcome the list of circumstances in which consent would be considered to be absent. Should any other examples be included? Do you have any other comments about the effectiveness of section 10?

Frida Petersson: Yes. It is important that we stress that the list is a non-exhaustive statutory list and that it is not a complete checklist of situations in which consent is not given. It is important that it is stated in the bill that the list is non-exhaustive and that if a situation that arises is not on the list, it could still be the case that consent was not given.

Robert Brown: Section 10(1) says:

“without prejudice to the generality of”

section 9,

“free agreement to conduct is absent in the circumstances set out in subsection (2).”

In other words, section 10 makes it clear that the circumstances described are examples. Do you have concerns about that phraseology?

Frida Petersson: We just think that it should be stressed further that the list is non-exhaustive, to ensure that the meaning behind it is taken into account when the bill is used in court. We are quite happy with the general idea of the introduction of a non-exhaustive list and the fact that when the Crown has established that one of the situations that are listed has occurred, it will have proved lack of consent.

However, we have a problem with the idea of someone giving prior consent. It is extremely important that consent is given at the time that sexual activity takes place, which is why we have a problem with section 10(2)(b). As was mentioned in the previous evidence session, the bill does not state for how long such consent is valid. If one accepts the interpretation that consent is valid until it is withdrawn, the victim must surely have an opportunity to withdraw it, which he or she would not have if they were asleep or, indeed, unconscious.

11:30

Robert Brown: As we touched on before, this issue is tricky to pin down. When people go out, they may over the course of the evening move from being sober to being more or less drunk or more or less incapable of giving consent afresh. We are dealing with human circumstances that may be difficult to establish in situations that come before a jury. What is your position on prior consent that is given at an early stage? I refer to instances in which people go out on the understanding that they will end up in a sexual situation, but one of the parties gets drunk during the evening and is not capable of giving consent anew. People could be landed with a serious criminal offence. Is the proposition that, unless there is a specific further agreement, we are dealing with a crime of rape?

Frida Petersson: Yes. We wish to remove the possibility of prior consent. Only consent that is given at the time when the sexual act takes place should be valid. That would take away the worry about whether consent must be renewed and when it must be withdrawn.

Robert Brown: It would, but would it not cause a considerable hiatus, given that criminal statutes are normally to be construed strictly? If people were convicted in the circumstances that you describe, they could go to jail for a long time. Are we not getting away from the reality of human behaviour in some sexual situations?

Frida Petersson: We are dealing with very difficult situations. The bill states that consent can
be withdrawn at any time—we believe that it should be possible for a person to withdraw consent. It is suggested that someone who is asleep or unconscious is incapable of doing that. The policy memorandum states:

“The definition makes clear that people who are asleep or unconscious lack capacity to give or express consent while in that state.”

They are also incapable of withdrawing consent at that stage. The notion of prior consent is problematic. Arguably, it would lead court cases to focus on whether the victim gave prior consent, rather on whether consent was given at the time when sexual activity took place, which is the most important issue for us.

**Robert Brown:** Is that not a slightly overanalytical approach to the matter, given that people do not sign written documents in this context? Will not having prior consent not land us in as many problems as having it would?

**Frida Petersson:** We do not see the benefit of prior consent. We believe that it takes away some of a person’s sexual autonomy and her ability to change her mind. It is up to the person to consent or not at the time when sexual activity takes place.

**Robert Brown:** We are dealing not with situations in which someone has changed their mind, but with situations in which nothing is said.

**Susan Gallagher:** The onus must be on the accused to demonstrate what reasonable steps they took to ensure that consent was given.

**Robert Brown:** Or that consent still exists.

**Cathie Craigie:** Your evidence on this provision is very strong. You may want to suggest a form of words to amend the bill. If a woman agrees at 6 o’clock at night—in company, within the hearing of others—to have sex with someone but withdraws consent later in the evening, could that be a defence for the accused under the bill as drafted?

**Frida Petersson:** We wish to remove the notion of prior consent. In our view, it could be used as a defence under the bill as drafted, which we find extremely problematic. It contradicts the possibility of the victim withdrawing consent.

**Cathie Craigie:** I think that the committee would be keen to hear any further suggestions from Victim Support Scotland on this issue.

Under the bill as drafted, if a man touched his sleeping wife in a sexual manner on the basis that consent had been given prior to her falling asleep, would that be a sexual assault?

**Susan Gallagher:** It is very problematic. That is the reality. It must be based on a reasonableness in the context of the particular relationship and what goes on in that relationship generally. We would state categorically that, if what goes on between a man and a woman as part of normal practice includes a threat of violence or attack against the woman and she has not given her consent, it could be a problem if the law offered a justification for what happened.

Another question that must be raised is how the victim feels about the act once it has been perpetrated or even before it has been perpetrated if the victim wakes up. If the victim does not consent during, after or before the act, we believe that there is an issue with consent.

**Robert Brown:** Let us assume that the provision on prior consent was removed from the bill. With the rape definition under section 1, we would still be left with an issue about consent or reasonable belief that the other party had consented. Would there not still be an issue that prior consent could be part of the circumstances that led to A having a reasonable belief that B had consented? The thing must be dealt with one way or the other, either by the interpretation of judges and juries or in the legislation.

**Frida Petersson:** I see your argument, but we do not believe that the one issue has to do with the other. It is difficult to pinpoint what reasonable belief would be, but we do not believe that it has to do with prior consent.

**Robert Brown:** Surely, reasonable belief could be the fact that there had been an indication of consent at an earlier stage, such as in the circumstances that Cathie Craigie mentioned.

**Frida Petersson:** But that does not categorically have to be prior consent.

**Robert Brown:** I take that point. Would it be preferable to have the greater uncertainty of the general definition without the specific reference to prior consent?

**Frida Petersson:** Yes.

**Robert Brown:** I think that we would be interested to receive any further thoughts that Victim Support Scotland has on that very complex and difficult issue.

**The Convener:** It is a difficult matter. As I said earlier, we come down to human behaviour and human relationships. Sometimes, one has great difficulty in codifying law under those headings.

**Paul Martin:** Victim Support Scotland’s written submission suggests that there is too great a disparity between the penalties, on the one hand, for rape or rape of a young child and, on the other, for the crime of having intercourse with an older child. The submission suggests that such crimes should be prosecuted only in the High Court. Can you provide some background on how you reached that conclusion?
Frida Petersson: The crimes of rape and of rape of a young child can be prosecuted only in the High Court, whereas the crime of having intercourse with an older child can be prosecuted in a summary court, which has a lower range of penalties available to it. We believe that there is too big a disparity between how cases would be dealt with depending on the age of the victim. We believe that having intercourse with an older child should still be seen as a very serious crime. We should show victims aged 13 to 15 that we take such crimes seriously. We should show the general public that offences involving that age group do not fall in a gap between rape and rape of a young child. We should not grade the severity of the attack based on the age of the victim. There is nothing to say that an older child will have a lesser or better reaction to a sexual offence than a younger child. Therefore, we do not agree that there should be a big gap between offences involving a 12-year-old and those that involve a 13-year-old.

In addition, there can be big differences between two people aged 13. Whereas some 13-year-olds might be very mature and able to fend for themselves, others might be still very much children. We believe that there is too big a difference between how the bill deals with offences involving young children and those involving older children. Given the severity of the attack, the penalty should be based on the merits of each case. Older children should be able to be heard in the same court and have access to the same rights as younger children and older victims.

Paul Martin: So the issue that has been raised involves the rights of the victim as well as the sentencing tariffs that are available only in the High Court.

Frida Petersson: We believe that such victims should have the right to have access to the same penalties as would apply in the case of younger victims and in the case of offences under section 1. Those who are aged 13, 14 or 15 do not have access to the same penalties, because their case can also be heard in a summary court.

Paul Martin: I share your concerns, but there may be issues to do with whether activities have been wholly consensual. Have you raised that matter?

Frida Petersson: With regard to older children? No. We have not commented on that.

The Convener: Would you summarise your position? You are not suggesting that someone aged 16 years and one month who has had consensual sexual intercourse with a girl aged 15 years and 11 months, for example, should be indicted in the High Court.

Frida Petersson: No.
Sexual Offences (Scotland) Bill: Stage 1

10:27

The Convener: Our main business this morning involves the taking of evidence on the Sexual Offences (Scotland) Bill.

Early in our consideration of the bill, we identified certain themes that we were particularly keen to explore. In today’s evidence-taking session, which is our second on the bill, we will discuss aspects of the bill with specific relevance to children and young people.

On our first panel are Jan McClory, the assistant director of children and family services at Children 1st; Dr Jonathan Sher, the director of research, policy and practice development at Children in Scotland; and Martin Crewe, the director of Barnardo’s Scotland. We have received written submissions from the panel, so we will go straight to the questions.

Children 1st suggests that section 10 of the bill, which deals with situations in which there is no consent, should be extended to include cases in which the victim has previously been the victim of physical or sexual abuse by the accused, and cases in which the victim agreed to or submitted to the act because he or she was subject to emotional or psychological abuse. Can Jan McClory explain a little more about the kind of situations that she envisages? Why does Children 1st feel that they could not be included in section 10(2)(c)?

Jan McClory (Children 1st): We raised those two areas in recognition of the imbalance of power, because we are concerned about the impact of previous or current abuse by a perpetrator on any young person. Consent could not possibly be considered possible in a situation in which there is a differential in power between the two parties. The kind of situation that we anticipate would involve some form of previous coercive behaviour—whether sexual or otherwise—towards a young person, and cases in which a young person has been pressurised, either physically or emotionally, by a person who could be considered to be in a position of trust or who has power over them.

10:30

The Convener: So you are saying that section 10(2)(c), which refers to violence, would not cover such coercive behaviour.

Jan McClory: Yes.
The Convener: I would like to probe things a little further. The bill proceeds on the understanding that children under the age of 13 cannot give proper consent to sexual relations. Do members of the panel share that view?

Martin Crewe (Barnardo’s Scotland): Barnardo’s Scotland’s view is that drawing a line in the sand at the age of 13 may not be perfect, but it is perfectly reasonable to do so. Therefore, we are happy with that approach.

Dr Jonathan Sher (Children in Scotland): Drawing age boundaries is a necessary tool in legislation, and because doing so is a necessity, we agree with the approach that has been taken. It is worth noting that all such age definitions are no more than proxies; levels of maturity and knowledge and abilities vary widely among children of such ages. However, law cannot be created around individual variations among young people. Therefore, it makes sense to us that the line be drawn at that point.

The Convener: That is in line with the evidence that you submitted yesterday.

Let us take things further. The bill raises the possibility of children under 13 being guilty of a criminal offence if they engage in sexual activity of a consensual nature with other children under that age. What are the panel members’ views on that?

Jan McClory: We would argue—we agree on this—that if young people under the age of 13 are incapable of giving informed consent to sexual activity, a contradiction exists in the bill, in that they could be charged with a criminal offence. We would argue that young people under 13 are not capable of sexual offences of such a nature.

Martin Crewe: Our position is similar, but subtly different. We accept that there are occasions when children under 13 can commit offences, but we strongly suggest that, if the bill as it currently stands is passed, the Lord Advocate should issue guidance to the police and, by implication, to the child protection agencies that says that considerable discretion exists with respect to handling prosecutions. I say that because some cases that our services have dealt with are primarily child welfare and child protection cases.

The Convener: The Lord Advocate has, of course, unfettered discretion in all such matters.

Martin Crewe: Our concern is that, whether or not a charge is progressed, the police should have discretion in individual cases. The cases that we deal with, which sometimes involve charges of lewd and libidinous behaviour, are generally dealt with through the hearings system. The bill ups the ante, so that a child could be charged with the rape of a young child.

The Convener: I think that Paul Martin will want to pursue that issue further, but in the meantime I call Nigel Don.

Nigel Don (North East Scotland) (SNP): I have listened to what the panel members have said, and I do not disagree with the tenor of the suggestions.

Do any of you agree that it would be unsatisfactory to have a law that says that something is illegal but which is routinely not enforced, and is only occasionally enforced when the Lord Advocate happens to think that the circumstances require it? The Lord Advocate may very well be right, but it is the general idea of having a law that is not enforced that worries me. Does it worry any of you?

Martin Crewe: I think that you are right, but the cases that we deal with, particularly those that involve young children, are complex. I can give examples of cases in which behaviour has occurred that we would agree we do not want to see, but such things happen, and it is rarely in the best interests of the children to go ahead and prosecute.

Nigel Don: I would like us to try to write the law in such a way that we know what it is that we are prosecuting. I appreciate that that may mean that we have to use rather difficult words, and that we might end up with grey areas, but would it not be better to say that we will prosecute in situations in which—for example—there is a degree of coercion? Would that cover the circumstances in which one would hope the Lord Advocate would proceed?

We are struggling with the whole idea of underage criminality, but I would prefer there to be a form of words that tells the prosecution system when it should roll, rather than leaving that wholly to the—albeit perfectly reasonable—discretion of
those who do not tell society on what basis they operate.

Martin Crewe: Based on our casework, it would be quite a challenge to write a form of words that would actually be practical in the circumstances that we are dealing with. At some point, there has to be discretion in the system. A more direct line to take, if you wanted to do so, would be to ensure that a case that is referred to the procurator fiscal is also referred to the children's hearings system at the same time; that could then be negotiated.

Nigel Don: Can any of the other panel members help me out? My primary concern is with creating criminal offences that we do not routinely prosecute. In other words, we say, "This is the criminal law but, actually, we don't mean it."

Jan McClory: I agree that we do not need more offences as a way of protecting children and young people. The crucial element with regard to what is written and enshrined in law on this issue is the accompanying guidance on the implementation of the law, in relation to the understanding of professionals who are working around it.

Angela Constance (Livingston) (SNP): I hope that I am not going too off-beam here—I have listened carefully to the evidence so far. Do you have any views on how the bill should or could impact on the age of criminal responsibility? You have already raised concerns about a contradiction in the bill with regard to children under 13—they are not eligible to give consent and yet can commit an offence—which led me to think about the age of criminal responsibility, which I appreciate is sometimes regarded as a rather contentious issue. Do you think that there is a crossover on those issues?

Dr Sher: That is an important issue, and the Government or Parliament might wish to consider it. However, if the age of criminal responsibility is going to be considered, it needs to be done directly and with a great deal of thought. The bill cannot sort out that much larger and more complex issue. If the bill has a relationship with the issue, it might be in signalling that there is an issue worthy of further consideration in other circumstances.

The Convener: If that were to happen, it would have to be done comprehensively, rather than in a piecemeal fashion, in relation to a particular type of offence.

Robert Brown (Glasgow) (LD): I will stick with section 15 for the moment. I accept the background about the age of criminal responsibility. However, most of us might be concerned not so much about discretion and going forward with proceedings that should not be taken up as about the offences in section 15 to do with kissing and touching involving young children who are under the age of 13—I will forget about the matter of the different age groups for the moment. Most people would not regard that behaviour as being criminal in any sense, or even necessarily reprehensible. Do you have any further concerns about the definitions in section 15 that you could tell us about today or on which you could come back to the committee?

There is also the subsidiary issue of criminal prosecution or referral on offence grounds to the children's reporter. Nevertheless, something that ends up being an offence can end up giving someone a criminal record, which might have to be disclosed later under disclosure legislation. Do you have any thoughts about a way around that, leaving aside the age of criminal responsibility problem?

Jan McClory: I can only agree with you that many of the activities that are listed in section 15 would not give cause for concern about young people who are merely developing and growing as individuals in society. We do not want to see anything in the bill that underlines that such behaviour is offensive—within a criminal context—in any way. That is why it important that we remove from the bill the notion of an offence being committed by a child under the age of 13.

Martin Crewe: I go back to the earlier point about appropriate guidance. Quite a lot of the provisions in the bill that deal with children will rely on people exercising a degree of common sense in practice, and different parts of the bill lend themselves more to that approach. Good guidance could prevent such cases from being progressed.

Robert Brown: I am still concerned about the idea of there being criminal offences that most people would not regard as criminal offences but which could leave people with a criminal record—albeit theoretically in most cases. This might be a matter for the lawyers in your respective organisations, but is there scope for any form of defence under that heading, or any other way of getting at the problem that would allow the legal exclusion of such potentially criminal but, in fact, non-criminal situations?

Dr Sher: In the sections that deal with 13 to 15-year-olds, there are much more precise definitions of the activities that are considered to be criminal and those that are not. You will know that Children in Scotland favours decriminalisation rather than criminalisation, but even within that, there are much more precise definitions for the activities of older children than there are for those of younger children. Perhaps the way of moving the issue forward, if that is the path that the committee wants to take, would be to use more precise definitions that exclude all the behaviours that common sense and collective experience suggest.
are not regarded as, and are not in fact, criminal behaviours. That can be done within the law.

10:45

I underscore my colleagues’ point that one of the worst outcomes would be for younger children to be labelled as criminals for engaging in such activities and, therefore, to begin to think of themselves as criminals. One of the developmental truths about children under 13 is that they begin to live up or down to the expectations that we adults place on them. It would make much more sense, and would be much more helpful to their development, for them to be regarded as children who are engaging in behaviours that raise concerns that can be dealt with in a health and welfare context rather than a criminal justice context. In this arena, there seems to be remarkably little value in labelling children as criminals or having them label themselves as criminals. It is not helpful.

Paul Martin (Glasgow Springburn) (Lab): My question is for Children 1st first of all. From its written evidence and from what Jan McClory has said this morning, Children 1st seems to be calling for a complete ban on criminal proceedings being taken against children under the age of 13 in any circumstances. I ask her to clarify whether that is the case.

Jan McClory: It is completely inappropriate and unacceptable for an under-13-year-old to be charged with a sexual offence.

Paul Martin: I will provide an example of something that might happen in real life. If a 12-year-old assaults a two-year-old, should criminal proceedings against the 12-year-old not be considered?

Jan McClory: When we deal with a young person under 13 who behaves inappropriately towards other children or causes them harm, there is great concern about the welfare and needs of that young person. The behaviour must be considered as a care and protection issue, not only for the other young children involved but for the young person who is behaving inappropriately. It would be more appropriate to make a referral that examined other concerns—such as whether the child is in moral danger themselves and whether they are beyond parental control—in an environment in which the young person can be looked after and supported, rather than prosecuting them for an offence that we believe they would be largely incapable of understanding.

Paul Martin: Will you go into more detail about that? You have made it clear in your written evidence and what you have said that there are two different forums—the children’s hearings system and criminal proceedings—and that you do not believe that criminal proceedings are the way forward because you are concerned about the possibility of the individual being labelled if they receive a criminal conviction. Apart from that, is there no possibility of using criminal proceedings as an intervention, perhaps to send a message to such young people that their activities are unacceptable?

Jan McClory: The reality is that situations in which young people are likely to cause grave harm to other young people are extreme—they are not representative of the behaviour of the vast majority of young people—and dealing with such behaviour as a care and protection issue through the children’s hearings system sends the right message. If a young person under the age of 13 is engaged in behaviour that is harmful to others, that needs to be understood, and they and their family need to be helped to seek to resolve some of the difficulties that the young person faces, instead of that young person being criminalised. It is important that the message that goes out to young people, their families and communities is that under-13-year-olds who cause grave harm need help and support and have little true understanding of the impact of their behaviour.

Paul Martin: So you want a complete ban on criminal proceedings, you do not want the Lord Advocate to be involved in any intervention and you want such behaviour to be reported to the children’s hearings system. Is that the only way in which you would proceed, no matter the circumstances?

Jan McClory: As I said, we would like the notion of charging under-13-year-olds with a criminal offence to be removed from the bill. Obviously, there is the possibility of a very extreme situation—which I think is what you are referring to—but we would say that the most appropriate way for an under-13-year-old to be dealt with is through the hearings system, rather than referral to the Lord Advocate.

Paul Martin: I ask the same question of Barnardo’s, which has given some indication of its views. Will Martin Crewe clarify how his organisation would proceed?

Martin Crewe: We run three services throughout Scotland that deal with harmful sexual behaviour by children. Even in those services, the situation that you describe is very rare. However, in extreme cases, we have to face the fact that criminal proceedings might be appropriate and will happen.

Paul Martin: So Barnardo’s view is that the bill should not be amended and that the option of criminal proceedings should remain available to the Lord Advocate.
Martin Crewe: Our line is that although that option should be used extremely rarely, we do not contest that it should be provided for in the bill.

Paul Martin: I ask Dr Sher for his view on the same question.

Dr Sher: As a general principle, Children in Scotland is not in favour of the criminalisation of young children. Whether that presumption of non-criminalisation would be put aside in particular instances defined as very extreme is a matter for the committee to decide; I cannot bring you evidence about it.

I can say two things, however. First, what we know from many years of research and work in the area is that it is extraordinarily rare for young children to become sexual predators of any kind if they have not first been victims of severe sexual abuse. By and large, it is the children who have been badly harmed by adults who perpetrate such rare crimes.

That leads to my second point. Members might have discerned from my accent that I am not originally Scottish. One of the things that attracted me to come to Scotland is the tradition that is represented first and foremost by the children’s hearings system, which has found a middle course between simply ignoring unpleasant social realities and unpleasant and bad behaviour and, conversely, turning everything into a criminal offence. There is a great deal of value in that Scottish tradition of viewing and treating children as children, even in the aftermath of their negative or worrying behaviour. I hope that the bill will reflect or extend that noble Scottish tradition of finding a middle path that neither ignores nor approves of such activities, and which does not criminalise them either. The Scottish approach understands that they are children and that it is overwhelmingly likely that they are children who have been harmed. There needs to be an appropriate welfare response both to help them get over the harm caused to them and to stop them harming anyone else as a result.

Paul Martin: I cited an example of a 12-year-old harming a two-year-old. Can you think of no examples in which criminal proceedings would be more beneficial than using the children’s hearings system? There can be welfare interventions through the criminal prosecutions route as well.

Dr Sher: It might just be a failure of my imagination and there might be extreme circumstances that warrant an extreme response, but I cannot bring you evidence about that.

The basic principle is that we should not criminalise young children. If the committee can identify exceptions to that, that is the committee’s prerogative, but I have no evidence to offer one way or the other; I have the principle.

The Convener: We will move on to sexual activity between older children.

Cathie Craigie (Cumbernauld and Kilsyth) (Lab): Before we do, I would like to pursue the same line a wee bit further, with your good will.

The Convener: It is infinite.

Cathie Craigie: The committee has been advised that in 2006-07 slightly fewer than 16,500 children were reported to the children’s reporter for offences, whereas 99 children under the age of 16 went on to be prosecuted through the Scottish criminal court system. Is that the right balance? Do those figures provide enough comfort to the people who work with young children that the system is working on the social grounds that Dr Sher mentioned?

Martin Crewe: Broadly, yes. The ratio of prosecutions is very low compared with the number of cases that are referred to the children’s hearings system.

Jan McClory: A major concern to our organisation, in addition to whether cases involving children lead to prosecution, is the help and support that are available to young people who, technically, commit offences through involvement in inappropriate sexual behaviour. Regardless of whether a case is dealt with through the criminal justice system or the children’s hearings system, when it comes to the outcome that we are looking for, which is a change in the behaviour of young people, our greatest concern is about the absence of support services and treatment programmes for young people who exhibit sexually inappropriate behaviour. Regardless of the system that deals with them, if that behaviour is not addressed while those people are still relatively young, the chances are that it will not be resolved and their behaviour will not change. That is of as much concern as the legal process.

Cathie Craigie: To avoid any confusion, the figures that I quoted did relate only to sexual offences; they relate to offences across the board.

Jan McClory: Yes—you were talking about offences across the piece.

Cathie Craigie: I will now move on to the next area of questioning. I note from its submission that Children 1st consulted young people on their sexual behaviour. It was one of the few organisations, if not the only organisation, to do so. How did you go about that? How many people were involved in the consultation exercise? What was the age range of the group that you worked with?
Jan McClory: As we mentioned in our submission,

"we held a conference in June 2008 jointly with ChildLine in Scotland to debate the issues raised within the Scottish Law Commission recommendations."

That national event involved participants from the many different agencies in the statutory and voluntary sectors, as well as children and young people who were users of the services of ChildLine and Children 1st.

Following on from the issues that were raised at the conference, consultations were held in some of our young people's services, most prominently among users of our young people's chill-out zone service in West Lothian, which has provided sexual health guidance and support to young people for about seven years. We held focus groups and the service's staff conducted a specific consultation of 12 young people—young men and women—that dealt with a range of issues around the key areas that the bill addresses, particularly the age of consent and decriminalisation. We undertook that consultation internally to enhance the evidence from the conference in June.

Cathie Craigie: How many people were involved in the conference and the focus group?

Jan McClory: More than 120 people were involved in the conference in June and the more recent consultation involved a group of 12 users of our service in West Lothian.

11:00

Cathie Craigie: You have drawn together some interesting evidence from your consultation. As I said, Children 1st is one of the only groups to go that far, so I congratulate you on that work.

How did you express the findings of the consultation in your submission? Some of the points that the young people made do not marry up with the conclusions in your submission. I am thinking in particular about the messages that are sent out. The age of consent is not changing, but if a feeling exists out there that it is changing, the protection from pressure that some young people mentioned will be taken away.

Jan McClory: In our written evidence, we tried to embrace the different perceptions and concerns that young people expressed to us. We also tried to acknowledge that, although the age of consent will remain the same, as you say, the message might be communicated to them that, with decriminalisation, the age of consent will be reduced. We tried to embrace the difference of opinion that exists among young people, which is a major concern for us. We carried out a small consultation within our own services because we believe that consultation has been lacking and that it must take place.

We are all here because our major concern is the protection and wellbeing of young people. Children 1st does not want young people under 16 to engage in sexual activity without support, information and education. We believe that, for most young people, the age of consent is absolutely right. We accept that some under-16s will be involved in sexual activity and we believe it is important that Scotland has an equal distribution of services that young people can access to seek support, information and guidance.

We know from providing such services ourselves—and from other organisations' experience—that being open to dialogue and discussion and being there for young people to raise issues around sexuality does not automatically lead to their engaging in sexual activity. It helps a lot of young people to make safe and wise decisions for themselves, which often equates to their disengaging from sexual activity or deciding not to become involved in it.

We heard from young people that changing the law to decriminalise could send out a clear message that, although the age of consent is still 16, sex between young people aged 14 to 16 is permissible and therefore an expectation. That was a particular concern for young women, although interestingly some of the young men who were involved in our consultation felt strongly that the message should remain that 16 is the absolute limit. They had concerns, perhaps not surprisingly given the group of young men, about predatory behaviour.

In our submission, we tried to embrace the complexity of the situation and the need to have messages that can be clearly understood by young people and everybody who is involved in working with them and providing support and guidance.

Cathie Craigie: Some of my colleagues might take the point a wee bit further.

Mr Crewe or Dr Sher, do you have any comments?

Martin Crewe: Barnardo's position is that we unequivocally support the Scottish Law Commission's position that sexual intercourse should be decriminalised for 13 to 15-year-olds—boys as well as girls—because of the difficulty with the current situation with an activity that is so common. I refer to Nigel Don's earlier point about the intention of the legislation. If up to a third of children engage in sex before the age of consent but we consider prosecuting only a tiny minority of them, is it worth having the law in place at all? We acknowledge that the activity happens.
Our line is that persuading young people not to indulge in sex is less about making sex criminal and more about providing easy access to appropriate advice. I do not know whether anybody saw the awful Channel 4 programme “Embarrassing Teenage Bodies”, but the thing that seemed to bring home the message to young people was showing them the effects of sexually transmitted diseases and what it means to be a teenage mother. Opening up the advice will be far more effective in discouraging that behaviour.

Cathie Craigie: The reason why I raised the point is that Children 1st consulted with young people, who

“spoke about using 16 years old as a form of ‘buffer’ … to withstand peer pressure to have sex earlier than this age boundary.”

Some young people felt that an “actual or perceived change” in the age limit might lead to more pressure,

“more early sexual activity and more unwanted pregnancies.”

Has Barnardo’s spoken about the issue to young people who are involved with the organisation? Do you accept that point that young people are making?

Martin Crewe: It is admirable that Children 1st has undertaken that work, but I am sure that Jan McClory would agree that the sample was not statistically significant. We run services for children who have been sexually abused and services that deal with harmful sexual behaviour. I have spoken to the front-line workers, whose view is that criminalising will not have a significant deterrent effect on the sort of disadvantaged young people who, disproportionately, have sex early. I support more research on that, but it is too early to tell what would really have the effect that we all seek.

The Convener: To an extent, we may have anticipated some of the other members’ questions.

Stuart McMillan (West of Scotland) (SNP): I have a question for Dr Sher that is based on Children in Scotland’s written submission. In the section on criminalisation versus decriminalisation of consensual sex between 13 to 15-year-olds, which is in part 1 of the bill, you discuss the fact that very few children and younger people view consensual sex with people of their own age as a criminal activity and you highlight a few examples. Could it not be suggested that, if younger people in the 13 to 15-year-old category do not understand that 16 is the legal age of consent, they are not mature enough to have sexual activity in the first place?

Dr Sher: Children in Scotland, my colleagues who are giving evidence, committee members and the Scottish Government all agree that we ought actively and effectively to discourage sexual intercourse, not only among everyone who is under the age of consent—16—but among older teenagers who are not ready to become fully sexually active. There is no disagreement anywhere that I know of. No one argues that underage sexual intercourse is a good thing—it is not and all of us should discourage it actively through whatever means we have.

However, that must be coupled with our actively and effectively encouraging all children below the age of consent who, despite our robust and sincere advice to the contrary, choose to engage in sexual activity and intercourse—which we all regard as an unwise and unhealthy choice—at least to behave in a manner that will have the fewest and least serious negative consequences for them, their partners and society as a whole. We all agree that that means providing easy and confidential access to first-rate information, providing support for avoiding pregnancy and preventing the transmission of sexually transmitted infections, and dealing well with the social and emotional problems that arise.

What is the message of the bill? As we stated in our written submission, we think that there is a problem with having an empty threat, but also with criminalisation. Our suggestion—together with the Scottish Law Commission and a variety of other groups—is to decriminalise consensual sexual intercourse below the age of consent, but to couple that with a new robust public health campaign, which says that the age of consent is still 16. All of us believe that it is unwise and unhealthy for people to engage in sexual activity below the age of 16. However, if people are going to do so, they should not make things worse: they should not compound the problem by becoming pregnant, by transmitting STIs or by causing other problems.

We all understand that there is an intended message in the bill. The problem is serious and under-16s should get the message that it is so serious that it has been made a crime, and therefore not engage in sexual activity until they are over 16. I hope that everybody will take that message on board. Frankly, however, I have no confidence that that is the actual message that will be taken on board by under-16s. In our submission, I specified a set of plausible other meanings and interpretations that young people will give to the bill as it stands. In my view, those are unhelpful—but very likely—interpretations.

The best strategy is twofold. First, it is to decriminalise, and to couple that decriminalisation with a robust public health campaign saying that the age of consent is still 16, and that we do not approve of the behaviour of engaging in sexual
activity under that age. Those two things should tie together.

Secondly, we should now do what should have been done by the Government earlier. As commendable as the efforts of Children 1st are, they cannot replace a meaningful full-scale Government-led national consultation of a wide cross-section of children and young people. That should happen now, so that whatever the provisions of the bill that is passed, the guidance and practice are informed by what will actually work with children and young people, because we will know what they are thinking, instead of guessing what they might be thinking or how they might interpret our messages. That last element has been missing, so we need to engage in a broad national consultation of the children and young people whom we are trying to help and give good counsel.

The Convener: That was a comprehensive answer.

Angela Constance: Dr Sher has given a detailed response on the advantages of decriminalising consensual sexual activity between older children. I understand that Barnardo’s Scotland also supports that. Does the panel see any disadvantages or potential risks in such a move? We have already heard Cathie Craigie speak about how young people themselves view the situation. They have intimated that there is a protective factor from the law as it currently stands in respect of resisting peer pressure.

Jan McClory: That is covered in our evidence, and we have listened to young people’s views on that. To return to what Jonathan Sher was saying, we took a small sample of views from among our services, and we consulted people at our conference. There is much more that could be learned and understood about how young people will receive the message. We do not want unnecessary criminalisation where consensual sex has taken place, but we caution that sex is not always consensual in the age group that we are discussing. There is still a need for protective factors for young people. Our position on that is clearly laid out in our evidence.

The Convener: Would anyone else like to add anything?

11:15

Martin Crewe: The only risk is the risk of sending a message that could be misunderstood. As Dr Sher said, we have to manage the message carefully. It is important to say that we are not changing the age of consent. If we adopt the proposals of the Scottish Law Commission, we are not saying that Children under 16 can have sexual relations with whomever they want.

Nigel Don: The point that underage sex might not be consensual is entirely obvious to us, as adults. However, is there any reason why that lack of consent is not covered by the criminal offences in sections 1 and 2, the latter of which seems to be all-embracing?

Jan McClory: It is covered by those sections, obviously. However, our concern is to do with the message that is sent to young people, how they understand it and how they cope with the notion of when sex is permissible in terms of their own personal decision making and when it is an offence for anyone to be sexually active. Our concern is about young people’s decision making and the pressures and permissions that exist in society.

Cathie Craigie: The evidence that we are hearing seems to suggest that, in relation to sexual activity between older children, part 4 of the bill is not yet right. The Government did not consult young people, and the children’s commissioner has suggested that we seek to ensure further involvement with consultation of young folks. Given that we all seem to agree that what we have before us is not ideal, do you agree that we should not rush to legislate but should, instead, leave that part of the bill for another day, by when we will have been able to listen to young folk and examine legal issues and the needs of young people?

Martin Crewe: It is fair to put some sort of caveat on any research of that nature. We need to remind ourselves what we are talking about. It would be good to undertake that research, but you would be asking young people to talk about a situation that they would not be in at that moment in time. Two 15-year-olds, in a moment of passion, might not behave as rationally as they might do when surveyed. I support going ahead with wider consultation, but we also need to have a reality check and ensure that we understand what is happening on the ground.

Angela Constance: Does the panel think that older boys and girls should be treated equally with regard to the criminal law in this area? Does the panel approve of the extension of the criminal law to older girls who engage in consensual sexual relations with older boys, given that under the present law under-16s are protected by criminal law but are not subject to prosecution?

Jan McClory: We are in favour of gender equalisation in legislation. It is unacceptable that young men and young women are treated differently. However, there are questions around identifying someone as a sex offender in the first
place—doing that to women is no more appropriate than doing it to young men.

The Convener: That is in line with your earlier point.

Martin Crewe: Our position is that we support gender equality, with the decriminalisation of the activity for both sexes.

The Convener: We will now turn to defences in relation to offences against older children.

Stuart McMillan: Children 1st expressed concerned about confusion in the bill, especially in relation to the age difference defence in section 29(3). In what regard is the defence confusing? Do other aspects of the bill present a confused picture? I have done some research on the matter and I gather that Austria, Italy and Latvia have similar provisions in their legislation.

Jan McClory: You know something that I do not know; I am afraid that my research was not as full as yours was.

As we said in our submission, we are concerned that the criminalisation of non-exploitative relationships between 16 or 17-year-olds and 14 or 15-year-olds would be confusing and unworkable in law. The arbitrary notion of a two-year rule—and the boundary between a two-year age difference and an age difference of one year and 11 months—would be hard for young people to absorb and understand and would lead to confusion.

Martin Crewe: Section 29(3) is a difficult provision, but we considered the matter and concluded that it would be difficult to come up with anything better. The problem relates to Dr Sher’s point about how children reach maturity at very different ages. Whatever approach is put in place, it must be acknowledged that we might be talking about a 15-year-old girl who is as sexually and emotionally mature as the 17-year-old boy or about two young people between whom there is a big difference.

We deal with quite a few cases that involve children who have learning disabilities. In such cases age is much more of a proxy than it is in other cases. Section 29(3) is not ideal, but we want such a provision in the bill and we have not been able to come up with better wording.

Robert Brown: The underlying issue is whether a sexual relationship between older children is exploitative. A general point that has been made in favour of the approach that is taken in the bill is that the existence of offences that do not rely on proof of consent would give the prosecution more scope when a child had been sexually exploited by another child but there was not enough evidence to secure a conviction under sections 1 and 2. That sounds like a difficult argument in criminal law terms; is it a good reason for supporting the criminalisation of certain sexual activity without requiring proof of consent?

The Convener: Do you want to answer that, Ms McClory?

Jan McClory: Me again. I am not sure that I can add anything without repeating what I have said.

The Convener: Do the other witnesses want to augment their previous answers?

Dr Sher: Another way of considering the two-year rule is to regard it not merely as a defence against a criminal charge, which will be used at the back end of a case, but as a presumption—at the front end—that there will be no prosecution when the age difference between two consenting older children is less than two years, unless there are extraordinary circumstances. Instead of the provision being regarded as relevant only as a defence when a charge has been laid, it could be regarded as a presumption that no charge will be laid in the first place, unless there are extraordinary circumstances.

Bill Butler (Glasgow Anniesland) (Lab): In response to a question from CathieCraigie, Ms McClory mentioned the need for support for young people whose sexual behaviour gives rise to concern. Will the witnesses comment on the type, effectiveness and availability of services, including sexual health services, in Scotland? Why not start with Mr Crewe and give Ms McClory a break?

Jan McClory: Thank you.

Bill Butler: No problem.

Martin Crewe: Throughout Scotland, there is a wide variety of services giving some sort of generic sexual advice to young people. Our concern is that specialist services for children with harmful sexual behaviour are few and far between. We provide services in three locations in Scotland. What is particularly interesting about those services is that if the children come to us young—usually under 12 or 13—there is little difference between those children who have exhibited harmful sexual behaviour and those who have been abused. There is a willingness among children to address their harmful sexual behaviour, especially at a young age, and the success rates are good. As an investment for addressing those behaviours, specialist harmful sexual behaviour services are invaluable.

Jan McClory: I agree. Specialist services that support changes in the behaviour of young people can produce startling results. However, such services are few and far between, and many are under constant threat because of the funding situation. That does not help us to build a sustainable model of support for young people who present us with challenging behaviour.
Services throughout Scotland are inadequate and are not necessarily located in the right places.

We consulted young people on the availability of sexual health services. We asked them whether the Government could spend more money on sexual health and, if there could be an increase in investment in their locality, what they would want. What was interesting was that they did not say that they would make more contraception available—that they wanted more condoms or anything like that. What they said was that they wanted to have more people to talk to about sexual relationships, and indeed about relationships in general.

It is important for us to understand that young people see sexual health as related to relationships and social development. They want to be able to talk about that, as part of their life and their future, in a safe environment. Sex education and sexual health issues are still closeted, and young people feel that there is still a risk to them, even within education and mainstream school activities, in engaging in discussions on those issues. If they disclose things to teachers, they worry about what is done with that information. They are concerned about becoming the subject of staffroom gossip, or about the impact on their relationships with teachers.

Interestingly, some of the young people whom we consulted said that they would like to have more school nurses, and that they would like to have school counsellors. They would like sexual health to be integrated into the curriculum, rather than just being part of the personal and social education programme. In terms of investment and return, what they were really asking for was not more sexual health equipment but more support and more understanding about where they are coming from and what their dilemmas are.

Bill Butler: So, in general, young people exhibited more common sense than some adults.

Jan McClory: My experience, from working directly with young people in the field of sexual health for many years, and from my role in Children 1st, is that young people show sensitivity and an insight into their behaviour that contrasts slightly with the behaviour of the adults around them. Without fail, they try to wrestle honestly with issues and talk about the pressure that they are under. They find it confusing that, although the adults in their world have high expectations of them to behave responsibly, to know the score about everything and to be open about sexuality, those adults do not exhibit that behaviour in return.

We have a population of young people who are prepared to accept support when it is offered and who value guidance. They value being taken seriously and being respected for who they are and the position that they find themselves in. Many young people will talk about the fact that their first sexual encounter might have taken place when they were under the influence of alcohol. They are able to open up and discuss that, and to say that that is not the way that they wanted it to be. However, it is difficult for them to find a location for that dialogue that values and respects them.

11:30

Dr Sher: I have two quick points. There seems good reason to increase the investment in helping not only the young people who have been victims of sexual exploitation or abuse but the young perpetrators. For example, one of our member organisations—the Kibble education and care centre in Paisley—receives a number of referrals, primarily from local authorities, of boys who have been victims and then become perpetrators of sexual abuse. It is not easy, quick or inexpensive, but the centre has had good results in its work with those boys. That suggests that it is not a waste of time, energy or money to invest in helping to turn their lives round.

Bill Butler: Is there enough such investment?

Dr Sher: Across Scotland, no there is not.

Bill Butler: Is investment in those services minimal?

Dr Sher: It is less than adequate. I do not have all the figures at hand, but I know that the demand for such services cannot be met through current resource allocations.

The other relevant point is that there is a precedent for a public health information campaign and increased education in this arena. That is what the Government has done, rightly in our view, in dealing with the rape-related part of the legislation. It accurately noted the need for, and its responsibility to provide the resources for, a significant public awareness campaign to spread the right message about rape. It was concerned that the public in general and potential jurors in particular would not understand the new law and that it therefore needed to make an active, positive effort. Such an active, positive effort to spread the right messages and provide the right support and assistance to young people needs to happen in addition to the passage of the best bill possible.

Bill Butler: Thank you.

Nigel Don: I want to pick up on Dr Sher's comment on the inadequacy of the resources. I want to get a feel for the order of magnitude of the issue from the three folk who are here to give evidence. Everybody would like more resources, but are the services that we are talking about underresourced by 10 per cent, or do resources need to be increased by a factor of two or 10?
Roughly, what is the resourcing position for guidance and remedial work with youngsters who have such problems?

Martin Crewe: My guess is that, if they were available, about five times as many facilities could be used to good effect.

Dr Sher: I cannot make an estimate, but I can say that Kibble is an example of there being some resources at the deepest end. It is clear that similar resources are not available for the earlier interventions that might help to keep people out of places such as Kibble in the first place. Additional help is most needed in early interventions.

Jan McClory: I would hesitate to put a number to the question, but it is clear that there is a disparity in sexual health support services for young people between urban areas and rural environments, where access to such services is extremely limited. In rural areas, there are many issues of confidentiality, which particularly affect young people’s access to services. The distribution and provision of services in different areas have to be considered.

Investment is an issue, but so is looking at current resources and how sexual health issues are dealt with in the curriculum and by school nurses at the moment. It is not a question of simply increasing investment; we must understand how young people engage with adults and how we can use existing resources to better effect to produce better results. Investments in time and in hearing from young people about what works are required. Massive additional investment may not be needed; rather, better organisation of what we have may be required.

The Convener: Those matters will no doubt be followed up in another place under the aegis of the committee.

I thank the witnesses for coming to the meeting and for giving evidence so clearly. I thank Ms McClory in particular for being so cheerfully behind the 8-ball for much of the proceedings. Your evidence is extremely useful.

There will be a brief suspension so that the panels can change.

11:36

Meeting suspended.

11:37

On resuming—

The Convener: I welcome Scotland’s Commissioner for Children and Young People, Professor Kathleen Marshall. I thank her for her attendance. We shall move straight to questions.

Paul Martin: Professor Marshall, your written submission recommends that the Scottish Government engage with young people in order to formulate law, policy and practice on underage sexual activity. What form should that engagement take?

Kathleen Marshall (Scotland’s Commissioner for Children and Young People): Jan McClory of Children 1st gave a clear steer on that. It is important that that organisation consulted service users, although only a small sample was involved.

The issue is sensitive. I do not think that the committee could, for example, simply invite a panel of young people to the Parliament and ask them about it. One must work through agencies and people who already have or who can build up relationships with young people so that sensitive issues can be discussed in an appropriate way. The group dynamics must be right. Some of the young people whom we are most concerned about might be vulnerable to peer pressure. Are they likely to speak up in a focus group in which there are powerful voices?

Obviously, I have considered the matter. I have standing groups with young people, but we do not have a service-type relationship with them that would mean that it would be appropriate for me to go to my reference group, for example, and immediately talk about such issues.

We have submitted ideas about how such consultation could take place. It needs to be done sensitively. I applaud Children 1st for its work with its group, although only a small sample was involved. We need to progress the issues more widely with young people who have different backgrounds and experiences.

Paul Martin: What age groups are you referring to? Is there a minimum age? What age groups should be consulted?

Kathleen Marshall: Above all, this issue shows the sense in article 12 of the United Nations Convention on the Rights of the Child, which is about taking account of young people’s views on matters that affect them. We are all struggling to come to some kind of resolution on this issue without knowing about the realities of young people’s lives from their perspective. Lots of age groups could be consulted, but that does not mean that the information should be presented in the same way. There are parallels here with sex education. Some of the detail in the bill is very graphic and you would not want to go and present it in that way to young people.

The bill is very complex—this is a complex subject—so different kinds of scenario could be developed from it for different ages, and the information could be presented in that way. If young people are going to be affected by the
legislation, they should be consulted. Certainly, those aged 13 and upwards should be consulted because the bill has particular resonances for them.

**Paul Martin:** That was almost a ministerial answer until the end.

**Kathleen Marshall:** Certainly 13, 14 and 15-year-olds must be consulted.

**Paul Martin:** That would be the minimum that you would recommend.

**Kathleen Marshall:** That is an absolute minimum. We have to consult them because it is their lives that we are talking about.

**Paul Martin:** Have you carried out any work in that respect?

**Kathleen Marshall:** No. As I said, I would not do that directly. My office has a health group and a care group, with which we work closely on those issues, and we also have another general group. However, proper consultation must acknowledge the relationships that need to be built up to get a proper response.

Years ago, before I had this job, I used to do quite a lot of work on HIV and sexual health education for young people. I remember an initiative in Lothian to help to inform young people by using teachers who were no longer working as teachers but who were trained in sexual health education to lay the groundwork in a school. They got the class to divide itself into friendship groups and then talked in those groups, because they found that the young people often had similar issues. I remember one of the workers telling me that, in one class, one of the groups had only two young women. Her initial reaction was to integrate them into a bigger group but, when she talked to them, she found that they were involved in behaviour that was off the scale as far as other young people were concerned and that it was therefore appropriate to work with just the two of them.

I have always remembered that as a good example of making sure that we create a situation in which young people can talk freely because we have shown that we trust them and take them seriously, and they do not have to expose themselves to their peers. It is not about bravado or the converse—the young people who might feel that they are under peer pressure to consent to things, say things or exhibit behaviour that they do not feel comfortable with. The consultation will have to be carefully designed.

**Paul Martin:** As the children’s minister, are you—

**The Convener:** Not minister.

**Kathleen Marshall:** I thought that something had happened there.

**Paul Martin:** I am sorry. As the children’s commissioner, are you disappointed that the Government has not carried out such a consultation to date? The bill is significant and it will affect children.

**Kathleen Marshall:** It is disappointing that the bill has come this far without young people having been consulted. However, it is not too late.

It would take a lot of groundwork for the kind of consultation that I am talking about to be effective, well planned and sensitive, and the question is whether that will be possible within the bill’s timescale. It would not be helpful to rush something through to get a piece of legislation, because that would mean that everyone would think that the issue has been dealt with—people will say that the issue has been the subject of recent legislation and that we should not revisit it.

The current situation is not ideal or principled. I am thinking specifically of the gender inequalities that young people face. The question is about whether we try to patch that up and then believe that we have done it, or whether we say that there is still a lot of unfinished business.

People are not polarised about this issue. Everyone here wants the same thing. I have not come across anyone in the debate who says that they are happy about underage sex. Everyone wants to support young people to make the right choices. If we are serious about doing that, we must not do something that has unintended consequences.

11:45

**Paul Martin:** You said that the minimum age for consultation should be 13. However, the statistics tell us that those under 13 are involved in underage sex. If the minimum age for consultation is 13, how do we consult those under 13?

**Kathleen Marshall:** I did not say that; I said that it should be at least 13. Thank you for raising the matter. It gives me the opportunity to clarify what I said, which is that, at minimum, we should consult 13 to 15-year-olds. There is a case for also consulting those who are under 13, but we would need to think carefully about how we do that. Also, there should be segmentation of the questions and issues that we put to those young people who have been involved in that kind of behaviour and those who have not. I said that, at minimum, we
should consult those who are 13 and up, but there is a case for consulting those under that age, too.

**The Convener:** That was my recollection of your evidence.

**Robert Brown:** In your submission, you said that the bill should be amended

“to exclude younger children from criminal consequences in relation to the ‘strict liability’ offences”.

For the avoidance of doubt, to which offences are you referring in the context of the bill?

**Kathleen Marshall:** Any offence that involves sexual activity. An associated issue is the age of criminal responsibility—we can get on to that if you want to do so.

**The Convener:** No. I would prefer not to do that today.

**Kathleen Marshall:** In my submission, I said that I find it strange that we are prepared to criminalise younger children for engaging in behaviour that they are legally deemed to be incapable of consenting to. There should be no possibility of criminal liability in sexual offences that involve children under 13. I could expand on that, but I will not; I have taken to heart the convener’s message.

**Robert Brown:** That said, will you expand a little on the kind of extreme cases that previous witnesses have raised. For example, we heard of a 12-year-old having some sort of sexual activity with a two-year-old. Is there not scope for having a different approach in those extreme cases?

**Kathleen Marshall:** No, not at all. If a 12-year-old is engaged in that sort of behaviour with a two-year-old, the matter is one of extreme concern. We need to take significant measures to address the situation, but the criminal law is not the appropriate way to address the matter. A 12-year-old is still a developmental being. Of all our population, we have to regard our children as redeemable. We have to try to help and encourage them towards a better way of life. The example raises serious issues about the life and experience of that young person that led them to do that.

Without getting into the debate on criminal responsibility, I think that there is something about the phrase that is unhelpful. For example, when we talk about raising the age of criminal responsibility, people tend to think that, because we are talking about responsibility, we are talking about moral responsibility—whether someone knows the difference between right and wrong. That is not what it is about. When the Scottish Law Commission produced a report on the subject a few years ago, it talked about how unhelpful the language is. What we are really talking about is how we respond to such behaviour. It is about the age of criminal liability and the age of criminal prosecution. It is not about saying that there is no moral responsibility or differentiation between right and wrong; it is about asking what we do about the young person involved and how we try to get them back on the right track so that they become a confident, positive and contributing member of society.

**Robert Brown:** However, in addition to the welfare of the perpetrator child—if that is the right way to put it—the issue of public safety is involved. I want to explore two aspects of that, the first of which relates to whether a different approach needs to be taken in such cases, including different procedures. The second aspect relates to disclosure certificates and the issue of the rehabilitation of offenders, which we touched on earlier. Should a distinction be made between public safety-type cases where a child under 13 is involved and consensual sexual activity by young people who are equal in age when determining whether a record should be made that may materialise later on and have an evil effect on the progress of someone’s career or whatever?

**Kathleen Marshall:** The public safety issue must be of concern. If we go down the criminal route and do not get to the nub of what has happened to a young person and find out why they are behaving in the way that they are and whether they are dangerous in the short term or long term, we are doing the public a disservice as well. I fully accept the public safety argument, which is about trying to create a safe and secure society for everyone, including young people.

Unfortunately, if we extend the criminal record part—as we know, even a referral on an offence ground to the children’s hearings system would count as a conviction for the purposes of the Rehabilitation of Offenders Act 1974, although not for other purposes, and such things could show up in disclosures later—we are devaluing the disclosures system. If people can rubbish it by saying, “Well, you can get a sexual offence record for having sex with your girlfriend or boyfriend when you’re 15, so that doesn’t mean anything,” that will devalue something that is a useful tool for identifying people who are a danger to children or other adults. There is a genuine issue, not only for the young people in relation to whose actions there would be a completely disproportionate response, but for the perception of the disclosure system.

**Robert Brown:** Can you tell the committee what situations you are thinking of when you talk about public safety issues? Do you accept that, in the interests of public safety, certain exceptional cases ought to show up in disclosure checks? That number might be small, of course. How might
we define those that should show up? What mechanisms might we put in place in order to ensure that that happens in a way that is rational and fits in with other legal concepts?

Kathleen Marshall: I have no problem at all with the principle of safeguarding the public. Very few young people will genuinely be a threat to public safety. It is not in the interests of those who will be a threat to the public that that should go unnoticed or unremarked and that they should not be catered for. However, the question of how we can fit that into the welfare-based system is not an easy one to answer today. You have to watch what route you take. There is a question about what comes through the doors that you open when you follow such a course.

The public safety issue is one thing, but consensual sex between two young people does not sound to me like a public safety issue. We have to disentangle those issues.

Robert Brown: Accepting that the bill is not going to deal with the age of criminal responsibility, are you concerned that the definitions in section 15 might criminalise kissing, touching or similar consensual activities between children who are under 13?

Kathleen Marshall: Yes, that is a serious concern. All sorts of innocent behaviour could be caught up in that, and we could end up cornering children into a no-touching approach, which is an issue that we have talked about previously in relation to the unhealthy, clinical environment that we are creating between adults and children, wherein adults are afraid to talk to a child or comfort them when they fall and teachers are afraid to put sun cream on a nursery child. We are going to end up giving children the same message and telling them that touching and any display of affection or intimacy is dangerous. That is not helpful. We have to get the balance right.

The Convener: We will now turn to the issue of consensual sex involving older children.

Cathie Craigie: I get the impression that you think that the bill’s provisions on sexual activity between older children are not ideal. In what ways could those provisions be improved?

Kathleen Marshall: My problem with the bill is that we are proceeding on the basis of insufficient information. The act that set up my post says that I must take account of the United Nations Convention on the Rights of the Child and involve children and young people in my work. It also says that I must encourage others to take account of the views of children and young people in their work, so I am putting it to the Parliament that wrote the act that set up my post that on this issue above all, it is necessary for us to understand the situation from young people’s perspective. I think that there is a hole in the information in that regard.

When I responded to the Government’s consultation, although one would not know it from the media reports, I gave a cautious welcome to the decriminalisation proposal. I recognised that there could be a downside if it were received in a way that made it look as if the age of consent would be lowered, with the result that young people might feel under pressure. I said that any such measure would have to be accompanied by an extremely high-profile public health education campaign to counter that effect. I also said that we could not progress the idea until we had spoken to children and young people, whose lives, experiences and motivations are at the centre of the issue.

The recent survey that showed that 34 per cent of 15-year-old boys and 30 per cent of 15-year-old girls were sexually active demonstrates that, whatever message the law is giving out, it is certainly not being universally accepted. The people who have been concerned about decriminalisation are worried that sexual activity among the young will increase further and that being sexually active will become normal among young people. The convener does not want me to talk about the age of criminal responsibility and is probably even less keen on me talking about the physical punishment of children, but what is fascinating about the debate—

The Convener: I am in no way trying to inhibit you. I just do not want such issues to be discussed here and now. I am more than happy to have that debate elsewhere, but I ask you to confine your remarks to the bill’s provisions.

Kathleen Marshall: Yes, but one of the phrases that was used constantly in the debate on physical punishment was, “We do not wish to criminalise ordinary loving parents.” I find it strange that the same people who said that seem to be quite keen to criminalise ordinary loving teenagers. There is a strange link between the two subjects, both in that sense and from the point of view of what we describe as the symbolic use of the law, which is about whether it sends out a strong message. The fact that people who argue one thing in one debate argue the opposite in the other shows that we have a great deal of thinking to do about the purpose of the law, which, to an extent, is a highly academic issue.

Neither I nor, with the greatest respect—I say that sincerely, rather than as lawyers use the phrase—the committee has the information to proceed on the issue at the moment.

Cathie Craigie: Thank you for that response. I accept what you are saying. You are batting the
ball back into our court, which the act that set up your post entitles you to do.

In your submission, you explored the issues of “principle”, “effectiveness” and “unintended consequences”, but you did not come to a final conclusion. Have you had further thoughts on those issues? Will you expand on the principles that you think should govern the law in relation to consensual sexual activity between older children?

Kathleen Marshall: I did not come to a conclusion because I do not think that we have the information that allows us to do so. We must start with the reality of young people’s lives; it is not just about subsections in an act. We must start from there and ask how the law can help young people. I want a resolution that respects the international standards to which we are committed. The Convention on the Rights of the Child seeks to protect young people, to ensure that they are supported in doing that. We must start from their lives.

12:00
There is also a new Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse. We have not ratified it yet, but it addresses the issue. Article 18 states:

“Each Party shall take the necessary legislative or other measures to ensure that the following intentional conduct is criminalised:

a. engaging in sexual activities with a child who, according to the relevant provisions of national law, has not reached the legal age for sexual activities”.

However, the convention goes on to say:

“The provisions of paragraph 1.a are not intended to govern consensual sexual activities between minors.”

So there has been debate about the issue at international level, too.

We have heard that young people are interested in relationships, not just the mechanics. We want to promote something that encourages them to behave in a way that is respectful of themselves and of other people, and we want to ensure that they are supported in doing that. We risk unintended consequences by bringing in the weight of the criminal law and the fear of prosecution when a young person has done something that, in retrospect, they regret—and a lot of the research shows that they do regret it. So we need to think further about that.

Those are my thoughts. I do not pretend to be able to get into the head of a 14 or 15-year-old—they live in a different world. We really need to set up a context in which we can hear from them and start from their lives.

Nigel Don: Good afternoon, Professor Marshall. How unhappy are you about the idea of having a law that is routinely not enforced?

Kathleen Marshall: That is an interesting question. I noticed that you posed it at last week’s evidence session. At the heart of this is the argument about the symbolic use of the law. People seem to be in agreement that we do not want to apply the criminal law to cases in which the activity is consensual, but the argument is that the law sends out a strong message. The possible unintended consequence of not enforcing the law is that young people will get the impression that there are laws that do not need to be obeyed. There is a parallel with physical punishment, as I mentioned in a footnote to my written evidence.

The Convener: We have read it.

Kathleen Marshall: Relying on the basis of existing principles—not on the de minimis rule that the law does not concern itself with trivialities—we argued that minor assaults between adults, such as taps, are not prosecuted and neither should they be when they occur between children. I have some sympathy with the symbolic use of the law. We do not catch all muggers, murderers or rapists, and the conviction rate is not a guide to whether the law should make a clear statement.

One of the problems is that already, when the activity is known to be consensual, there are no convictions. The phrase, “If it ain’t broke, don’t fix it” springs to mind. There is a sense in which we have let the genie out of the bottle. We have had big debates about the issue and now have it in the act along with binding instructions for the police. What are they going to say? Are we going to come out and say, “Right. This is what the law says, but we’re not going to prosecute”?

There are some precedents. The Crown Office has a prosecution code on its website, which shows the principles that it applies in deciding whether to prosecute. I seem to recall—although I have not checked this—that in one case, concerning Travellers sites, there was a presumption against prosecution. That is not unknown in our law.

There is a symbolic use of the law, but we must be prepared to prosecute in appropriate circumstances. That then leads to the question of how those circumstances can be decided unless there is an investigation. How can it be known that the activity was consensual? That takes us into the unintended consequences to which I referred, which apply across every part of the population. We are talking about our children, not some group of people out there. Is a police investigation helpful to someone whose 15-year-old daughter is standing before them pregnant by her 15-year-old boyfriend? Unless we say that there will be no
investigation, there will always be a criminal dimension because there will always be an associated question about an investigation. Even that is quite scary for people.

I have not answered the question cleanly, because there is a symbolic side to the law. At present, and in the debate about the bill’s provisions on consensual underage sex, we talk about sending out a strong message to young people, but 30 per cent of them are not taking the message on board now. Will a strong message combined with a direction not to prosecute actually make any difference?

Nigel Don: That is helpful and I am glad that it is on the record. I would like to explore a further point that needs to be on the record.

I understand what you mean when you say that you cannot get your mind around being a teenager. My increasingly grey beard tells you that it is some time since I was a teenager, but at one level I well remember being a teenager and I know perfectly well that as a 15-year-old I would have wanted to know what the law actually said. I am wondering what to tell my 15-year-old son that the law really says. Should I tell him not just that the law is not routinely enforced but that, when it is enforced, it will be at the Lord Advocate’s discretion?

I have nothing against the Lord Advocate either personally or in principle, but if we do not know how her discretion will be exercised, we do not know what the law is. The first rule of law is that it applies to everybody and the second is that we know what it means. How unhappy are you with the idea that children do not know and cannot find out what the law actually is?

Kathleen Marshall: I listened to your discussion about that with the previous panel. The Lord Advocate’s discretion is written throughout the criminal justice system and not just into particular laws. What matters is not just the sufficiency of evidence but that prosecution is in the public interest, and there are other principles that apply. It would be difficult to have a system with no such discretion about whether to prosecute. As I recall, the policy memorandum does not mention the policy thinking behind leaving the decision to the Lord Advocate’s discretion, but it has been suggested in discussions that, in general, we will not prosecute, which seems to counteract the strong message that the law is meant to send out.

There is another issue. Is the criminal law the only or the most appropriate way in which to set standards for young people? Do we always need a command with the threat of punishment, be it empty or not? Are there other ways in which we can encourage young people to understand what is best for them and other people and to have standards that are based on something other than the threat of punishment? How can we encourage them to have standards that come from within and are about dignity and respect?

People respond to different things. Some people will never park on a double yellow line, for example, but others will do it just to show that they can. People have different views of the law and they respond to it differently. Some people like to challenge it and some people like to undermine it. Some people are law abiding and scrupulous, but other people respond to something quite different that comes from within themselves. When the UN committee scrutinised the United Kingdom’s performance, one thing that came out was that we demonise our young people. In particular, other parts of the UK have a hard-punishment ethos, although we are better about that in Scotland.

I like to think that we can proceed in a way that respects our young people and tries to treat them positively, rather than that we have the criminal route as the fallback position.

Nigel Don: So would you support the idea that those who engage in sex before we say that they should are not treated by the criminal law but are referred to the children’s panels or wherever? I am not sure where the idea came from; it might be the original Scottish Law Commission proposal. It would send the signal that underage sex is not right and will have consequences, but not criminal consequences.

Kathleen Marshall: The children’s panel is a more appropriate route for dealing with such behaviour than the criminal law because it also focuses on the welfare of the young person concerned and we are talking about consensual activity. There is also the question whether all such children should be referred to the children’s panel. The panel system would be completely swamped by it, but a consideration of whether referral was appropriate in some cases would be valuable.

To avoid a swamping and to take account of what previous witnesses said, there is a huge need for young people to have access to services to talk about such matters and to get friendly and helpful support and guidance in a way that respects them and helps them to respect other people. We should be looking at the issue from that angle. When issues need to be addressed, cases could be referred to the children’s hearings system, but I do not think that we could deal with all cases in that way.

The Convener: A depressing answer. The final question will come from Cathie Craigie.

Cathie Craigie: Professor Marshall, you said that we are basically talking about 30 per cent of young people; I remind us all that 70 per cent of
young people are taking on the message. It is important that we get that across.

Nigel Don referred to the original proposal from the Scottish Law Commission, which I accept, that all the young people in question should be heard through the children’s hearings system, although I understand that it could be swamped by the level of complaints. Do you have any information on the number of young people who come before the children’s panel in cases involving sex?

Kathleen Marshall: You would be better asking the reporters on the next panel of witnesses. From my previous work in the Scottish Child Law Centre, I know that there has been a debate in which some reporters wanted all underage pregnancies referred to them and social work departments said that that was not appropriate. We would have to be discriminating.

The Convener: The question might more properly be pursued with the reporters in the next panel.

Kathleen Marshall: The Scottish Law Commission was working on the basis that the only available ground of referral was offence and that such an issue could not be fitted into other grounds. I have since heard some reporters say that they have used other grounds of referral. That would be interesting to explore as a matter of fact.

The Convener: We will try to tease that out.

Professor Marshall, we are much obliged to you for coming along this morning and answering in your usual frank style—your honest responses will be of considerable assistance to us in formulating a view on the matter.

Karen Brady (Scottish Children’s Reporter Administration): At the moment, for young persons under 16, anything that falls to be dealt with as a criminal offence is jointly reported to the procurator fiscal and the children’s reporter, who then discuss the most appropriate place for dealing with the matter. If it is decided that the children’s reporter will deal with the referral, the reporter will then decide whether there is a need for compulsion. Therefore, the test for determining the need for intervention in a young person’s life is based on the grounds of the referral and on the need for compulsion. At the moment, I am unable to provide figures for the number of offences that are dealt with in that way.

The Convener: We would appreciate it if you could provide them in writing.

Robert Brown: Are you able to give us a flavour of the kind of things for which, under the current arrangements, a very limited number of cases have gone to court?

Karen Brady: The procurator fiscal tends to deal with cases that have more serious coercive elements. The general assumption is that cases involving young people under 16 will be dealt with by the reporter: the criminal courts deal with only a very limited number of cases involving such behaviour.

If any criminal activity is involved, the reporter is likely to refer the matter as a criminal offence. However, if the behaviour predominantly constitutes a criminal offence, current case law restricts us in referring that kind of behaviour on non-criminal welfare-based grounds. In general, however, the majority of such incidents will be dealt with by the reporter.

Robert Brown: Professor Marshall said that she had heard that some reporters had used welfare-based grounds to take such matters forward. Do you have any knowledge of that?

Karen Brady: That might happen in cases in which a young person has not been referred for such behaviour by the police. As you know, young people can be referred by any source, and it might well be that concerns have been referred through some other route and that, as a result, the fiscal and the reporter have not been able to discuss the matter.

Robert Brown: That might happen in cases in which a young person has not been referred for such behaviour by the police. As you know, young people can be referred by any source, and it might well be that concerns have been referred through some other route and that, as a result, the fiscal and the reporter have not been able to discuss the matter.

If behaviour has begun to form a pattern or has given rise to a series of concerns about the child being outwith parental control or exposed to moral danger, and if those concerns are not solely to do with criminal behaviour, the reporter will be able to use those separate concerns and that pattern of behaviour, which can very often reflect, but is not exclusively linked to, sexual behaviour that is cause for concern. However, reporters tend to use such grounds in cases that give rise to wider
concerns and which reflect a pattern of behaviour that goes wider than the particular issue.

**Robert Brown:** Are you able to give us a flavour of the situations that would be referred under the criminal grounds that, as you say, are more normally used? I assume that they are not used in, for example, consensual arrangements between children of 14, 15 or whatever.

**Karen Brady:** Are you talking about the cases that are prosecuted?

**Robert Brown:** No. I am talking about cases that are referred to the children’s hearings system.

**Karen Brady:** Those cases are likely to be referred to the reporter, but very few will end up at a children’s hearing. The reporter will base his or her decision on the behaviour that has been presented and all the other matters related to that young person, including their parents, their living environment and their development.

The reporter must also consider the need for compulsion. Only when there is a need for compulsion will the young person be referred to a children’s hearing. If a young person is not referred to a children’s hearing, it does not mean that there will be no response or action to address concerns. Measures are often put in place to engage the young person and their family voluntarily. However, the decision to require a children’s hearing will be based on two factors—the young person’s behaviour and whether there is a need for compulsion.

**Robert Brown:** Am I right in assuming that a case that would be rape for an adult will be dealt with by the procurator fiscal, through the criminal courts, or is the position not quite that straightforward?

**Karen Brady:** No—it depends on the circumstances of the child. The more serious the offence, the more likely it is that the Crown will be interested in prosecuting the case. The presumption with all under-16s, irrespective of their offence, is in favour of the matter being dealt with through the children’s hearings system. However, the fiscal may decide to prosecute. The cases in which very young children are dealt with by the criminal courts are likely to relate to serious offences.

**Robert Brown:** If the bill is passed in something like its present form, will the Scottish Children’s Reporter Administration have to make significant changes to the approach, philosophy and practice that it adopts when dealing with such matters?

**Karen Brady:** We will want to look at the matter in the context of our decision-making framework, which involves consideration of various aspects of a child’s life. I am not sure that I can go beyond that at this point.

**Robert Brown:** I refer you to the arrangements for 13 to 16-year-olds. Although there are differences of legal principle, there is also a recognisable echo of previous law. Do you envisage there being significant changes to the way in which you approach the question of what cases are prosecuted, which are referred to the children’s hearings system or in any other regard?

**Karen Brady:** I do not think so—the presumption will remain that young people under 16 should be dealt with through the children’s hearings system. The same process will be followed and the same presumptions will apply in respect of offences that are committed by that group.

**Robert Brown:** Originally, the Scottish Law Commission debated the possibility of having, as an alternative to criminal prosecution, a non-offence ground for referral to the children’s hearings system for 13 to 16-year-olds. Would having such a ground be of assistance to you in your work, or would it be a negative factor?

**Karen Brady:** We think that that would be the most appropriate way of dealing with the issue. From a child-centred perspective, it would provide an opportunity to address the behaviour and needs of a young person in the round and in a welfare-based way. It is difficult to know whether it would change the number of cases that the children’s hearings system would receive; to a large extent, that would depend on referral practice. However, the appropriate way of responding to young people’s behaviour in the children’s hearings system is on a ground for referral that enables hearings to consider the wider welfare needs of young people, as well as their behaviour.

**Angela Constance:** What principles should govern the criminal law in relation to sexual activity involving, first, those whom the bill describes as “young children”, and secondly, those whom it describes as “older children”?

**Netta Maciver (Scottish Children’s Reporter Administration):** I see that I am not being allowed to escape that question. The bill currently distinguishes between young children under 13, who are considered to have no capacity to consent, and those between 13 and 15, who are considered to have limited capacity to consent. Our belief is that, as Karen Brady said, these concerns are addressed most effectively and appropriately as an issue of welfare, care and protection. The mechanism for that would be the new ground of referral, which has already been covered.

**Angela Constance:** So the underlying principle is the welfare of children.
Netta Maciver: Absolutely. We heard from earlier witnesses about the difficulty of legislating for individual cases. The hearings system allows for individual assessment.

Nigel Don: The bill treats older boys and girls equally when they engage in consensual sexual relations—it criminalises both of them. Do you think that that is the way forward or—assuming that we are sticking with the idea of criminalisation—do you think that it would be better to stick to the current position of being able to prosecute only the boy?

Netta Maciver: We do not think that it is acceptable that there is a different way of treating young men and young women. However, as the bill stands, there is the potential to criminalise both of them equally. We think that there are potential difficulties with that, which you might want to explore further.

Nigel Don: I would be happy to explore them further because, as the bill is drafted, we are talking about criminal responsibility. If you would highlight the potential difficulties, that would be of great assistance.

Karen Brady: As Netta Maciver said, we think that the behaviour should be dealt with as a matter of welfare within the children’s hearings system. There are potential practical consequences of the bill in relation to the Rehabilitation of Offenders Act 1974 and in relation to any conviction or charge that will follow a young person throughout their life as a result of the disclosure provisions that we heard about earlier. Dealing with the behaviour in the way that the bill proposes has clear implications.

An issue that was highlighted earlier is how young people are dealt with and the response of professionals in relation to disclosures of underage sexual activity. If the bill remains as drafted, there will be issues around whether a young female who is pregnant is a victim of a serious offence or whether she has committed an offence herself. That will create challenges for some of the agencies that have to respond. The category that the young person falls into—whether they are treated as a victim or as someone who is accused of committing an offence—will affect how they are dealt with thereafter by the police in interviews and so on. There will be practical consequences of the bill as drafted. Our wider view is that the matter is better dealt with in the hearings system as a welfare issue.

Nigel Don: If we accept your point and given the possibility that the bill will go through as drafted—I have no idea what we will finish up with, because the issue is clearly difficult—do you think that the problems that you have just articulated could be dealt with by appropriate paragraphs that would allow freedom of work for those who deal with youngsters after the event? Should we be able to draft things in such a way that the appropriate professional services can be given without liability? Is that likely to be a problem? Should we be able to solve that problem if we put our thinking caps on and draft things correctly?

12:30

Netta Maciver: It is important that we make clear where we stand. We fully appreciate that the Government wants the law to continue to make clear that society does not encourage underage sex. However, we want to be able to respond to concerns about the sexual behaviour of children, whatever their age, and we want our response to be based on the principle of affording protection to children. You ask whether we can manage to do that; we think that if there is an appropriate ground of referral, we will be able to bring to a case the individual scrutiny that, allied with consideration of whether compulsory measures of care are needed, will enable us to make the decision that is best for the child.

Nigel Don: That takes us to the question that was asked earlier—possibly by me. From your perspective, what is the point of maintaining a law that we routinely do not apply, and which we apply only rarely, I presume in cases in which another aspect of the law could be applied?

The Convener: I note a degree of hesitation on the part of the witnesses.

Karen Brady: Our position is that a new ground for referral would be the more appropriate approach and would give us the opportunity to deal with the behaviour in the context of consideration of the young person’s wider welfare needs.

Nigel Don: Does that mean that you see no purpose in having the criminal law on your side at that stage?

Netta Maciver: It is fair to reflect some of your previous witnesses’ concerns about the messages that might be sent out. We are saying that, although we do not regard sex among the under-16s as particularly healthy for young people, we accept that the people on whom we are most likely to focus will generate a range of other concerns.

Stuart McMillan: The SCRA agreed with the abolition of the offence of lewd, licentious and libidinous practice but expressed concern that the bill might not cover conduct that is currently criminal. Will you explain your concerns?

Karen Brady: In our written evidence, we said that, in relation to that particular aspect of the bill, there would be a need to prove a purpose in the offences. Our concern is that by removing the
common-law offence of lewd and libidinous practices and moving to the offences that are created in the bill, some areas might not be covered and difficulties might be created if it were not possible to prove a purpose. The bill might therefore give less wide protection for young people than exists under the common-law provisions. We flagged up our concern because we do not want children to be less protected than they currently are.

The Convener: If there are no more questions, I thank Ms Maciver and Ms Brady for their extremely helpful evidence.

We move into private session. I thank the public for their attendance.

12:33

Meeting continued in private until 13:24.
Sexual Offences (Scotland) Bill: Stage 1

10:18

The Convener: I intimate to our witnesses and to others present that, today being 11 November, business in the Parliament—and indeed in all public buildings and courts in Scotland—will be suspended briefly at 11 o’clock for the appropriate commemoration. I will attempt to bring proceedings to a halt at a suitable moment just prior to 11 o’clock. I apologise for the necessary interruption but I am sure that everyone appreciates it.

I welcome Euan Page, senior parliamentary affairs officer at the Equality and Human Rights Commission; Mhairi Logan, manager of Scotland’s lesbian, gay, bisexual and transgender domestic abuse project; and Tim Hopkins, policy and legislation officer at the Equality Network. I thank you for attending to give evidence; it is greatly appreciated. The committee is slightly behind the 8-ball, time-wise, so I ask members to ask questions as succinctly as possible.

Bill Butler (Glasgow Anniesland) (Lab): Good morning, colleagues. As you know, the Sexual Offences (Scotland) Bill seeks to move the law in the direction of making rape gender neutral. Could each witness comment on that policy from the perspective of equalities and human rights?

Tim Hopkins (Equality Network): We have been pursuing that end for many years. In England, the law of rape was extended in 1994 to include male rape. If a man is raped, it is important that the right language—the language of rape—is used in prosecuting that. I thank you for attending to give evidence; it is greatly appreciated. The committee is slightly behind the 8-ball, time-wise, so I ask members to ask questions as succinctly as possible.

The project definitely accepts the definition of rape. We are very pleased that the right language—the language of rape—is used in prosecuting that. I thank you for attending to give evidence; it is greatly appreciated. The committee is slightly behind the 8-ball, time-wise, so I ask members to ask questions as succinctly as possible.

Bill Butler: How do the witnesses respond to the comment that rape is still overwhelmingly a crime committed by men against women, and that the policy of gender neutrality might obscure that fact?

Euan Page: I disagree that there is any—

Bill Butler: I am playing devil’s advocate.

Euan Page: Of course. It is a very good point. The Equality and Human Rights Commission disagrees that there is any contradiction between striving for gender neutrality in statute while recognising that the policy environment in which the new law will be introduced is one in which we are dealing with rape as a gendered crime. There is no contradiction as far as the commission can see.

Bill Butler: Does Ms Logan have a comment on that view, which is sometimes expressed by some people?

Mhairi Logan: The project definitely accepts that we are talking about disproportionate gender-

penis and vagina in section 1 of the bill. Transsexual people have told us that they are unhappy with the terms “artificial penis” and “artificial vagina”. Such language is not used in the corresponding English legislation, which simply refers to surgically constructed parts. That is what we are talking about. An artificial body part is a prosthetic part; an artificial limb is a prosthetic limb, not a surgically reconstructed limb. A limb that is part of the body, whether it is surgically constructed or original, would not be called artificial, and the same should apply in the language of the bill. We recommend the language that is used in the English legislation and removal of the word “artificial”.

Mhairi Logan (LGBT Domestic Abuse Project): We support what Tim Hopkins has said. The domestic abuse project believes that it is great that men will be able to name the experience of rape as such. We are really pleased with the changes to the first offence of rape.

Euan Page (Equality and Human Rights Commission): I agree with my colleagues. This is a long-overdue rewriting of the law to ensure that offensive, outmoded terminology is removed and that the offence of rape can apply equally to male and female victims. We welcome that.

Our submission picked up on one or two outlying issues. Although the bill strives, rightly, to make rape and sexual offences gender neutral in statute, the policy environment in which we work is that—without for a second downplaying the equal trauma and pain that are caused by rape regardless of the gender, gender identity or sexuality of the victim—rape is still predominantly a crime committed by men against women.

Bill Butler: Does Ms Logan have a comment on that view, which is sometimes expressed by some people?

Mhairi Logan: The project definitely accepts that we are talking about disproportionate gender-
based violence, but as it stands, the bill does not diminish that. It is about the policy context within which we work. Lesbian, gay, bisexual and transgender people who experience domestic abuse and rape should also be considered in terms of gender-based violence; that sits quite comfortably alongside what is proposed in the bill.

**Bill Butler**: I understand that.

**Tim Hopkins**: The number of cases in which the new crime of rape as set out in the bill would be committed by someone who is legally a woman would be very small. The Scottish Law Commission was right to identify penetration with the penis as a specifically bad crime. The penis is a sexual organ, it is in the nature of rape, and it is what people understand rape to be. We are therefore in favour of rape being a separate crime, which means that it can be committed only by someone who has a penis; the majority of those who commit rape are men. The crime is gender based and the law should recognise that.

**Bill Butler**: All three organisations refer to rape of a woman by a woman. Is that a significantly prevalent issue?

**Mhairi Logan**: Our written submission refers to Stonewall Scotland’s recent research, in which approximately one in 15 lesbian or bisexual women disclosed that they have been raped by a partner. Other research that was done in 2006 into same-sex domestic abuse showed that approximately one third of respondents disclosed that they had experienced sexual violence by a partner. We are therefore talking about significant numbers and a massive issue.

That is why we said that it is important that the bill includes an offence that sits alongside rape and which is clearly distinct and not subsumed within general sexual assault. It is important that the rape with an object offence is included to cover lesbian and bisexual women’s experience in the context of domestic abuse. Without that, we cannot say that the legislation is sexual-orientation neutral because it will not cover the experience of a sizeable proportion of women.

I support what Scottish Women’s Aid and Rape Crisis Scotland said on the issue. It is important that the term “rape with an object” is used. As Tim Hopkins pointed out with regard to gay and bisexual men being able to use the word “rape”, an important part of experiencing sexual violence and being able to recover from it is for the victim to reach a point at which they can say not that they were forced to have sex, but that they were raped. Giving lesbian and bisexual women that language is important to the recovery process, and rape by an object or another body part can still be a separate offence. We should think about that.

**Tim Hopkins**: Our position is the same as that of my colleagues. There should be a separate offence. The English offence is called “sexual assault by penetration”, but the term “rape with an object” would be better because it captures the victim’s rape-like experience while distinguishing the crime from the central rape offence of penile penetration. The offence should cover vaginal and anal penetration, but not oral penetration; that is what the English law does. The Scottish Law Commission originally suggested that in its 2006 discussion paper.

**Euan Page**: I agree with what has been said. The EHRC pointed to stakeholder concerns that there is a gap in prevention, protection and understanding in the area of same-sex female rape, both in the criminal justice arena and in the wider interventions for support after such an event. We need to be alive to that.

**The Convener**: I turn to Cathie Craigie, although I think that the witnesses have anticipated her questions to some extent.

**Cathie Craigie (Cumbernauld and Kilsyth) (Lab)**: The witnesses are very good and are covering everything while taking account of the convener’s introductory remarks.

I hear everything that you have said this morning, what is in your submissions, and the clear arguments that have been made. The Lesbian and Gay Christian Movement’s written evidence raised concerns about the same matters. It suggests that, if the Government is not willing to take the route that we have just discussed, we should consider creating a separate offence of assault by penetration. What are your views on that?

10:30

**Tim Hopkins**: The principal difference between what the LGCM suggests and what we suggest is just the name of the offence. It suggests the creation of an offence that is similar to the English offence of assault by penetration with an object or another part of the body. We believe it is important that the offence is called something like rape with an object; as Mhairi Logan said, such an assault is experienced by the victims as a form of rape, so it is important that the word “rape” is included.

**Cathie Craigie**: Would you confine the definition of rape to vaginal and anal penetration?

**Tim Hopkins**: Yes. Other witnesses have discussed the matter with you already and the Scottish Law Commission discussed it in its final report. There is an issue about, for example, a forced kiss during which there is penetration with the tongue. If the crime of rape with an object was defined to include oral penetration, such a forced
kiss would become an example of rape with an object. It is not clear that it makes sense for the word "rape" to be applied to such things, whereas it is much clearer in the case of coerced and forced vaginal or anal penetration. That is why we believe that it is not appropriate to include oral penetration in the offence. Oral penetration would be covered by the sexual assault offence.

Mhairi Logan: The word "rape" depicts the seriousness of the offence. I agree with Tim Hopkins that the definition of rape with an object should be confined to vaginal and anal penetration.

Cathie Craigie: Would you include penetration by other parts of the body?

Mhairi Logan: Yes, definitely. People experience violent rape with the hand, fingers or other parts of the body. It is important to include that.

The Convener: We turn to questions on consent and reasonable belief, on which Robert Brown will lead.

Robert Brown: I want to ask about two aspects. The first relates to the question of the victim being asleep or unconscious. The same point has been made in different ways by many organisations, but the Equality and Human Rights Commission, in particular, states:

“It is very difficult to see under what circumstances an individual would wish to consent to sexual activity at some point in the future when s/he is asleep or unconscious.”

To an extent, the issue is theoretical. Will you elaborate on your thinking on it? There is a genuine question about when consent takes place. How do we deal with the problem of situations in which alcohol has been taken or issues of greater uncertainty arise?

Euan Page: The committee is right to try to bottom out that area, because it is not clear cut. We must ensure that we do not sweep up in the law people who behave inappropriately but not in a way that should leave them open to a serious criminal charge. As we state in our submission, we need to get a handle on the situation that is envisaged. The dangers in going down the route of prior consent are manifold. By its nature, consent, or free agreement as it is defined in the bill, implies the ability freely to withhold consent at any time, but that ability is removed if one of the sexual partners is unconscious.

I know from reviewing the previous evidence that has been given to the committee that there have been discussions about situations in which people have had too much to drink and somebody gets caught up in the moment. To take the model to its logical conclusion, however, is it really conceivable that an individual would be caught up in the moment and have sex with somebody who was unconscious? Part of a sexual relationship between two adults is the important principle of reciprocity, and that would be missing from such an arrangement.

The dangers of proceeding with the provision on prior consent outweigh the dangers of removing it. We need to ensure that the criminal law does not inadvertently reinforce the public misconception, which is unfortunately still widely held, that somebody can be responsible for being raped because they had too much to drink or acted stupidly with drink, drugs or whatever. The responsibility for being raped does not exist; the rapist is the only person who is responsible for a rape.

Robert Brown: Your submission states that section 10(2)(b) of the bill, which deals with the matter, should be removed. Is that what it boils down to?

Euan Page: Yes. Unless a compelling reason is given for recrafting the provision in such a way that it clearly protects a group of people who would otherwise be caught up in criminal law inappropriately, the provision should be removed from the bill. The Equality and Human Rights Commission is not aware that any compelling reason has been provided thus far.

Robert Brown: Do you have a clear view about how consent should be indicated in the perhaps more ambiguous circumstances that we are discussing? We should bear it in mind that the matter has given the courts difficulty for 150 years, when cases of clandestine sexual assault were first decided by the High Court.

Euan Page: I do not pretend that this is an easy area. Doubtless, we will move on to talk about the bill's provisions on due regard being given to the defendant's indications of what steps were taken to establish consent, which perhaps ties in with the issue that we are discussing. We need to get to the bottom of what consent looks like, be it verbal or otherwise.

To take the matter out of the realm of statute and into the realm of policy, we should consider Rape Crisis Scotland's excellent this is not an invitation to rape me campaign, for which there are posters and have been adverts in magazines and papers in the past few weeks. Consent is not affected by whether somebody has had too much to drink, is flirting with somebody, has kissed them or is wearing a particular outfit. Consent can be given or withdrawn at any point. It is important to get to the bottom of the fluid nature of consent. One does not enter into a contract to have sex with somebody. We need to get away from the onus being on the victim, who is grilled about why he or she gave out mixed messages or whatever.
The onus should be on the accused to explain what indications they believe they were given that the person consented to have sex with them.

Robert Brown: I think that we all accept those points, but the difficulty is that we are talking about criminal statute. In court, ultimately, there will have to be proof beyond reasonable doubt of all the issues, including that there was no consent. That is what gives us problems, is it not? Does anyone else have any different comments on that?

Tim Hopkins: The results for LGBT people on the issue are no different, so it is not an LGBT equality issue, but I will comment briefly. What is required is not the removal of section 10(2)(b) altogether but the removal of the second half of it, which states that prior consent is possible. We would still want a rule that stated that there is no consent if the person is unconscious.

I have the impression that the prior consent provision was included in the bill to deal with specific circumstances that, it was suggested, might arise between people in long-term relationships, but I agree with Euan Page that the dangers of including the provision outweigh the possible benefits. Regardless of what it strictly means in law, it sends out the message that prior consent is an excuse for rape. Situations that arise in long-term relationships could perhaps be dealt with in prosecution policy.

Mhairi Logan: Prior consent does not sit sensibly alongside free agreement. They contradict each other, and a question arises about how long ago the person gave their consent. I worry that the argument would be used in the context of domestic abuse and rape cases. We support the point that Rape Crisis Scotland and Scottish Women's Aid made on the matter.

Robert Brown: The other issue is reasonable belief, which section 12 covers. It is arguable that there is an element of academicness about that provision, too.

Mr Page, the Equality and Human Rights Commission has criticised the reasonable belief provision in section 12 and suggested that it runs the risk of being meaningless because of the difficulty of saying what steps the accused took if they will not give evidence. Will you elaborate a little on that? Do you have any other thoughts on how that challenge might be dealt with? Perhaps the bill has not got things altogether right, but the issue is important.

Euan Page: Before I answer those questions, it is worth putting on the record that I endorse Tim Hopkins's comments. We are not looking for the excision of the whole of section 10(2)(b); rather, we are talking about excising the offending second part of it.

The reasonable belief provision is enormously encouraging, but there is a question about its practical application. How can we introduce the provision into court procedures in a way that does not jeopardise a defendant's right to silence? Would it be possible, whether through judicial guidance or otherwise, to make it clear that an inference can be drawn from a person's refusal to provide evidence on the steps that were taken to ascertain consent? That is a practical suggestion.

Robert Brown: Are there any other thoughts or suggestions?

Tim Hopkins: I do not have anything to add to what has been said.

Robert Brown: There is concern about the provision and practical laws of evidence. Would there be any advantage in widening the provision and using the phraseology in the English Sexual Offences Act 2003? That act states that the reasonableness issue is to be determined "having regard to all the circumstances".

It should be borne in mind that an objective element to reasonable belief is introduced in part 1 of the bill.

Euan Page: The answer to your question is, "Possibly." When the Equality and Human Rights Commission met members of the bill team, we acknowledged in our discussion that section 12 strays into wider questions to do with the law of evidence in Scotland. Perhaps that question needs to be considered in the round with wider questions to do with the law of evidence. That is one possibility. Perhaps we could get back to you in writing on the matter once we have further discussed it internally.

Robert Brown: That would be helpful.

The Convener: It would be useful if you could reply to us in writing, Mr Page.

We turn to the definition of rape. Stuart McMillan's question appears to have been anticipated.

Stuart McMillan (West of Scotland) (SNP): I am content with the responses that have been given.

The Convener: Right. Angela Constance will therefore lead on questions about children and young people.

Angela Constance (Livingston) (SNP): As the witnesses know, the bill will continue to criminalise many forms of consensual sexual behaviour between older children. Is that consistent with the human rights of older children? Is it, for example, consistent with their privacy rights under article 8(1) of the European convention on human rights? I direct that question at Mr Page first.
Euan Page: The committee wrestled with that issue in its first two evidence sessions, and I do not know whether the Equality and Human Rights Commission has a great deal to add to the useful responses that you received then. We endorse the pragmatic approach that a number of witnesses have advocated. Provisions exist to deal with the very rare circumstances in which a criminal justice response would be the first and most appropriate response, but it is hard to envisage a situation in which such a response would come before a sexual health and child welfare response. In addition, the Lord Advocate has discretion to intervene when that is necessary. We would expect criminal justice interventions as opposed to other responses to be rare, as they are already.

You are right. Several potential rights are involved, particularly if we are to consider any moves towards an automatic appearance before a children’s panel. There are all sorts of issues to do with rights to privacy and the most appropriate way of dealing with individual children. We wholeheartedly agree with what has been said, and endorse the pragmatic, case-by-case approach that many witnesses have taken.

Angela Constance: Are you saying that, provided that there is discretion and people are not automatically referred to the children’s hearings system, for example, no conflict exists with the right of older children to privacy? Have I understood you correctly?

Euan Page: I think that that is right. If we are pragmatic, the law will stay in place. We think that the Lord Advocate would use her powers of discretion sparingly, and we want the best interests of both children to be paramount. It is hard to square such an approach with an approach involving an appearance before the children’s panel or any other criminal justice intervention.

Mhairi Logan: I do not have anything to add to that.

Tim Hopkins: I do not have much to add. The Equality Network does not work with children and young people, so we do not have a view on where the boundaries that separate what is and is not criminal should be. However, it is important to us that there is no sexual orientation discrimination in the law. It is clear that, at the moment, the law discriminates on grounds of gender—members have discussed that with other witnesses. If a 15-year-old boy and a 15-year-old girl engage in sexual activity, the boy—but not the girl—will have committed an offence. The law also discriminates on grounds of sexual orientation at the moment, because if a 15-year-old girl engages in sexual activity with her 15-year-old girlfriend, they will both have committed an offence, whereas if a 15-year-old girl engages in sexual activity with her 15-year-old boyfriend, she will not have committed an offence. We are pleased that that sexual orientation discrimination will be removed from the law.

It is also important that the law is implemented in a way that is free from discrimination. For example, if the question whether to prosecute an offence under section 27 is left to the discretion of prosecutors, it is important that that discretion is exercised in a non-discriminatory way. Equally, referrals to the children’s panel need to be made in a non-discriminatory, sensitive way, because a privacy issue for young lesbian, gay and bisexual people is that they may not have come out to, for example, their parents.

The Convener: Nigel Don has a question for Mr Page.

Nigel Don (North East Scotland) (SNP): I want to return to the point that Mr Page made about taking a pragmatic approach and the Lord Advocate’s discretion. In previous evidence sessions, I have been concerned that we could, for understandable reasons, finish up with a law that is routinely not enforced. It also seems to me that we are talking about a law that the average older child could not describe. The perpetrator of the offence would not be able to tell me or you what the offence was, because they would not know the circumstances under which it would be prosecuted or the circumstances under which it would not be prosecuted, which would apparently happen in the majority of cases. As someone who can discuss human rights, does the fact that people would not know the law offend you?

Euan Page: There is a general issue to do with the extent to which sexually active 15-year-olds refer to criminal statute before they decide what to do. That problem will doubtless remain.

I was struck by the comments that were made by, I think, Children in Scotland. It is a case of weighing up the pros and cons of changing the law and decriminalising such offences, or proceeding on the basis that has been advocated by several witnesses, who believe that, on balance, it is better to ensure that we continue to have a criminal law response in our armoury while recognising that that response is unlikely to be used frequently. I realise that such an approach is unsatisfactory to some members, who will think that laws that will not be enforced should not be passed. However, organisations in the children’s sector have stated that we must be mindful of the complexities of the law in this area and of the unintended consequences of sending out messages that the law has been relaxed or the penalties lowered.
The issue is not clear cut or easy, but a number of witnesses have advocated the best balance, which involves moving forward on the basis that the law exists with the understanding that when and how to proceed will be up to the wisdom and judgment of the Lord Advocate.

The Convener: We appear to have dealt with the bulk of the issues. Does Ms Constance have any further questions?

Angela Constance: Mr Hopkins has anticipated my final question, but I wonder whether Ms Logan or Mr Page wants to give a view on the equalisation of the law on consensual sexual activity between young men and young women over 13 but under 16. Both groups are potentially criminalised.

Mhairi Logan: I agree with what Tim Hopkins said. There used to be a problem, in that there was a difference in law between two young women in a relationship and a young woman and a young man in a relationship, but the bill will rectify that.

Euan Page: I am happy to go along with Tim Hopkins’s and Mhairi Logan’s comments.

The Convener: We will have a final question from Bill Butler.

Bill Butler: Are there other issues in the bill on which panel members wish to comment? Are there equalities and human rights issues that we have not yet touched on?

Tim Hopkins: I have one further point to make, and I hope that I will not take too long to explain it.

The Convener: So do I.

Tim Hopkins: The issue is discussed in our written evidence. Section 13 of the Criminal Law (Consolidation) (Scotland) Act 1995, which is entitled “Homosexual offences”, deals with most of the sexual offences committable between men. Most of the section will be repealed by the bill, with the offences being replaced by gender-neutral and sexual orientation-neutral offences, which is great. However, part of section 13 of the 1995 act deals with offences that connect to prostitution. The Scottish Law Commission proposed two years ago to repeal all those offences and to consolidate the necessary provisions with general prostitution offences that are also in the 1995 act. However, when the Law Commission published its draft proposals, it pulled back from its original position, because, it said, the Scottish Executive had excluded prostitution from the remit of the review—

The Convener: I will interrupt you there, Mr Hopkins. You appreciate that we have to deal with the bill that is before us.

Tim Hopkins: Yes.

The Convener: I would prefer not to have extraneous matters introduced at this stage.

Tim Hopkins: I am sorry. In that case, I will not talk about material related to prostitution, which is arguably outwith the scope of the bill.

The Convener: Those discussions are for another place and time, of course.

Tim Hopkins: Fair enough. However, the parts of section 13 of the 1995 act that the bill, as it stands, will leave in legislation include material that will require consequential updates, because of other measures in the bill. In particular, section 13(4) of the 1995 act defines “a homosexual act” as an act of

“sodomy or an act of gross indecency or shameless indecency”.

There are two problems with that. The first is that “shameless indecency” no longer exists as an offence, and the terms “sodomy” and “gross indecency” are, in effect, repealed by the bill. The second is that the language is very offensive. It is discriminatory to define any homosexual act between men as sodomy, gross indecency or shameless indecency. Section 13(4) of the 1995 act must be amended, by a simple consequential amendment to the bill, to define “a homosexual act” in straightforward terms as a sexual act between men.

Another problem is that section 13(9) of the 1995 act goes beyond prostitution. It criminalises any soliciting or importuning by

“any male person for the purpose of procuring the commission of a homosexual act”.

We think that that criminalises a man asking another man to have sex with him, because doing so is regarded as soliciting the procuring of a homosexual act by the other man. The words “for the purposes of prostitution” are missing from section 13(9) of the 1995 act. That is the key point. In all other legislation on prostitution, the words “for the purposes of prostitution” are there to qualify the words “soliciting” or “importuning”. We therefore recommend that the phrase be inserted into what remains of section 13 of the 1995 act, to ensure that the scope of what remains catches only prostitution—as the Scottish Law Commission suggested—and does not accidentally catch things that should be legal for gay men, just as they are legal for everybody else.

The Convener: That is a useful clarification to add to what is in your submission.
Bill Butler: I am obliged to Mr Hopkins as well, convener. We now have something to think about for sections 13(4) and 13(9) of the 1995 act.

Does Ms Logan or Mr Page have anything to add?

Mhairi Logan: I would like to make one final point on the question of rape with an object. As the bill stands, it is proposed that rape would only ever be dealt with as a solemn matter in the High Court. We would like that also to be the case for rape with an object.

Euan Page: The committee has already highlighted this issue during previous evidence sessions. In questions of coercion or threats of violence, we need to be sure that we do not have in our minds the scenario of the knife against the throat. The dynamics of coercion and violence in an abusive relationship can be much more subtle and insidious than that. An individual’s ability to consent freely to sexual activity can be hampered in ways that might not be immediately obvious, and we must be aware of that.

Enable Scotland will be next to give evidence this morning. The Equality and Human Rights Commission got sight of Enable’s submission only after we had produced our own. Enable raises a very important point about how we can address the difficult area of ensuring that we extend all the protection that we should to people with learning disabilities while not using the criminal law as a means of regulating how consenting adults have sexual relationships.

I completely understand that two opposing principles are at play. The overriding and unacknowledged principle at the moment is that people with learning disabilities should not have the same autonomy and opportunities to make decisions about how they live their lives as other people. We need to address that head on, and Enable makes some practical suggestions on how to ensure that the greatest possible protection and the greatest possible autonomy and dignity are extended to adults with learning disabilities when they are deciding when and with whom they will have a sexual relationship. The Equality and Human Rights Commission will be contacting Enable to try to think through some of those issues.

Robert Brown: Violence is sometimes described as violence such as would overcome the fortitude of a reasonable person. Is some sort of qualification to that required, to distinguish significant threats of violence from more minor incidents?

Euan Page: The issue is perhaps more complex than has been suggested. Sometimes things are easy to say but difficult to get right in law. Circumstances have to be taken into account.

Enable’s written evidence makes the point that threats that might appear minor or inconsequential to one person might, to another person, be extremely distressing and have a major impact on their future decisions. Legislation must therefore capture not so much the nature of the threat but the circumstances in which it is made.

The Convener: I congratulate the panel of witnesses on evidence that was the acme of brevity and clarity. I am very much obliged to you all for that. Thank you for your evidence. The committee will consider carefully what has been said.

I now suspend the meeting in order that we can commemorate the war dead when the two minutes’ silence is announced at 11 o’clock.

10:59

Meeting suspended.

11:03

On resuming—

The Convener: I welcome to the meeting Norman Dunning, chief executive of Enable Scotland. We will proceed directly to questions, which will be led by Nigel Don.

Nigel Don: Good morning, Mr Dunning. Fortuitously, I want to ask about section 10, which is where we left off. Will you expand on the suggestion in your written submission that the notion that someone might submit to sexual contact as a result of threats be reconsidered?

Norman Dunning: I agree with the previous panel that the issue must be seen in context. After all, what one person sees as a credible threat might not seem so to another. In that respect, people with learning disabilities might be much more suggestible to threats than others. As we say in our written evidence, a person’s pet might be threatened or they might be told that they will never be allowed to go home again, and they will find such threats credible in a way that others might not. As a result, we suggest that if section 10 is to be amended, it should cover not only threats of violence but credible coercion or something like that.

Nigel Don: I get the impression that, given those examples, we will not be able to list in the bill all the relevant threats.

Norman Dunning: Not at all.

Nigel Don: Are you therefore suggesting that we should use phrases such as “credible threat”, “threats that are relevant in all circumstances” or something like that?
Norman Dunning: Yes—threats that are relevant to the particular person in the particular situation. The issue obviously extends beyond people with learning disabilities, but we considered it in the context of how those people would react in the situation.

Nigel Don: So you would be happy with a general proposition, along the lines that we have just discussed.

Norman Dunning: Yes.

Paul Martin (Glasgow Springburn) (Lab): You will be aware that the bill will repeal some sections of the Mental Health (Care and Treatment) (Scotland) Act 2003, relating to offences involving abuse of trust. Is the bill’s approach to such offences an improvement on the 2003 act?

Norman Dunning: No. I must make it clear that Enable Scotland has changed its view. We gave evidence to the Millan committee in which we supported what became section 313 of the 2003 act. There were similar provisions in the Mental Health Act 1983, although they applied only to women with learning disabilities.

We in no way wish to give the impression that we condone any breach of trust by people who are there to care for and support people with learning disabilities, but the criminal law is not helpful in trying to resolve that situation. We note in our submission that there have been only four referrals under the 2003 act, none of which has resulted in prosecution. There were only a handful of referrals under the previous provisions in the 1983 act. Criminalising such a breach of trust does not seem to work, which is why we have revisited the issue.

We have had a considerable debate within our organisation, and with people with learning disabilities and their parents. One way that we led that discussion was by presenting different scenarios that might occur and asking how they might best be resolved. One issue that arose was that scenarios involving breaches of trust between a care worker or a support worker and a vulnerable person, such as someone with a learning disability, usually take place in private. One finds out about them usually because somebody who is closely involved—either the vulnerable person or somebody from their wider family who hears about it—comes forward and tells someone.

We feel that people are not coming forward with that information, probably because of the criminal law. The issue is quite subtle. It is important to remember that we are talking about people with learning disabilities who have the capacity to consent, rather than people who do not have the capacity and who are already covered by legislation. If a person enters into a consensual relationship with their care worker, we have to be subtle in dealing with the situation.

To cut to the chase, we find out about such relationships when someone tells us, and therefore we have to make it easier for people to tell us. If a support worker finds themselves getting into an improper relationship, we want them to come forward, but they are less likely to do so if they think that it is a criminal offence. We want the person with the learning disability who is engaged in a consensual relationship to feel that they can come forward without getting the person they got involved with caught up in the law. Other people connected with the scenario are also more likely to come forward and point out a wrongdoing if they do not think that it will result in a criminal conviction.

We should not underestimate people’s reluctance to come forward—first, to be a witness in a criminal case, and secondly, to be a witness in a case that involves a delicate sexual matter. We are taking a pragmatic approach: we think that the best way to protect people is not to use the criminal law.

There are, of course, other sanctions that can be applied. If the support worker was employed, their behaviour would be inappropriate in their employment situation, and if they were a registered worker, their registration might need to be terminated. However, we do not think that the criminal law is the best way to deal with the situation.

Paul Martin: Do you envisage any scenario in which using the judicial system would be of benefit? I appreciate that your point is that regulation can help, but there must be scenarios—for example, involving predatory behaviour or someone abusing the trust of a number of individuals they are caring for—in which it would be more effective to pursue a criminal offence. You have set out specific scenarios, but the situation is complex. Surely the opportunity for criminal interventions should remain while understanding that regulation plays a role.

Norman Dunning: You make a valid point about predatory behaviour, although I refer again to the fact that the current law does not help—there are no prosecutions. There are also other ways of dealing with predatory behaviour, particularly by registered care or social workers, whose registration can be terminated.

There is currently a gap. As members may know, the Scottish Social Services Council is in the process of registering care workers. It started with social workers and then service managers, but the logistics mean that it is taking a long time to register everybody. So regulation exists, but its implementation is taking time, and it will probably
be another three or four years before all care workers are registered. We know that there is a gap, but we still feel that the criminal law is not the best way to deal with the situation.

Ultimately, regulation will cover all support workers, but, as we acknowledge in our evidence, it will not cover people who are not recognised as care workers—people who help somebody to get a job, for example. However, there will always be such issues.

I return to the fact that we are talking about consensual behaviour. If someone’s learning disability is such that they cannot consent to a sexual act, there is no problem of interpretation—that is clearly a criminal offence.

Paul Martin: Do you accept that there will be circumstances in which people might be preyed upon? I appreciate the consensual element that you referred to, and I recognise that there are adults with capacity, but do you acknowledge that those adults face complex issues? Do you accept that some individuals could take advantage of those circumstances, despite the capacity issue that you referred to? Surely there should be the opportunity to pursue criminal law. I acknowledge the issue that you raised about enforcement, but it does not take away from the fact that there are complex issues concerning the detection of such activities.

Norman Dunning: Again, it is a question of how best to help people with learning disabilities. Rather than "protecting" them—as I said, there is no evidence that the current law does that, and the new measures are very similar—we need to educate them and give them the confidence to be ordinary citizens. A lot of the information that we receive from people with learning disabilities with capacity is that they want to be treated like other citizens—like everybody else.

The issue goes right back to education. At the moment, a lot of people with learning disabilities are vulnerable in sexual matters because they do not receive the same sex education as other people when they are children. They do not have the same opportunities to form the ordinary peer relationships that other people have, because people are too protective of them.

We hear from people with learning disabilities that they want to be less protected, better educated and better supported. Giving those people the right support to deal with complex matters in their lives is much more important than having a criminal sanction. Criminal sanctions tend to work the other way round—they mark them out as being different and encourage overprotective attitudes.

The Convener: There are no other questions for you, Mr Dunning, so I thank you for your attendance. The issues that Enable Scotland is particularly involved in are difficult and sensitive, and we appreciate the fact that you have come to answer our questions.

Norman Dunning: Thank you.

Meeting suspended.

On resuming—

The Convener: I reconvene the meeting and welcome the third panel of witnesses. The Rev Graham Blount requires only a limited introduction, as he is well known to members of the Parliament in connection with his work as the parliamentary officer for the Scottish Churches Parliamentary Office. He is joined by Alistair Stevenson, the public policy officer of the Evangelical Alliance.

Good morning to you both and thank you for your attendance. The purpose of this type of evidence-gathering session—I direct this information to Mr Stevenson in particular—is for members to question witnesses about the content of the bill. We are not interested in any extraneous matters this morning; we are dealing with the bill as it is before us.

I will ask the first question. What is the proper role of criminal law in regulating sexual conduct?

The Rev Graham Blount (Scottish Churches Parliamentary Office): When we talk about sexual conduct among those who are in some sense children—whether younger or older children, they are our focus in relation to the bill—we see the regulation of sexual conduct fundamentally as a welfare issue. The Church of Scotland is still persuaded that, in that context, the criminal law is not the most effective way to protect older young people from themselves. Increasingly, the present legal situation is not working if the criterion is to deter people. We do not want to exaggerate the figures—about which the committee has heard—but it appears that the law is not successfully discouraging young people from engaging in sexual activities.
The Convener: May I interrupt you for a second? This is an important issue that we intend to examine in greater depth later on, if you will bear with us. I am interested in hearing what you feel is the role of the law in dealing with sexual conduct generally.

The Rev Graham Blount: The law exists to protect vulnerable people. Obviously, in a given situation certain judgments will be relevant in determining which people are vulnerable and require to be protected in the context of consensual sex between young people. In most situations, we believe that it is appropriate to treat all those involved as equally vulnerable.

Alistair Stevenson (Evangelical Alliance): We agree that the law should provide protection. A lack of legal involvement in a case would send a clear message that the law does not give direct expression to the principle that vulnerable persons should be protected and seen to be protected. The law exists to provide protection for vulnerable people. We agree with Graham Blount on that point.

The Convener: We will come to the issue of children presently.

In the written evidence that we have received, there is general appreciation and acceptance of the terms of the bill. Do you find any of its provisions difficult to accept or agree with? I invite Mr Stevenson to lead on that question.

Alistair Stevenson: I am happy to do so. We did not submit written evidence to the Justice Committee because we thought that our views were successfully taken on board by the Scottish Government when the bill was produced. We have no further problems with the bill.

The Convener: That will no doubt come as great encouragement to the Government.

The Rev Graham Blount: The Church of Scotland welcomes the broad intent of the bill. In certain areas of detail—other than those on which we have commented—we do not have adequate knowledge to comment further. We want the principle of protecting vulnerable people to be reflected in legislation, and we are persuaded that the bill as a whole seeks to do that.

The Convener: That is perfectly straightforward. We turn to the definition of rape.

Stuart McMillan: The committee has received a considerable amount of evidence suggesting that the crime of rape should be extended to include penetration with an object, instead of such conduct being covered by a more general sexual assault offence. Do you have a view on that?

The Rev Graham Blount: The church has not taken a view on the issue. We recognise that difficulties arise wherever one draws the line in these matters. One would not want to broaden the definition of rape in a way that progressively made the offence seem less serious. That is not to say that there are not very serious forms of sexual assault that do not come within the definition of rape.

Alistair Stevenson: We have no evidence to submit on the matter.

The Convener: Again, you have been quite clear. We move to the issue of children and young people.

Paul Martin: The bill draws a distinction between younger children and older children, and suggests that whereas sexual relations between younger children should be criminal, sexual relations between older children should not necessarily be criminal. What are your views on that issue?

The Rev Graham Blount: Drawing a line at a particular age is problematic, but it seems sensible to recognise that there is a difference between very young children and teenagers.

Paul Martin: You referred to the role of the criminal law. Can you elaborate on that? Has the General Assembly of the Church of Scotland taken a formal position on issues relating to the bill?

The Rev Graham Blount: The General Assembly appoints the church and society council to speak for it between General Assemblies. The council submitted a response to the consultation on the Scottish Law Commission’s proposals, and the contents of that response are reflected in what we have said at this stage. The General Assembly was aware of our response when it met earlier this year. It did not debate the matter formally, but it did not seek to change what had been said in the church’s name.

Paul Martin: Does the church have a specific position on how the criminal law should relate to younger and older children?

The Rev Graham Blount: We made our submission before the General Assembly. I am not sure that I understand your question.

Paul Martin: I am seeking to ascertain whether the church’s position could change. When the General Assembly meets again, could there be developments in its position?

The Rev Graham Blount: That is always possible, as is the case in any organisation. When Enable Scotland gave evidence to the committee, it indicated that its view had changed. Our position was known to the General Assembly earlier this year, but it did not seek to change it.

Alistair Stevenson: I think that the clearest message I can come to you with this morning is to
say that, while the Church of Scotland has a view on this, certainly Christians across denominations are particularly divided on the issue. I suppose that I am here this morning to provide the other side of the argument and to say that although, initially, it is extremely difficult, as has been said, to draw lines in the sand in terms of age, it is important to do so, as the Rev Graham Blount has indicated. We think that, although some children might have the capacity to understand the implications of their consent, many children between the ages of 13 and 16 do not. Children are more likely to be vulnerable to exploitation and are less likely to understand the capacity either to withhold or to give consent. We therefore agree with the Government’s position that children between the ages of 13 and 16—older children—should be criminalised in some cases.

As the Rev Graham Blount has said, at the heart of any church and Christian response is our wish to cement our firm foundation in the ideal of ensuring the welfare of the most vulnerable in society, including children. That must be to the fore of any discussion. We think that the law can and should play a role in drawing a line in the sand at the age of 16 and saying that we disagree that children between the ages of 13 and 16 should be having sex with each other. The law can be used to send a clear message. Although it might be a blunt instrument in this case, on the basis of all the evidence that we have heard, we regard it as the only means of addressing the issue.

Paul Martin: So you believe that the law plays a role in regulating sexual behaviour among young people.

Alistair Stevenson: We do, yes.

Paul Martin: The Rev Graham Blount’s view is slightly different. In your written evidence, you suggest that the criminalisation of young people is unacceptable.

The Rev Graham Blount: That is not entirely the same thing as saying that the law does not have a role to play. We do not believe that criminalising young people who engage in consensual sex within the specified age parameters is the most effective way of discouraging them from engaging in that activity or of ensuring that those who engage in that activity are supported.

Paul Martin: I appreciate the point that you are making, but do you believe that the law has a role in regulating that behaviour? You say that the law is not the most effective means of preventing that behaviour, which is one argument, but do you believe that the law plays a role in preventing that behaviour? In other words, is there a role for the law or are there some intervention opportunities to deal with that behaviour in some instances?

The Rev Graham Blount: There are intervention opportunities in law for situations in which the sexual activity is not consensual. We have no reservations at all about the role of the law in such situations. We favour a legal position that makes the situation a matter of a welfare referral to a children’s panel. That would be a use of the law but not of the criminal law.

The Convener: Would you be relaxed in the knowledge that all prosecutions in Scotland are at the discretion of the Lord Advocate, whom we hope would ensure that the cases that you have in mind would proceed on a sensitive basis?

The Rev Graham Blount: Yes. Our concern is about the passing of new legislation that would, rightly, extend the crime by making it even-handed for both boys and girls, if—as the implication appears to be—the Lord Advocate issues guidance that the law should not normally be enforced.

The law might be understood to send an important signal to young people, but it is a very confusing signal if we find it necessary to remind people in statute that the Lord Advocate always has discretion, on the basis that much of the discussion seems to assume that the vast majority of cases will not be prosecuted. We would also be worried if people were prosecuted under one heading because the heading under which it was suspected their action actually fell could not be discussed in court. A prosecution might be pursued because it is believed that an activity was not consensual, but because that is irrelevant to the indictment it would not come out fully in court.
There is a risk in
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I tried earlier to

that I would take in such a situation.

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would continue to send, to children in that

not outweigh the message that the law sends, and

children has implications, but we feel that they do

understand that criminalising sex between older

child is of utmost importance for any Christian and,

point that I made earlier, but the welfare of the

family. That is one reservation that we have about

use of the criminal law. It might be helpful to

bring older children who are in such a situation to

the children's panel, not on criminal grounds, but

on welfare grounds.

Alistair Stevenson: I might be reiterating the

point that I made earlier, but the welfare of the

child is of utmost importance for any Christian and,

I am sure, for every person at the table. We

understand that criminalising sex between older

children has implications, but we feel that they do

not outweigh the message that the law sends, and

would continue to send, to children in that

situation, which is that the people who make the

decisions for them feel that it is not appropriate for

them to have sex. The children might not

understand that at that moment in time. Putting on

my teenage hat, if I was a 15-year-old, I suppose

that I would like to rest assured that the people

who have made the decisions—who are more

intelligent than me and who have been around a

lot longer—have seen the evidence and

understand the implications more than I do and

therefore have the authority to speak on the

matter. If that was in my mind as a 15-year-old

teenager, it would be fundamental to the next step

that I would take in such a situation.

Nigel Don: I cannot help but point out that the

Rev Graham Blount has been the first person who

has actually supported the position behind my line

of questioning, which is that a law that is not

routinely enforced may not deserve the title of law

and might be counterproductive. However,

although it has been suggested that we should

simply decriminalise such sexual activity, doing so

would send the wrong message. Generally

speaking, that does not have much support. Have

any of the people to whom Graham Blount has

spoken made suggestions about how we might

find some middle ground? Is there a legal turn of

phrase or another way of doing things that would

achieve the objective that we both have of making

an understandable and enforceable law that

nonetheless sends the right messages?

The Rev Graham Blount: I wish that I had a

bright answer to that, but none has been found.

The committee has previously heard a witness—it

may have been the witness from Barnardo's—
speak about the need for robust public health

campaigning and the provision of support services

for young people. That must be part of the

argument. The churches' welfare concern would

be reflected by introducing in the bill a statutory

welfare-based referral to the children's panel in

such circumstances. However, none of those

measures is the magic bullet that will sort out the

issue. We need to consider working with families

to support parents and teenage children in dealing

with the pressures that they face. I am pleased

that, in some places, churches are involved in that.

Personal support that is provided in an on-going

way, and not as a result of a case being reported,
is crucial to changing things.

Nigel Don: Do you accept that, if we put that in

the bill as a first line of attack, with the offence as

a subsequent line, as it were, the Lord Advocate

would not have discretion because she would not

have the locus in the first place to investigate the

case? As far as I understand it, we must retain the

offence throughout, even if we then say that it will

in practice be dealt with through the children's

panel.

The Rev Graham Blount: I am open to

correction, but I understand that if there appeared

to be a lack of consensual activity, the Lord

Advocate would want to investigate using other

provisions in the bill.

Nigel Don: I think sections 1 and 2 apply to

anybody of any age when there is a clear lack of

consensual activity. The problem arises when it is

not entirely clear. My understanding of the

justification for the bill as drafted is that the Lord

Advocate can exercise discretion from the very

beginning and that therefore, in effect, the police

can from the beginning exercise their discretion
to investigate a matter so that it is dealt with through

the criminal system, to the point at which a
decision is made not to prosecute rather than the

matter having to be revisited once the health

issues have been dealt with. I think that is the

basis on which the bill is drafted and that we are

stuck with it. Do you accept that?

The Rev Graham Blount: I tried earlier to

express my concern that the bill might lead to

young people finding themselves in court under

sections 1 and 2 when the basis of the Lord

Advocate's discretion to proceed with the matter is
something that is not, on the face of it, what they have been charged with.

Bill Butler: The bill will extend criminal responsibility for consensual sexual acts to girls aged 13 to 16, whereas at present such criminal responsibility extends only to the boy. Do the witnesses agree with that extension of the criminal law or, as has been suggested strongly by responses to previous questions, do they believe that the criminal law should not be involved when there are consensual sexual acts between older children and that, as the Rev Graham Blount said, there should be a statutory welfare-based referral to the children’s panel?

The Rev Graham Blount: Our belief is that whatever legal provision is made should be even-handed between boys and girls. As you say, we have already made the point about what we believe it is appropriate to deal with in legislation.

Bill Butler: Is it the Church of Scotland’s position that such acts should not be dealt with under criminal law?

The Rev Graham Blount: Yes. That is the position to which the church has come.

Alistair Stevenson: We agree that there should be a general principle of gender neutrality.

Bill Butler: Should the criminal law be involved?

Alistair Stevenson: Yes. I think it should.

The Convener: There are no further questions for the panel. I thank the Rev Graham Blount and Mr Stevenson for giving their evidence so clearly.

The Rev Graham Blount: I would like to say one thing that I have not said in response to any of the questions.

The church regrets that it did not raise the point, which some of your witnesses raised last week, about consulting children. We believe that it would be useful to do that before the Bill is passed. As Paul Martin hinted, there may be the possibility of the church’s view being changed. If what Children 1st found in their conversation with a relatively small number of children proved to be widespread, that would, at the very least, give us pause for thought.

The Convener: Thank you for putting that on the record. That is helpful. I again thank you both very much.

11:44
Meeting suspended.

11:45
On resuming—

The Convener: I introduce the final panel of witnesses. We are joined by David Greatorex, who is head of research at the Christian Institute, and Dr Gordon Macdonald, who is parliamentary officer at CARE for Scotland. The committee is greatly obliged to you for giving evidence. I am sorry that you have been kept so long, but you will appreciate that we have had a heavy morning’s work. That said, we move to questions, which will in some respects repeat the questions that were asked of the previous panel. I open by asking what the panel considers is the proper role of criminal law in regulating sexual conduct.

Dr Gordon Macdonald (CARE for Scotland): We agree with the earlier comment that the role of the criminal law is to protect vulnerable people. However, it is also to prevent harm, which is obviously part of protecting vulnerable people.

David Greatorex (Christian Institute): We echo that. The role of the criminal law is to prevent harm—it is a protective measure. As Alistair Stevenson said, the message that is to be sent and which comes out clearly in the policy memorandum is that the law has a role in regulating sexual conduct and in indicating society’s disapproval of children engaging in such activities.

The Convener: In their representations to the committee, the religious organisations have generally backed the provisions of the Bill. Are there any aspects of the Bill that you find unacceptable? If so, what are they, and what are your reasons for finding them unacceptable?

David Greatorex: Our main concern about the Bill is that it underestimates the seriousness of oral sex. As has been mentioned, certain sexual activities will be criminal under the Bill, but activities such as oral sex will not be criminal. When we talk about child protection and welfare, we must consider how serious oral sex can be; for example, sexually transmitted infections can be transferred through oral sex. Alistair Stevenson talked about drawing lines in the sand. We consider that this particular line has been drawn in the wrong place. We would like the law to apply to oral sex in order to indicate society’s disapproval of that conduct.

Dr Macdonald: I generally support that position. With sexual activities such as non-penile penetration, where one should draw the line can be quite difficult to judge. However, our concern is that there should not be opportunities for people to behave in a predatory way in relation to oral sex or other fairly explicit sexual activity.

The Convener: We turn to the definition of rape.

Stuart McMillan: The committee has received considerable evidence suggesting that the crime of rape should be extended to include penetration.
with an object. Does the panel have a view on that matter?

David Greatorex: We have not considered that issue particularly. We approve of the fact that oral sex is to be included within the definition of rape. I do not want to bang on about the same point, but we consider the fact that that is defined as rape under part 1 means that there is a disparity and that it is not treated as seriously with regard to older children in part 4.

Dr Macdonald: It is not an issue that CARE has considered.

The Convener: Fine. We turn to the sensitive issue of sexual activity between children and young people. Paul Martin will lead the questioning.

Paul Martin: Gentlemen, what are your views on the role that the criminal law plays in regulation of sexual behaviour between young people?

Dr Macdonald: I return to our answer to the first question. The law has primarily a protective role to prevent harm and to act as a deterrent. Specifically, where there is harm or predatory behaviour, the law acts as a mechanism for intervention so that that behaviour can be addressed by the appropriate authorities—the police, social services or whoever.

David Greatorex: Paragraph 113 of the policy memorandum acknowledges the importance of the criminal law in guiding young people’s behaviour. That is true of full sexual activity and, we believe, of oral sex. The message-sending role of the law is important: if any hint of a watering-down of the law is given, it will be taken as a weakening of the law. We do not want to encourage any form of underage sexual activity by weakening the law or giving the impression that the law has been weakened. The criminal law is an important indicator of society’s views.

We believe that the law should provide the capacity to intervene in the most serious cases, although we acknowledge that discretion will be exercised in many cases. To have the law in this area totally disapplied, leaving the authorities unable to intervene, is not a step that we would condone. The law should include scope for intervention in the most serious cases.

Paul Martin: Are you suggesting that young people think about the current law and decide that they should not engage in sexual behaviour because of the possibility of their being brought before the courts?

David Greatorex: The law will have a deterrent effect on some young people, although not on all. The fact that 30 per cent engage in sexual activity indicates that the law is not a deterrent to all, but some of the remaining 70 per cent will be deterred by the law. The Children 1st study found that children are using the age of consent as a buffer—an excuse or prop—to enable them not to consent to sexual activity. That is an important sign that young people do think about the law in this area.

Paul Martin: The bill draws a distinction between younger and older children. What are your views on that?

Dr Macdonald: We would not draw such a distinction. Essentially, we argue that 16 is the appropriate age of consent for sexual intercourse.

David Greatorex: I agree that 16 is the correct age of consent. We would not like the law to be watered down, because we believe that under-16s are still children. Nevertheless, we acknowledge the reasoning behind the drawing of that line. We say that children under 13 have no capacity for consent, and that children over 13 but under 16 have limited capacity. We still consider that children under 16 are vulnerable and require protection, and that they do not have the necessary capacity to consent to the types of sexual activity that we are talking about.

Dr Macdonald: I am aware that this is not the Health and Sport Committee, but from a purely health-focused point of view, the earlier people engage in sexual activity, the greater the health risk. That is certainly the case for cervical cancer. The age range 13 to 16 is crucial. We should seek to use not only the criminal law but other mechanisms to encourage young people in that age group not to engage in sexual activity. At the end of the day, the criminal law will not, on its own, solve the problem.

Cathie Craigie: In its submission, the Christian Institute says that “the law should prohibit any sexual activity below 16.” Are there any risks in criminalisation of sexual conduct between older children?

David Greatorex: Obviously one concern is that if a broad definition is used, children will be criminalised for kissing. That concern is often raised, but the area is exactly one where discretion is important and there is room for common sense. That is why we said “any sexual activity”. Discretion is required. By having the provision drafted in that way, someone can intervene, even in circumstances in which full sexual activity is not involved.

Cathie Craigie: In its submission and its oral evidence this morning, the Church of Scotland made it clear that it views the matter as a welfare issue. I may be putting words into the church’s mouth, but I understand that it thinks that the bill should be written appropriately so that it does not end up as law that is never enforced.
Do you think that the law will be “brought into dispute if legislation is passed which is not intended to be enforced”?

David Greatorex: I do not, no. There are many roles for the law. If not every case is prosecuted, the message-sending role of the law is not undermined—society’s standard is still clearly set out. Some people will benefit by being deterred and others will be enabled to say no. We learned that in evidence from Children 1st and similar evidence was heard in England and Wales when sexual offences legislation was considered in 2003. It was heard that children used the age of consent as a prop not to engage in sexual activity in which they were unwilling to engage.

Peer pressure is also important. Any assistance that we can give children to resist pressure that media coverage and peer pressure puts them under is important assistance. The criminal law can do that by expressing the seriousness of the activity.

Cathie Craigie: The Christian Institute’s submission raises a great number of concerns about part 4 of the bill—indeed, part 4 is the focus of your submission. How would you change part 4 to meet the concerns that you have set out?

David Greatorex: That is quite a question, and one that is probably beyond my pay grade.

As I said, we would like to see the line on sexual activity drawn much further down than it is at the moment. Oral sex should not be exempted but be brought within the provisions of the bill. One concern is the proximity of age defence—the 16 to 14 issue. From conversations with criminal law practitioners, I understand that under the current law prosecutions may result when the age gap between parties is 23 months. We believe that the introduction of the proximity of age defence in the bill will therefore weaken the law.

12:00

Cathie Craigie: Last week we heard from many organisations that work with and represent young people. The Commissioner for Children and Young People in Scotland made the point that, under the bill as drafted, if my next-door neighbour’s 15-year-old daughter becomes pregnant, she will be a criminal. In terms of the opportunity that the bill provides to look at legislation in this area, is that the right way forward?

David Greatorex: There is important room for discretion. We are looking at the wider picture—the message that is sent when we legislate in this area. We are concerned that focusing on difficult cases such as the one that you have described could dilute the message that is sent. We would like to maintain a firm position in the law, while allowing for discretion. Legislating for more difficult cases could allow cases in which the criminal law needs to intervene to slip through the net.

Dr Macdonald: Presumably the 15-year-old would be recorded as a criminal only if she were prosecuted and convicted in a court. As we have heard, that is unlikely to happen unless there is evidence of abusive behaviour.

The Convener: If the case were referred to the children’s hearings system, the offence would be recorded, although that is not a criminal conviction.

Cathie Craigie: You say that there should be flexibility and discretion to enable us to deal with particularly difficult cases. As we see in other areas with which we have to deal, young women below the age of 16 get pregnant all too often. Should discretion be exercised so that such cases are never prosecuted or, as other witnesses have suggested, should the individuals concerned receive welfare, education and training? Are we making legislation that we intend never to enforce? What is the point of having such legislation? One piece of written evidence—it may have been from the Christian Institute—stated that that would send out the wrong message; it would be saying that it is okay to break the law, because there is a way to get off.

Dr Macdonald: People need to remember that we are starting not with a blank sheet of paper but with the current law. The argument has been made that we should not pass laws that will not be routinely enforced or prosecuted. However, I do not imagine that the law is likely to be enforced routinely in cases where two 12-year-olds have had sex, even though that will remain an offence under the bill. No one is proposing that it should not be an offence just because there may not be a prosecution. There has been a tendency to see the issue in purely theoretical terms.

Margaret Smith asked about referrals to children’s panels. There have been about eight such referrals—I cannot remember over what period they were made. I would be concerned if it were suggested that every teenager who is having sex should be referred to the children’s hearings system. It would be really interesting to hear what those involved in the system would have to say about that suggestion. I do not imagine for one minute that children’s panels would welcome that, because it would snow them under with all sorts of cases. They have enough difficulty in dealing with the number of cases that are already referred to them.

Whether in relation to older or younger children, the law is aimed at targeting the most serious abuse and predatory behaviour. We all accept that
most children will not end up in court or even go to the children’s panel but, in some cases, it is important to have that mechanism. Otherwise, no intervention will be made to prevent behaviour that might lead to more serious offending behaviour later. That is why the law is important. The issue is not that the law will not be enforced; it will be enforced, but the key point is that enforcement will be appropriate.

David Greatorex: Cathie Craigie said that children are becoming pregnant routinely. I am sure that we all want to reduce the number of such pregnancies and we should use every tool that is at our disposal to do so. The criminal law is one tool that we have. The law’s deterrent role is real and significant and it can be applied through the bill.

The policy memorandum says that we should not take risks with young people’s health. By weakening the law, we would take the risk that the deterrent effect—which currently functions—was reduced or removed, which would mean that more children engaged in sexual activity, which could be dangerous for them. I would maintain a strong role for the relevant criminal law.

Robert Brown: You talk about the criminal law’s deterrent effect, on which one can have varying views. Do you have evidence, such as research, that the criminal law has a deterrent effect on sexual conduct?

David Greatorex: I have nothing to hand. We have the evidence from Children 1st that the law is in some children’s minds, because they use it as an excuse not to consent. However, I have no research to offer the committee.

The Convener: That is fair enough.

Bill Butler: As you know, the bill will extend criminal responsibility for consensual sexual acts to girls who are aged 13 to 16, whereas at present only the boy has criminal responsibility. Do you agree with that extension of the criminal law?

Dr Macdonald: Yes.

David Greatorex: Yes.

Cathie Craigie: At the end of the previous panel’s evidence, the Rev Graham Blount said that the Church of Scotland supports the call that we heard in evidence last week for further consultation with children and young people. Do you support that?

David Greatorex: The findings of Children 1st were interesting. The role of the law as a prop to allow children not to consent should be further considered. However, we return to Alistair Stevenson’s comment that older and wiser heads should legislate, rather than children themselves. We would consult children and be interested in their views, but we would hesitate to give those views too much weight. The criminal law has an advisory role in regulating children’s conduct, so we would hesitate to allow them total freedom to dictate that regulation.

Dr Macdonald: I am not sure whether the committee should undertake such consultation. The danger is that the sample will be skewed, particularly if specific organisations arrange the consultation. I am not sure what age of children the committee would consult. I do not particularly want you all to turn up to interview my four-year-old, thank you very much—not that I would not welcome you for a cup of coffee any time you liked. The question is what is appropriate. Obviously, the committee will exercise discretion in deciding what it wants to do; however, if you go down that road you must ensure that you get a balanced sample of opinion rather than the views of a selected number of people. That is where I would consider there to be some difficulty with that course of action.

Cathie Craigie: Convener, the suggestion was made last week that there should be age-appropriate consultation.

The Convener: That is not to say that Dr Macdonald’s four-year-old might not have some sensible contributions to this or any other discussion.

There are no further questions for the panel. Thank you for your attendance. I also thank the witnesses who gave evidence earlier. We have dealt with some difficult and sensitive matters this morning, and the way in which the evidence has been given has been particularly helpful.

Nigel Don: I would like to put on record, for the avoidance of doubt, the fact that I am a member of the Church of Scotland and the sponsor of Alistair Stevenson’s regular visitor pass.

The Convener: That is noted, Mr Don. Do any other members have interests to declare in that respect?

Cathie Craigie: I, too, declare that I am a member of the Church of Scotland. I did not realise that I had to say that.

The Convener: The interest is peripheral; nevertheless, your declaration will be recorded.
Scottish Parliament
Justice Committee
Tuesday 18 November 2008

[THE CONVENER opened the meeting at 10:20]

Sexual Offences (Scotland) Bill: Stage 1

The Convener (Bill Aitken): Good morning, ladies and gentlemen, and welcome to the meeting. I make my usual intimation that all mobile phones should be switched off.

We have received no apologies so far, although Angela Constance has indicated that she has been detained. James Kelly MSP will attend for agenda item 2.

Under agenda item 1, the committee will take evidence on the Sexual Offences (Scotland) Bill. I welcome the first panel: Detective Chief Inspector Louise Raphael of the Association of Chief Police Officers in Scotland; and Temporary Deputy Chief Constable Bill Skelly of ACPOS’s family protection portfolio. I welcome Mr Skelly in particular, as this is the first time that he has appeared before us.

I ask our first panel members—and all the other witnesses who are present—to give short and succinct answers. That would be greatly appreciated, as we have a heavy agenda.

We will go straight to questions.

Robert Brown (Glasgow) (LD): Good morning.

I want to ask about consent and free agreement, which section 9 covers. The ACPOS submission states that although the use of the term “free agreement” is okay as far as it goes, it is a bit “simplistic” and that it would be helpful if the expression were expanded “to include the terms ‘voluntarily’ and ‘with knowledge of the nature of the act’”.

Bearing in mind the need for juries to be able to reach views on such matters, will you give examples of situations that you have concerns about and explain how the concept of free agreement would benefit from the addition of the idea of voluntariness to the bill?

Temporary Deputy Chief Constable Bill Skelly (Association of Chief Police Officers in Scotland): Good morning. ACPOS does not underestimate the complexity of that question. The definition of the word “consent” is key to later provisions in the bill.

We do not think by any means that there should be an absolutely definite definition of the term “free agreement”, but we would like there to be an extra little bit of guidance on how the public—juries in particular—and the police should interpret the meaning of the word “consent”. As the bill stands, the combination of section 9, which defines consent as free agreement, and section 12, which deals with reasonable belief, go some distance towards giving an understanding of what is meant, but they do not go quite far enough.

For us, the definition of the word “consent” goes beyond merely the absence of denial. Section 10 deals with situations in which consent could not be seen to have been given, but it deals with negative attributes. We think that the bill should include positive examples, such as positive verbal affirmations of consent or behaviour that indicates that understanding and knowledge were present in the person who gave consent. It is a matter of going beyond saying that consent is merely silent or that consent/free agreement is an absence of negative indicators, and saying that consent can be the presence of positive indicators such as verbal or behavioural actions.

Robert Brown: I do not think that anybody would disagree with such an objective, but do the words “free agreement” not already imply an element of positiveness? I cannot read that term as meaning just the absence of denial.

Temporary Deputy Chief Constable Skelly: We are saying that the guidance on free agreement—or on the indications that there has been free agreement—should be expanded. I understand the complexities of the issue. The bill states that “consent” means free agreement”, it then gives circumstances in which conduct takes place without free agreement—negative examples are given. We have suggested that it would be useful if the bill indicated positive things that showed that free agreement was present, such as indications of knowledge or of the person voluntarily taking part in whatever the act was.

Robert Brown: I want to return to the initial point, which you did not entirely deal with. Do you have any examples of types of situations that you or your colleagues have come across that would illustrate the point you are trying to make or the difficulties with the current arrangements?

Temporary Deputy Chief Constable Skelly: Often, agreement or consent is inferred by silence, or by nothing being given. With reference to section 12, the person who is accused of the crime is in some ways required to provide information as to their reasonable understanding or belief that free consent or agreement was present. As far as examples are concerned, we would look for positive consent or positive indications to have been given. That might be verbal agreement or behavioural indications that show agreement. That requirement is not intended just to benefit the
Robert Brown: Section 10(2) sets out some of the circumstances in which conduct takes place without free agreement. Does it not deal, in significant measure, with your point? That subsection illustrates a series of situations, whether raised by way of defence or otherwise, that have been the subject of legal cases over the past century and a half or more.

Temporary Deputy Chief Constable Skelly: Absolutely. As I said earlier, the bill as drafted goes some considerable distance towards tackling the issue of defining consent, using the interpretation of free agreement. The instances given in section 10 indeed go some distance towards dealing with our point, but ACPOS feels that the bill could go slightly further. That is not to suggest that the bill does not address the issue, however; it certainly does.

Robert Brown: Do you have any fears that making the definitions more complex will give rise to greater problems in what is already a difficult area for establishing and proving various facts, and that it will make it even more difficult to prove rape and similar offences?

Temporary Deputy Chief Constable Skelly: I understand those concerns, which I am sure the Crown can articulate far better than I can. It is thought that, the more that we put into a piece of legislation, the more proof might be demanded—therefore, the higher the level of evidence required. It comes down to the art of drafting and to the question whether provisions should be in the bill or in guidance to follow, which might expand on the points that we have been making. I accept those concerns around the idea that, the more we include, the more we have to prove and the more complex things become. We feel that the issue is worth bringing to the committee. Beyond that, it is for you to decide where that issue sits.

Robert Brown: I want to test the quality of what you are saying, and its evidence base. I will return to the initial point. From your experience, do you have in mind particular situations in which current definitions, or directions to juries, have given rise to problems following a police investigation and a case being brought to court?

Temporary Deputy Chief Constable Skelly: Discussions around consent are central to almost every case that goes through the court system. When it comes to drafting new legislation to redefine, or to define better, what is meant by "consent" in the judicial process, we have borne in mind the fact that that question comes up on every occasion, and that is why it is so hugely important. You ask whether we have any examples of the problem; I reiterate that, in practically every case that goes through the court system, the issue of consent comes under significant scrutiny. At this stage, when we are discussing new legislation and the definition of consent as free agreement, it is vital to get the provision right, as the matter will come under intense scrutiny in the courts.

We are not trying to address the specifics of one or two cases that have gone through court. We are not arguing that, if we had been able to show positive consent and positive affirmation in certain cases, the provisions before us would have been of assistance; we are saying that, if we are not firm and clear about what we mean by "consent", that will cause confusion and difficulty across the whole spectrum of cases that go through the system in future.

Although as drafted the bill goes a great way towards assisting us and the courts in understanding what is meant by "consent", amendments that further define what is meant by free agreement might need to be considered to provide the courts with a bit more help.

10:30

Robert Brown: As lay people, we need to get some flavour of the issue. I realise that highlighting such matters is going to be somewhat difficult, but I wonder whether you can come back to the committee with any practical examples—obviously anonymised—in which the police service found it difficult to prepare a case for prosecution.

Temporary Deputy Chief Constable Skelly: Absolutely.

Robert Brown: That would be helpful.

The Convener: Cathie Craigie will ask some questions on aspects of the bill that relate to children and young persons.

Cathie Craigie (Cumbernauld and Kilsyth) (Lab): In what circumstances are the police called to investigate the possibility that a child has committed a sexual offence? In answering, could you distinguish between younger and older children, cover consensual and non-consensual aspects and tell us about the number and outcomes of such investigations?

Temporary Deputy Chief Constable Skelly: Could you break that down a bit?

Cathie Craigie: Okay. First, could you distinguish between younger and older children in such circumstances?

Temporary Deputy Chief Constable Skelly: ACPOS has already provided written evidence on sex between or involving children, so I will try to keep my replies as succinct as possible.
Given the incidence throughout Scotland of older persons well beyond 18 or 21 having sex with people aged between 13 and 16 and of 13 to 16-year-olds having sex, we felt strongly that there was a need to maintain current age levels to allow the police to carry out appropriate investigations into cases of such sexual intercourse or activity. As a result, we welcome and concur with the provision set out in section 27(7), which gives the Lord Advocate the ability to issue us with guidelines and a discretionary power with regard to the way we report such investigations.

I am not able to present the committee with a huge amount of statistics, but if you can be specific about which statistics you want we will do our best to gather them from individual forces or from across Scotland.

**The Convener:** That would be helpful. We will intimate to you the statistics that we might find useful.

**Cathie Craigie:** It would be helpful if you could give us as much of a breakdown as possible on the numbers and ages of those involved in consensual and non-consensual sexual activity.

How will passing the bill in its current form impact on your ability to investigate allegations that a child has committed a sexual offence?

**Temporary Deputy Chief Constable Skelly:** It will allow the police to continue to make an appropriate and proportionate response to incidents involving sexual behaviour among older children. Earlier in the bill’s development, we were concerned by suggestions that such a provision might not be included.

**Cathie Craigie:** So, as things stand, if the bill allows you to continue doing your job, there will be no change.

**Temporary Deputy Chief Constable Skelly:** Yes. We will support it if the amendments stand.

**Cathie Craigie:** No. I mean that if, as you say, the bill as it stands will allow you to continue to investigate as you do at the moment, there will be no change to what you do.

**Temporary Deputy Chief Constable Skelly:** The change is in balancing the issues around gender. The current legislation criminalises only one gender, and the bill will address that anomaly. The investigative process will be able to continue as at present. The bill will assist us in relation to the manner in which we will be able to treat gender in matters of sexual behaviour between older children, which will be a great help. It will allow us to approach investigations on a legislative footing; without it, we would not have such an opportunity.

**Nigel Don (North East Scotland) (SNP):** Good morning. Can you clarify for me the current process of investigation? Because sexual relations between youngsters are, by definition, illegal at the moment—albeit that only one party is criminalised—you have a duty to investigate. I presume that, if something came to your attention, you would do that as a matter of routine. Am I right in thinking that, once you have conducted whatever investigation you feel is appropriate—that is clearly for your discretion—it is up to you to decide whether to refer the matter to the procurator fiscal or to close the book on it? I am not sure how the process works. Can you please clarify that for me?

**Temporary Deputy Chief Constable Skelly:** I ask Louise Raphael to expand on that.

**Detective Chief Inspector Louise Raphael (Association of Chief Police Officers in Scotland):** As it stands, there is limited discussion following the police investigation. Ordinarily, we would report the circumstances to the procurator fiscal if that were appropriate; the decision regarding what happens after that rests with the procurator fiscal. Welfare services are engaged at that point as well.

**Nigel Don:** Sorry, but I am still not quite sure about this. I presume that you have discretion to decide that there is nothing in the case to worry about and that, therefore, you will not refer the matter to the procurator fiscal, or do you refer every case to the procurator fiscal, once it has been investigated, for the fiscal to make the decision?

**Detective Chief Inspector Raphael:** Yes.

**Nigel Don:** You mean the latter.

**Detective Chief Inspector Raphael:** Yes.

**Nigel Don:** Thank you.

**The Convener:** Louise Raphael used the caveat "if that were appropriate". Can you define that in wider terms?

**Detective Chief Inspector Raphael:** By that I mean when there is evidence to substantiate that an offence has been committed.

**The Convener:** I call Bill Butler.

**Bill Butler (Glasgow Anniesland) (Lab):** Nigel Don has covered the point that I wanted to raise, convener.

**Cathie Craigie:** The committee has been taking evidence on the bill for several weeks and has heard concerns from some quarters about our having unnecessary law that is not enforced. It is clearly a criminal offence for a person under the age of 16 to engage in sexual activity, although sometimes the whole force of the law is not
applied. There have been suggestions that it is wrong to have something in legislation but not to enforce it. We have been told that it would be better for such matters to be dealt with as a welfare case, rather than as a criminal case. Do you have any comments on that? I am sure that you have read that evidence.

Detective Chief Inspector Raphael: Our concerns revolve around the fact that the absence of the provisions would deny us the opportunity to investigate a case fully in order to establish whether there had been coercion or whether there had been informed consent. If the powers were not contained in legislation, we would not have the opportunity to investigate a case fully to establish such issues. Peer pressure is an extremely powerful aspect of children’s lives, and what may appear, on the surface, to be free agreement or consent might be revealed not to be that when we probe further. Our concerns revolve around our lack of ability to conduct a proper investigation.

The Convener: I ask Nigel Don to come in on that issue. He can pursue a separate matter later.

Nigel Don: I am confused. Surely, if there were any suspicion or evidence of coercion, we would be dealing with a section 1 or 2 offence, would we not? The fact that the person was under 16 would not be relevant. Why, therefore, do we need to create an offence relating to older children?

Detective Chief Inspector Raphael: Sorry, could you repeat that? I did not quite understand your point.

Nigel Don: My point is that, if there is any evidence or suggestion of coercion, we would be dealing with a section 1 or 2 offence, would we not? The fact that the person was under 16 would not be relevant. Why, therefore, do we need to create an offence relating to older children?

Detective Chief Inspector Raphael: Yes.

Nigel Don: So you could investigate the matter on that basis. Why, therefore, do we need to create an offence relating to older children to enable you to investigate?

Detective Chief Inspector Raphael: I will give an example from our experience of dealing with girls aged between 13 and 16 who have engaged in sexual activity and become pregnant as a result. In one particular example, on initial inquiry, the girl offered the information that the pregnancy was as a result of sexual intercourse with a 15-year-old boyfriend. In the absence of legislation, we would have taken the matter no further. However, on further probing, it transpired that the girl had had sexual intercourse with a much older person. Our concerns revolve around our ability to ensure that we are conducting a proper investigation and establishing what offences, if any, have been committed.

Temporary Deputy Chief Constable Skelly: Our primary concern is over the safety and wellbeing of the child. We are not here to say that the police should be responsible for reporting all cases to the procurator fiscal because it is the procurator fiscal’s role to protect children; it is everyone’s role to protect children, which is our central aim.

In relation to legislation on sex between older children, we would not want the age of consent to move to 13; it should be kept at the current limit. We want to be able to investigate on a lawful footing, as opposed to one in which the law is absent, with the police acting ultra vires or in some other capacity to protect the child. That is not to say that the final outcome should be a prosecution or a conviction, but some other arrangements should be put in place to protect the child.

As I said, we will provide as much information as we can to give you a breakdown. For example, last year in the east end of Glasgow, there were 19 incidents of sexual behaviour in which one of the partners was aged between 13 and 16, including six incidents in which both partners were aged between 13 and 16. Therefore, six incidents involving sexual behaviour between older children were investigated by the police in the east end of Glasgow. Some of the remaining 13 incidents involved adults who were much older than 21. We are concerned about the issue, and we want to retain the ability to investigate.

Nigel Don: I will distinguish between the provisions that relate to sex between older children—the 13 to 16-year-olds—and those that relate to an older person having sexual relations with an older child. If we accept that the latter provisions should exist—that was the premise of my question to Ms Raphael, although I am not sure that she realised it and I apologise for not making that explicit—I am concerned about whether the police need the former, which relate solely to sex between older children, in order to investigate coercion. I am still not happy in my own mind if you are saying that you believe that, if there is any element of criminality in such cases, you cannot proceed under sections 1 or 2.

Temporary Deputy Chief Constable Skelly: Perhaps we have not been clear in our response to your questions. You are right; if a case shows elements of criminality, we have the power to investigate. That is not the basis on which we are saying the provisions that you are concerned about should be retained.

We want the legislation to give the police the ability to intervene in cases involving young people in which one or both parties are putting themselves at risk of significant harm. The bill would allow us to intervene at that point.

Nigel Don: Okay. Having now set out the ground rules of what is law and what is not, why
do you still think that there needs to be an offence of strict liability, although we will never enforce it, if older children have penetrative sexual relations with each other? Why do the police need that provision if you have sections 1 and 2 and the section that refers to older persons?

Temporary Deputy Chief Constable Skelly: Its absence would significantly restrict our lawful ability to carry out our duty to protect young people. It is not about criminalising individuals; it is about giving us the lawful ability to investigate, to ensure that we are protecting young people.

There might be other ways of doing that, and other agencies and bodies might require a different route and a different level of support, but for as long as the police are vested with a duty to protect young people and we have that role in society, we will need the tool to allow us to discharge that duty.

Nigel Don: Forgive me, convener, but this is a crucial point.

I do not want to disagree with you—I hesitate to disagree with a police officer about anything, and certainly ones with the experience that you folk clearly have—but it is still not clear to me why, if you have sections 1 and 2 as writ, you need the bill to provide another offence in order for you to investigate.

10:45


Nigel Don: Sorry—is it section 21? Let me check, to be absolutely clear.

No, it is not section 21. It is not about the older person. It is about children having—[Interruption.] Or is it section 21?

The Convener: It could be section 27.

Nigel Don: Right. Let us make sure that we are absolutely clear, for the sake of the *Official Report*. Yes—it is section 27, “Older children engaging in penetrative sexual conduct with each other”.

Forgive me, but it is still not clear to me what section 27 adds to your investigative armoury. If you have prima facie evidence of sex and you want to investigate that, you can investigate it for evidence of coercion, or at least lack of consent. Can you not do that with sections 1 and 2 in your back pocket? Why do you need section 27 as well?

Temporary Deputy Chief Constable Skelly: In Scotland, we consider 16 to be the age at which consent can be given to sexual intercourse, or to the sexual behaviour that is described in the bill. When such behaviour takes place below that age, society is concerned, even when consent or free agreement appears to have been given. Society believes that such behaviour is inappropriate and should be investigated, and that the people who should investigate it in the first instance are the police. While society in Scotland takes that view, we need the powers to be able to investigate.

If you believe differently, and you believe that consensual sex between older children is something that should take place, you would argue for the removal of section 27 from the bill, but we do not believe that that would be appropriate. There are a number of professional reasons why we say that. For example, we find predatory sexual behaviour occurring from a very young age. Some instances that we investigate lead us to people whose journey into adulthood is such that they become predatory sexual offenders. There are reasons why we would want to intervene at an early age, because doing that helps us to protect people throughout their lives.

That is one reason—but by no means the only one—why we want to retain the power. However, it is for the Parliament and the public to decide whether they want us to protect people in that way.

Nigel Don: I am sorry, Mr Skelly—I am with you, and I see where you are coming from, but I have still not got what I understand as an answer that tells me why you need section 27. I think that you can do all the things that you mentioned under sections 1 and 2. I wonder whether Ms Raphael can help.

Detective Chief Inspector Raphael: Often, circumstances do not come to our attention in the first instance but are reported through schools or social services or by other means. In the absence of the provision, if a young person explained that they had engaged in sexual intercourse with a peer of similar age, there would be no requirement for those organisations to alert us, and we would therefore be denied the opportunity to investigate. The provision means that there is a legislative requirement on the bodies to report the matter to us, which allows us to investigate.

Basically, if a set of circumstances was highlighted anywhere other than within the police service, the absence of the provision would mean that we would not hear anything about it and would therefore be unable to investigate.

Nigel Don: Thank you. I am with you.

The Convener: Cathie Craigie has a question on this important point.

Cathie Craigie: The change in legislation would mean that the 15-year-old girl that you gave as an example earlier would be a criminal. Under the existing law, and given the way in which you operate, is every 14 or 15-year-old girl who
becomes pregnant in Scotland reported to the police?

Detective Chief Inspector Raphael: Sorry, is every—

Cathie Craigie: Is every young girl under 16 who becomes pregnant reported to the police?

Detective Chief Inspector Raphael: They should be.

Cathie Craigie: Are they?

Detective Chief Inspector Raphael: As far as I am aware, they are.

Cathie Craigie: Perhaps we can get some more statistics or information on that.

The Convener: I think that there is some difference between the theory and the practicality. I very much doubt whether every girl aged under 16 who becomes pregnant comes to the attention of the police.

Detective Chief Inspector Raphael: As I said, they should come to the attention of the police, because underage sexual activity has taken place.

Temporary Deputy Chief Constable Skelly: It would not be different from any other crime. It is up to people to report incidents to us.

Cathie Craigie: You said in response to Nigel Don’s questions that there was a concern that some organisations and agencies, such as schools and the health service, would not bring such issues to your attention if there was a change in the law. I am trying to get at whether incidents of underage pregnancy are being brought to your attention at the moment. I know that, at the moment, a young girl in that situation is not committing an offence, but, if a girl aged under 16 has become pregnant, somebody has committed an offence. I am aware of the way that the law stands. I hear the evidence that you are giving, but I cannot quite understand where your concerns come from if incidents are not being reported at the moment.

Detective Chief Inspector Raphael: I have no idea of the numbers that are not reported to us, but whatever that figure is, it would be significantly greater in the absence of the proposed provision in the bill.

Paul Martin (Glasgow Springburn) (Lab): I want to follow up Cathie Craigie’s point about the criminalisation of the girl. What is the police’s approach? Do they consider the welfare of the girl? You mentioned predatory behaviour. Would the identification of the girl, who might not have come to your attention before, assist in identifying and dealing with the male, whose behaviour might have been predatory?

Temporary Deputy Chief Constable Skelly: Yes. The fact that the police are involved means that an investigation is carried out and both parties come to the attention of the care authorities, for example through social workers or the children’s reporter. The police approach the case from the point of view of the wellbeing of the victim. Given that both parties may very well have consented—section 27 deals with situations in which both parties consent—we would approach the case from the point of view that both parties are potential victims. We can investigate the circumstances and then treat the parties appropriately, depending on what the investigation tells us. That means that both parties are on our systems, which means that we should be able to care for them better in future, whether they come to our attention because of their continued predatory behaviour or because they become a repeat victim. Vulnerable people who put themselves into positions of vulnerability often do so more than once. The point is to be able to prevent that from happening in the future through some kind of appropriate intervention, although not necessarily a policing one.

The Convener: I invite Robert Brown to make a brief final point under this heading.

Robert Brown: The nub of this is which cases get taken forward for prosecution. You referred to 19 cases in the east of Glasgow. Why do some cases get prosecuted and others do not? Is it to do with the presence of predatory behaviour or some other element?

Detective Chief Inspector Raphael: That is a very difficult question to answer. It relates not just to the conduct itself but to social background or other factors that influence the circumstances. I apologise for not being able to answer your question with any great clarity, but it is an extremely difficult question to answer.

Robert Brown: But you are saying that there are wider issues than just the behaviour.

Detective Chief Inspector Raphael: Yes.

Temporary Deputy Chief Constable Skelly: When we report cases to the procurator fiscal, the ones that go forward for prosecution are those in which there is concern that there has been significant criminality, beyond what we would see in most other instances, when the matter might be better dealt with in another way.

The Convener: We will leave that point. It is a complex issue and we accept that you were put in a position of some difficulty.

Nigel Don: Does ACPOS support the distinction that the bill draws between sexual intercourse between older children and other forms of sexual contact between older children?
Temporary Deputy Chief Constable Skelly: We support section 27, which is the section to which you refer. The only part of it that we would put forward for further discussion is section 27(3), which refers to sexual activity other than using the mouth. The inclusion of activity using the mouth would require careful drafting because we would not want to criminalise kissing between older children, but by explicitly excluding it from the section we are allowing some types of sexual behaviour, such as oral sex, that we feel should be included. Although, broadly speaking, ACPOS supports the section—we have discussed the issue at some length—we think that that anomaly is a matter on which there should be further discussion.

The Convener: That seems a fair enough answer.

Nigel Don: I presume that you would prefer section 27(3) to be removed and an exception to be made for kissing, as you and I would understand it.

Temporary Deputy Chief Constable Skelly: Careful drafting is required. We are happy to engage with those in the Scottish Government who are drafting the bill to establish what form of words might be better, but the solution would be something like the one that you suggest.

Bill Butler: Under what circumstances should consensual sexual intercourse between older children be the subject of criminal proceedings? Do you have a view on that, or, as you stated earlier, is it your view that it is up to the procurator fiscal—in other words, you present the evidence as it is presented to us. I could report the evidence as it is presented to us. I could understand it.

Bill Butler: I want you to answer my question, as I have a small element of doubt in my mind. Can you allay it?

Temporary Deputy Chief Constable Skelly: You have answered your own question.

Temporary Deputy Chief Constable Skelly: It is for the procurator fiscal and the Crown to decide on prosecutions and how they go forward. We report the evidence as it is presented to us. I could foresee that when there is repeat offending we would be strong in our view that the matter should be dealt with by the criminal justice system but, ultimately, it is for the Crown to decide.

Bill Butler: Do you think that only in exceptional circumstances will consensual sexual intercourse between older children be the subject of criminal proceedings? You said earlier that you need the ability in legislation to intervene or investigate on the basis that, as a result of your investigation, although you will pass the case on to the procurator fiscal, other arrangements can be made to protect the child in question.

Temporary Deputy Chief Constable Skelly: Absolutely. There needs to be the ability to intervene and I foresee that, in sexual circumstances, it would result in conviction.

Stuart McMillan (West of Scotland) (SNP): Some of the issues were touched on earlier, but I am keen to clarify a couple of points. I come back to the extension of the criminal law to girls under the age of 16. Do you see any practical difficulties being associated with the extension of the criminal law?

Temporary Deputy Chief Constable Skelly: I do not, but perhaps my colleague might.

Detective Chief Inspector Raphael: No, I do not. It is probably only right and proper that the law is gender neutral in that respect and that there is equity between boys and girls. I do not anticipate any practical difficulties in the investigation process.

11:00

Stuart McMillan: Do you see any argument for treating young men and young women differently?

Temporary Deputy Chief Constable Skelly: I do not. ACPOS welcomes the fact that the bill broadly addresses gender issues and we support the move to address the apparent and real gender imbalance in current law.

Stuart McMillan: Your submission highlights section 29(3), on age proximity. You say that the section sets out "straightforward, unambiguous parameters that are easily understood".

Temporary Deputy Chief Constable Skelly: As far as anything is straightforward and unambiguous, yes.

Stuart McMillan: Indeed. Surely making 16 the age of consent would be unambiguous and more straightforward than what is suggested in section 29.

Temporary Deputy Chief Constable Skelly: I am not entirely sure that I understand what you mean because the legislation attempts in a coherent way to set out various age limits and types of offence that are committed and the reasons behind them. Section 29, "Defences in relation to offences against older children", attempts to be very clear about the position when there is a two-year age difference between the parties involved and so on. I am not sure whether I understand what you are saying.

Stuart McMillan: It could be suggested that section 29 would allow sexual activity to take place even though one of those involved is under 16, although they will be in the older child category. If the section were not included in the bill, the bill
might say that the age of consent is 16 and there should be no exceptions, so if anyone has sex with someone under 16, they should face the full force of the law. It could be suggested that section 29 dilutes the law and reduces the age of consent.

Temporary Deputy Chief Constable Skelly: Thank you for helping me to understand. The bill attempts to introduce checks and balances in how the legislation should be implemented. It provides an opportunity for balance in that society would take the view that someone who is significantly over the age of 16 should be in a position of greater responsibility and understand that the person with whom they are going to have sexual activity should be 16 years of age, but when someone is close to the age of 16, it is reasonable for them to make the defence that they believed that the other person was their age. Section 29 is proposing that the age at which such a defence is reasonable should be within a two-year window. Our view is that that offers an appropriate balance to criminalising the behaviour. If there is a sea change of view that says, "Well, no, there should be no balance; there should be a cut-off at 16 and that's it," that is for a group beyond the police to decide. However, it seems to meet the test of reasonableness to allow the defence to be put forward if the people involved are within a certain age range. As with all statutory defences, the one in section 29 is intended to introduce a balance to the legislation.

The Convener: The final question will be on abuse of the position of trust.

Paul Martin: I note from ACPOS's submission that you welcome "the provision in the Bill to extend the offences relating to abuse of trust from under 16 year olds to those under 18 year olds."

However, you state that there are persons "who have attained the age of 18 but who are nevertheless extremely vulnerable".

Which vulnerable groups do you refer to?

Temporary Deputy Chief Constable Skelly: Our point is that a number of people who have reached the age of 18 remain in the care system and are still highly vulnerable. It is necessary to set an age limit at some point; we are not suggesting that the age limit should be set at 19, 20 or 21, for example. Rather than proposing that the age limit in the bill be changed, we are simply making a general observation that, as I have said, a significant number of 18-year-olds remain in the care system. It might well be that the Protection of Vulnerable Groups (Scotland) Act 2007 provides an opportunity for us to deal with the issue in a different arena in a different way. We merely comment on the position rather than put forward any hard-and-fast change.

Paul Martin: I want to clarify which vulnerable groups you refer to. Section 35 mentions specifically the abuse of trust of persons who are mentally disordered. Do you have in mind other vulnerable groups that you did not mention in your submission?

Temporary Deputy Chief Constable Skelly: I have no more detail. We would welcome the opportunity to clarify the detail that lies behind what we said in our submission.

The Convener: There are three outstanding matters to be dealt with in correspondence—you have a note of them. The clerk will give you precise notification of the statistics that we would like to be provided with.

I thank Mr Skelly and DCI Raphael very much for their attendance, which has been extremely useful. We will have a brief suspension to allow for a changeover of witnesses.

11:07

Meeting suspended.

11:08

On resuming—

The Convener: I welcome the second panel, which comprises Professor Pamela Ferguson from the University of Dundee, James Chalmers from the University of Edinburgh and Professor Michele Burman from the University of Glasgow. We have received submissions from some members of the panel. We will move straight to questions. I repeat my request to the previous panel: answers should be as succinct as possible.

Stuart McMillan: Good morning. Mr Chalmers and Professor Burman suggest that further changes to the law beyond what is proposed in the bill will be necessary if conviction rates in cases of rape or sexual assault are to improve. In general, will the bill have any positive effects?

James Chalmers (University of Edinburgh): It is reasonable to say that simply clarifying the definitions of the relevant offence should ensure that there is less possibility of a jury being misdirected, for example, which might be helpful. I do not envisage any detrimental effects coming out of the bill. All told, I simply do not envisage there being much effect one way or the other.

Professor Michele Burman (University of Glasgow): I think that the bill will have a positive impact. In particular, it marks an attempt to place existing common-law and statutory sexual offences in a single act, and represents an important attempt to bring clarity into this area of law. The provision of a statutory definition of consent is important, because it brings much-
needed clarity, and will be a positive impact of the bill. One of the previous witnesses referred to the centrality of consent in rape cases and other cases of sexual assault. Consent is, indeed, a central part; it is at the heart of sexual offence cases. Having a clear understanding of what consent means will be especially helpful to juries, as well as to complainers and, dare I say it, to the accused.

Professor Pamela Ferguson (University of Dundee): I agree. The bill is to be welcomed because it provides clarification. However, more needs to be done on the law of evidence, such as sexual history evidence. That needs to be looked into next. In addition, there is a greater role for education, particularly in schools, about what we mean by rape and sexual offences. We must try to get across to young people that it is never acceptable to have sexual intercourse with someone who does not welcome it.

The Convener: That leads us to the second question that we would like to pursue, via Cathie Craigie, on the definition of rape.

Cathie Craigie: Good morning to all the panel members. The bill makes it clear that only a man can be guilty of rape, although the victim can be a man or a woman. Do the witnesses support that limited gender neutrality?

Professor Burman: Yes. I support the view that penile penetration is a crucial element of rape. I think that I said in my written submission that rape is a powerful and weighty word that taps into complex symbolic meanings. It conveys in specific terms the nature of the offence and denotes a specific type of wrong, with characteristics that are quite distinct.

Cathie Craigie: That is clear.

James Chalmers: It is fair to say that penile penetration is a crucial element of rape. Technically, the bill is gender neutral, because any person can commit the offences, so the bill therefore avoids the questions of gender that might arise due to gender reassignment. However, once the wrong of penile penetration is identified as being separate and distinct, it flows from that that essentially only men can commit the crime of rape—at least, as the principal actor.

Professor Ferguson: I agree. Women could be liable art and part if they became involved in rape. However, for the principal offender, it is appropriate that rape is defined as penile penetration.

Cathie Craigie: Over the past few weeks, the committee has taken evidence from a number of different interested parties who have suggested that it should be considered rape if a perpetrator abuses someone with an object. Can you comment on that? I do not know whether you have read any of the evidence that we have taken over the past few weeks, but it has been powerful.

Professor Ferguson: There might be merit in having a separate offence of penetration with an object. Currently, that offence is included in section 2 as part of sexual assault. However, it is a serious form of sexual assault and, for the point of fair labelling and having previous convictions reflect the gravity of the offence, having a separate offence has merit.

Professor Burman: I agree. The insertion of an object into the anus, vagina or other part of the body is extremely brutal sexual exploitation and a violation that can be as devastating as penile penetration and should be treated as no less serious a crime than rape. I support the proposal to have a separate offence that is distinct from sexual assault and equivalent in seriousness and maximum sentence to rape.

James Chalmers: I have nothing to add, save to say that any offence involving an object would obviously have to be gender neutral in a way that the offence of rape is not.

Professor Burman: I agree.

The Convener: We turn now to consent and reasonable belief.

11:15

Bill Butler: The definition of consent in section 9 has been welcomed by other witnesses. Are members of the panel content with “free agreement” as a general definition of consent, or could that definition be improved?

Professor Ferguson: Defining consent in terms of free agreement is a step forward, but I would prefer it if we simply used “free agreement” and left “consent” out of the picture all together. Rape would then be defined as penile penetration without the free agreement of the other party. Using “consent” in the bill can only lead to confusion. If, for example, a woman ultimately submitted to intercourse on the basis that she feared that she would be killed or seriously injured if she did not, that would be consent but not free agreement. It would be simpler to leave out “consent” and use “free agreement”.

James Chalmers: The words “free agreement” are preferable to the convoluted definition that has been used in recent English legislation. The correct approach to the definition of consent has been reviewed in a number of countries in recent years and the words “free agreement” are the best that anyone has come up with. Recent evidence suggests that if we continue to use “consent” juries might enter the jury room with preconceptions of what that means and apply their own
understanding, rather than any statutory test that is given to them. I am not sure that that situation would be altered terribly much by leaving out "consent", as I think that such offences are still understood as non-consensual offences, and that understanding would permeate any discussion among jurors.

Professor Burman: I largely agree. In Victoria, in Australia, where "free agreement" is used, the fact that someone did not do anything to indicate their free agreement is enough to show that intercourse took place without it. That is the kind of direction that is given by the judge to the jury as a way of clearly explaining the idea of free agreement. There might be scope for the bill to incorporate something like that. The directions to the jury need to be clear about what is meant by "free agreement".

Bill Butler: Are you otherwise content with those words being used?

Professor Burman: Yes. The term has lots of advantages, especially when compared with the situation in England and Wales. The term is simple and succinct.

Bill Butler: Do you agree with Professor Ferguson's concerns about the use of "consent"?

Professor Burman: Yes. I had not thought about the issues that Professor Ferguson raised, but, having listened to her, I feel that there is something to be said for her view.

Bill Butler: Do you agree with Professor Ferguson that "consent" should be excluded entirely and that it should be replaced by "free agreement"?

Professor Burman: Yes. I can see that "consent" could lead to confusion.

Robert Brown: I would like to pursue the question of prior consent in sections 10(2)(a) and 10(2)(b), which has been the subject of some criticism, particularly from Professor Burman and other witnesses. I would like to be clear about the principles behind this matter. Is the objection that people should not be allowed to make a choice in advance in that respect? Is it that the idea of prior consent might allow spurious defences to be raised? Is there some other reason? It would be useful to clarify this matter in relation to the point about sexual autonomy.

Professor Burman: If the notion of prior consent is introduced, it will make rape very hard to prove. Rape is already extremely hard to prove, but the Crown would need to disprove the existence of prior consent in any trial. That goes against the philosophical underpinnings of the bill, which are based on sexual autonomy and the idea that a person can withdraw their consent at any time. The notion of prior consent is problematic if, at the same time, there is a recognition in respect of sexual autonomy.

Robert Brown: What happens under the current law when there is some suggestion that people gave consent at an earlier stage? I assume that that must arise from time to time.

Professor Burman: It arises a lot. Consent is at the heart of all sexual offence trials.

Robert Brown: Are you suggesting that the provision relating to prior consent be removed as a complicating factor or that it be amended?

Professor Burman: I would remove it.

Robert Brown: Would that cause any problems? What would be the effect of removing the provision?

Professor Burman: I do not think that it would cause any problems, but I defer to my criminal law colleagues on the matter.

The Convener: The issue of prior consent would arise in only a small minority of cases, when a person was insensible through either drink or drugs. It would not arise in every case.

Professor Burman: You are quite right.

Robert Brown: The bill provides no guidance on when a person is too drunk to consent to sexual activity, which is a complex issue. How should we deal with that? If prior consent is removed, will we criminalise something that is probably a common activity between adults who have had too much to drink, and one that is, arguably, not criminal?

Professor Burman: I can base my answer only on my empirical research in the area. At the moment, many rape cases are characterised by one or other party having had drink. There are endless debates in court about the amount that has been drunk and the extent to which someone is intoxicated. Often, such evidence is introduced to suggest that a woman is of a particular character, has a particular disposition and leads a particular kind of lifestyle, and opens the door to attacks on her credibility and character. There is a danger of opening the floodgates to discussions about character in relation to drink.

Robert Brown: I see that, but the central issue is that people have sexual relations after one, other or both parties have had too much to drink. That is a practical human situation with which we and the courts must deal. You say that character issues come into the picture. If we set aside such procedural matters, what guidance can you give us on how we should deal with the question whether people are too drunk to give consent and the issues that surround that?
Professor Burman: I am unable to answer the question just now. If you give me a moment, I will think about how to do so.

Robert Brown: Do your colleagues have any thoughts on this common and complex issue? If we set aside the procedural implications and character issues, there is still a central point with which we are often required to deal. We need clarity on when conduct is and is not criminal.

The Convener: Professor Burman, we have all found ourselves in your position from time to time. Feel free to respond to the question later, when you are able to answer it.

Robert Brown: Do Professor Burman’s colleagues have thoughts on the matter?

James Chalmers: There may be little that we can do. It is difficult to lay down a precise test of when someone is too drunk to consent. In cases involving alcohol, it is inherently difficult to establish the precise circumstances and just how drunk someone was. I suspect that we can only reinforce the general test—that for sexual activity to be lawful there must be free agreement in all cases. That requirement is in no way diminished by the fact that someone has taken drink—drink is not a licence to exploit someone.

Robert Brown: That is a helpful comment. Do the definitions in the bill need to be changed to bring about the position that you describe?

James Chalmers: It is purely a matter of public education. I am not sure what can be done in the bill in that regard.

Robert Brown: Professor Ferguson, do you have any thoughts on the issue?

Professor Ferguson: Section 12 refers to the accused’s belief as to whether a person consented and states:

“regard is to be had to whether the person took any steps to ascertain whether there was consent”.

Presumably, if a woman is extremely drunk, it behoves the man to take at least some steps to find out whether she is past the point of being able to consent.

Robert Brown: That is helpful. Professor Burman, do you have any further thoughts? I will not press you if you have nothing to add.

Professor Burman: I agree with what has been said on the accused being requested to state the steps that he took to determine free agreement.

Robert Brown: I will move on to section 12. The bill tries to make the approach to consent objective rather than subjective, which most people accept is a satisfactory approach in principle. However, Mr Chalmers and Professor Burman have both questioned whether the bill will achieve that aim.

Will you elaborate on your concerns and how we might deal with the question of reasonable belief against the background of trying to make the approach as objective as possible?

Professor Burman: Currently, consent requires an honest belief by the accused, regardless of how reasonable or otherwise that belief is. As you say, that enables a subjective interpretation to be applied, and it has allowed the accused in trials to maintain that the victim’s behaviour amounted to what he believed to be consent.

The Crown currently has to prove that the accused knew that the woman did not consent, but there is no onus on the accused to set out what steps he took to ascertain whether the complainer consented. The current position means that trial proceedings are far likelier to focus on the actions of the complainer than on those of the accused, who is under no obligation to give evidence, while the complainer may be forced to undergo an intrusive secondary ordeal in the court room.

I support the move away from the subjective approach that is currently taken to establish mens rea. The introduction of a reasonable belief provision, whereby the accused must have reasonable belief that the victim consented to the act, is welcome. In a sense, the bill provides for a greater focus on the responsibility of the accused to demonstrate the steps that they took, but for me it is difficult to conceive how the accused could demonstrate that without taking the witness stand to describe those steps.

Robert Brown: Do you suggest, therefore, that there should be the right to draw an inference from the accused’s failure to explain his position in suitable instances? I know that you touched on that in your submission.

Professor Burman: Yes, I would support the bill making it more explicit that some inference may be drawn from the accused’s refusal to outline the steps that he took to ascertain free agreement.

Robert Brown: Mr Chalmers, do you agree with that approach? If so, do you have any fears about it moving the burden too far?

James Chalmers: At present, where the circumstances are crying out for an explanation, the jury can be directed to take into account the accused’s failure to give evidence. However, it would be inappropriate simply to direct a jury that it could draw certain inferences from the fact that the accused had not given evidence, when the accused is entitled to do so.

As far as I can tell, the current law on the inferences that may be drawn from silence is not often invoked by judges in charges to the jury. If there were a desire to use it more often in such cases, it would be helpful to include something...
specific in the statute. I am not entirely sure what form that provision would take, although I could consider it.

**The Convener:** Are you saying that there might be compliance problems with article 6 of the European convention on human rights?

**James Chalmers:** I doubt that there would be compliance problems if the rule were carefully drafted. At present, judges have discretion in appropriate cases to direct the jury that it may draw inferences from the fact that the accused has not given evidence when there are circumstances that cry out for an explanation. That is compatible with article 6.

**The Convener:** But are we not talking about going a bit further?

**James Chalmers:** If we went as far as saying that simply not giving evidence would count against the accused, it would cause problems with article 6.

**Robert Brown:** I have one final question. Is it possible or desirable to deal with that issue in the bill and in the context of the particular offences rather than consider it as part of a more general review of the laws of evidence and procedure?

**James Chalmers:** It would be far preferable to deal with the issue as part of a general review of evidence and procedure, although it might be some time before that opportunity presents itself.

**Robert Brown:** I accept that.

11:30

**Nigel Don:** I would like to pursue that point to its logical conclusion. Is there scope within the bill to say that the accused is duty bound to provide evidence in the particular circumstances of a rape or serious sexual assault accusation, or are we not able to say that in the context of human rights law?

**James Chalmers:** We could not say that. We can have regard to the failure of the accused to put forward an explanation, but we cannot drag them on to the stand to give evidence.

**Nigel Don:** Not no way.

**James Chalmers:** Not no way is the broad answer.

**The Convener:** We move to the question of those who are euphemistically described as older children.

**Paul Martin:** Professor Temkin, in her written submission, objects to the use of the term “older children” on the basis that

“A child is a child” and that the use of the term

“undermines the general message that sex with all children under 16 is against the law.”

Do panel members share that concern?

**Professor Ferguson:** I think that Professor Temkin is right, but it would be better to talk about children aged 12 and under on one hand, and children aged 13 and older on the other. It would be preferable for the bill sections to have those headings.

**James Chalmers:** I do not share that concern. Professor Temkin has made a similar point in the past about the use of terms such as “consent” in relation to children. The concerns that she expresses fail to give sufficient weight to the distinction between consensual sexual activity and non-consensual sexual activity by children under the age of 16. That is a serious distinction, and to say that the matter is as simple as recognising that children under 16 cannot consent does not acknowledge the complexity of the situation, nor does it recognise the law as it currently stands, in which there is a very sharp distinction between those two areas.

**Professor Burman:** I support what James Chalmers says. The area is very complex.

**Cathie Craigie:** I will ask James Chalmers a couple of questions based on his submission, but I welcome comments from the other two panel members. Section 4 deals specifically with children. James Chalmers states in his submission:

“It seems to me that it is inappropriate to pass criminal laws unless we are prepared to enforce them. The criminal law is too serious a tool to be used simply to ‘send a message.’”

He also states:

“It seems to me strange that any Parliament would pass criminal laws which it wished prosecutors to refrain from enforcing.”

A number of witnesses who have written and given oral evidence to the committee agree that sexual intercourse and sexual activities among children under 16 are not generally good for those children. How should the Government and the Parliament reconcile that belief with the issue that James Chalmers rightly raises about passing laws that will never be enforced?

**James Chalmers:** Government has other tools at its disposal to put across the message that certain things are not a good idea. A lot of things that we all might do are not good ideas, but the Parliament has not yet proposed legislation to outlaw them. It is a matter of public education as much as anything else—I am not sure that there is an easy way to achieve that.
Criminal law is perhaps viewed as an easy educational tool, but we must be wary of patronising young children and assuming that they are not well aware that particular offences are not prosecuted. If children see that people regularly engage in certain activities and are not regularly prosecuted, they are not likely to take the legal message seriously. The danger is that they then might start to take other legal messages less seriously than they ought to.

Cathie Craigie: Do you have any thoughts on how the bill could be amended to address those concerns?

James Chalmers: The concerns could largely be addressed by taking the approach that the Scottish Law Commission proposed. I would not propose anything significantly different from what the commission had in mind. The possibility of referral to a children’s hearing is a serious prospect, and I am sure that it would be viewed as such.

Professor Ferguson: I agree. The arguments are difficult, but I am persuaded by the evidence from people such as Kathleen Marshall. My worry is that, under section 27, in cases involving a pregnant 15-year-old, the police will have to treat her as a potential accused rather than as a victim. There will always be an allegation by the accused that the activities were consensual. The defence will be able to put it to that pregnant teenager that because she was worried about being prosecuted, she said that it was rape. Section 27 would open up all sorts of horrendous possibilities for girls to be accused of engaging in consensual activities that they did not agree to.

Professor Burman: I very much agree with that. As James Chalmers said, rather than make sex criminal, there are other opportunities for Governments to persuade young people not to indulge in sex. The issue is about providing easier access to appropriate advice and information. I support what Kathleen Marshall said the week before last about the need for a robust public health campaign that conveys a clear message that we do not condone sex for under-16s. That is a more appropriate route than criminalisation.

Cathie Craigie: My final question is for James Chalmers.

Many people have been waiting with great hope for legislation on how we address accusations of rape, so it is surprising that your submission states:

“It should not be expected that the Bill, if enacted, will do much—if anything—to affect the fact that the conviction rate in rape cases”

I will not go on, but I think that you state that the bill will not affect the conviction rate, or am I misreading that?

James Chalmers: No, you are not misreading. It is probably just as well that you did not go on, because that sentence is badly worded and does not make much sense. I meant to say that the bill will not affect the conviction rate if we continue to express the rate as a proportion of the number of rapes that are reported to the police, as we often do at present. That is different from expressing the conviction rate as a proportion of the number of rapes that are prosecuted, which is a small fraction of the number of reported rapes.

My impression—it is no more than that—is that most rape cases turn on two different accounts of events being put to the jury. It is a rare case in which the prosecution and defence in essence agree on what happened, but are not sure whether it was rape. The new law will help in clarifying those boundary issues, but in most cases the question is whether the jury believes one story that is well on one side of the boundary or another story that is well on the other side. Tightening up the boundaries, as the bill will do, is not likely to make any cases that would have fallen on one side of the boundary fall on the other side in future.

The Convener: Is that sufficient, Cathie?

Cathie Craigie: Yes—that is food for thought.

The Convener: I thank the witnesses very much for their evidence. It was given with great clarity and very succinctly, which is greatly appreciated.

The committee will suspend briefly while we change the witnesses.

11:38

Meeting suspended.

11:39

On resuming—

The Convener: I welcome Professor Gerry Maher, professor of criminal law at the University of Edinburgh, who will give evidence in connection with his former duties as a commissioner of the Scottish Law Commission. We have read the commission’s discussion paper and report, which give the principles behind the proposals. We will proceed directly with questioning.

Nigel Don: Good morning, professor. The principles behind the bill were given in those earlier papers. Will you clarify for the committee what the principles of this reform of our law should be?

Professor Gerry Maher QC (Former Commissioner, Scottish Law Commission): There are a variety of interlocking principles, but first and foremost we are concerned about sexual
autonomy as a principle: the bill should both promote and protect sexual autonomy. Of course, the sexual autonomy principle has important implications for the provisions on consent.

Another fundamental principle is protection. There are people out there who are vulnerable to sexual exploitation and there are people for whom sex is not an appropriate activity. The law should be seen to protect such people.

We also had other aims. Clarity in law is an important aim for any law reform, and this is an area in which the law must be clear. We are talking not about a technical legal set of rules but an activity in which everybody has an interest. The law must be clear about what people are allowed to do and what is criminal.

Nigel Don: Are those principles present in the bill?

Professor Maher: I hope so. As I said, the protection and promotion of sexual autonomy require some sort of conceptual framework. That is what we had in mind when we considered the consent model. The bill contains a number of provisions on the protective offences. My hope is that the law will now be clearer. The present law, which does not define consent, is certainly much less clear than any other attempt—especially our attempt—on that fundamental concept.

Nigel Don: I will pursue the last question that I put to the previous panel. Will clarification and rewriting of the law change the number of convictions, or do you agree with the previous witnesses?

Professor Maher: I tend to agree with the previous answers. The conviction rate is a fairly complex issue that seems to me, however one interprets the problems, to involve many possible explanations and causes. Concurrently with the commission’s project, the Crown Office conducted a review of the procedures for prosecution and investigation of rape and other sexual offences. It seems to me that the Crown Office’s review will have as much impact—probably more than—as our project will have on the conviction rate.

I also think that there is value in the law stating things clearly; for example, there is value in the law making explicit the proper principles of sexual conduct. The commission took the view that many of our recommendations on the consent model would spell out what is proper and improper in terms of sexual conduct.

Cathie Craigie: Why did the commission believe that rape should continue to be defined as a crime that can be committed only by a man?

Professor Maher: We took the view that, in trying to separate out the different types of sexual assault offences, of which rape is one, it is important to make it clear that the law should reflect the specific type of wrong that has been done to the victim. It seemed to us that penetration with someone else’s sexual organ is a distinct type of wrong that should have its own offence, which should be a separate offence from other types of sexual assault, including other types of penetration.

11:45

Cathie Craigie: According to written and oral evidence that we have received from women’s organisations, the effects of being penetrated with an object can be just as bad—and, if we are talking about physical damage, can be worse, especially for women. What is your view on that?

Professor Maher: I totally agree. There is no suggestion that in confining rape to penile penetration we are saying that all instances of penile penetration are worse than other forms of penetration, or that there is some form of hierarchy in that respect. The question is how to find an appropriate label with which criminal law can refer to such conduct. Although all types of unwanted sexual penetration are horrible for the victims, we felt that being penetrated by someone else’s sexual organ seemed to be a distinctive type of wrongdoing.

Again, I emphasise that we are neither suggesting some form of hierarchy nor saying that penile penetration is always worse than other types of penetration, or that other types of penetration are not as bad as penile penetration.

Cathie Craigie: What is your view of the suggestion that there should, in this respect, be another offence of similar seriousness to the crime of rape?

Professor Maher: The commission originally proposed a set of three sexual assault offences: rape defined as penile penetration; sexual penetration not just with objects but with other parts of the body; and a residual category of sexual assault. For a variety of reasons, we changed our minds. However, section 2 still refers to the offence of sexual assault by penetration, which suggests that the legislation marks out non-penile penetration as a specific type of wrong.

One of our pragmatic reasons for including sexual assault of penetration within the broader category of sexual assault was to do with the point about maximum penalties. It seemed to us that it would be better to keep sentences for all types of sexual assault within the range of the possible maximum of life imprisonment. Technically, it might be more difficult to attach a maximum of life imprisonment to what might be termed bare sexual assault—in other words, non-penetrative assault—but locating sexual assault by penetration within
the broader category of sexual assault might have advantages.

Cathie Craigie: I do not know whether you have followed the evidence that the committee has taken, but a significant number of people feel that the bill will not fully cover their various areas of concern, nor will it protect many men and women out there. I have to say, however, that we do not yet have suggestions for amendments in black and white.

Professor Maher: Are you talking about sexual assault?

Cathie Craigie: Yes.

Professor Maher: As we have argued, there is an offence of rape—in other words, penile penetration. The bill also sets out four types of conduct covering a wide range of sexual assaults. The common law would remain in force for anything that would not be covered by sections 1 and 2 including, for example, assault under circumstances of indecency. If a person is assaulted as a result of being urinated on by someone else, that might not fall four-square within the categories of sexual assault—indeed, it could be argued that it does not fall within those categories at all—but the Crown could prosecute on the grounds of assault under the aggravation of indecency.

The Convener: I want to be quite clear about the potential penalties. The maximum penalty for rape is, of course, life imprisonment, subject to a punishment part. How, under the bill, would a case such as we had a few years ago, in which a baton was forcibly inserted into a woman’s vagina, be classified?

Professor Maher: It would be classified as assault.

The Convener: What is the maximum penalty that that would attract?

Professor Maher: Under schedule 1, the maximum penalty for a prosecution on indictment would be life imprisonment.

The Convener: So, the same maximum penalty will apply under each heading.

Professor Maher: Yes.

The Convener: I was anxious to clarify that.

Professor Maher: Let me make this absolutely clear. Section 1 rapes and section 2 assaults will carry a maximum penalty of life imprisonment. That will apply to all types of sexual assaults that are prosecuted on indictment.

The Convener: That was my understanding, but I was slightly vague about it. I think Nigel Don is similarly vague.

Nigel Don: Can you please clarify your point, Professor Maher? My understanding is that, under those circumstances, prosecution would proceed under section 2(2)(a), which concerns sexual penetration. You are suggesting that if that provision and all the words that are associated with it were removed to another section—which is what a lot of people have asked us to do—there would be a struggle to attach the same penalty to what remains in what is currently section 2. Is that your view?

Professor Maher: That is one consideration. There are conventions about maximum penalties for statutory offences. I am not saying that it would be impossible to argue for life imprisonment as a maximum penalty for the residual category of assault, but it seems to us that it would be easier, instead of making such distinctions, to have a general section 2 type assault that is constituted by four types of behaviour.

Nigel Don: Would it necessarily be a bad thing if that were to be the consequence? If we removed all the offences of penetration with objects or body parts to another section, would it be a bad thing if the residual sexual assault did not carry the same penalty? It is not clear to me that it should.

Professor Maher: That would give rise to the problem that was mentioned earlier of trying to avoid hierarchies—saying that one thing is always worse than another. From the victim’s perspective, a sexual assault that is not penetrative can still have a terrible impact. To be told that it is okay because they have not been raped or sexually penetrated does not bring comfort to the victims in that scenario.

The Convener: Okay. We turn now to the issue of consent.

Robert Brown: Let us return to the general point about free agreement. The clarification in the bill has been broadly welcomed. Is it possible for that definition to stand on its own without reference to the categories in section 10, which have been at issue?

Professor Maher: When you say “stand on its own”, are you asking whether we could do away with section 10?

Robert Brown: Yes.

Professor Maher: That is possible. However, we feel that an important role of the definitions in section 10 is to spell out to people who are contemplating sexual activity that certain forms of such activity in and of themselves count as rape or sexual assault. We feel that the law would not give a strong enough message if we left consent as defined in the general definition of free agreement.

Robert Brown: I am concerned that the whole issue looks very complicated, in terms of
directions to juries and that sort of thing. At the end of the day, we want something that is transferable into judicial language and comprehensible to a jury so that juries can make clear-cut decisions. Do you think that, in broad terms, part 2 allows for that?

Professor Maher: I think it does. The problem that arose in the state of Victoria, which a witness mentioned earlier, was that judges and prosecutors tended to treat the list of definitions as a checklist. They went through the checklist to see whether an offence fitted in with it. However, the definitions are meant to apply simply when the facts bring one of the definitions four-square within a case; they are not a checklist. A judge would not direct a jury by going through each of the definitions. In many cases, no particular definition will be relevant and the direction on what constitutes free agreement will be the important factor.

Robert Brown: You make the interesting point that there has been an example, in another jurisdiction, of a section 10 equivalent being treated as a definitive list, with other situations being difficult to consider.

Professor Maher: The list is not definitive in the sense that it covers the field of what constitutes free agreement; it is a non-exhaustive list of cases of lack of free agreement. In our report, we said that we looked at the experience in the state of Victoria when the new law first came into effect. We found that after some initial problems and misunderstandings there was, among the wide range of legal practitioners and judges, general acceptance that the new law was working. Our concern was that that would not be the case. You say that the provision seems to be complicated, but no problem was found in putting it into practice in Victoria.

Robert Brown: In that context, I assume that the key phrase is:

“without prejudice to the generality of that section”.

Professor Maher: Yes—that is right.

Robert Brown: Significant concern has been expressed on the concept of prior consent. We are getting a sense that people view the provision as being somewhat theoretical and therefore difficult to apply to actual cases. In addition, we are hearing that it may, if it is applied, have adverse implications for the sexual autonomy point on which you place such emphasis. Having listened to and read the evidence, do you now consider that the view that is being expressed is reasonable or do you stand by the idea that prior consent continues to be relevant to the bill?

Professor Maher: We have to be careful about what we say in this regard. Most of the focus has been on section 10(2)(b), where I think the phrase “prior consent” is used. My worry is that the notion may get out that the law does not allow prior consent. I take the opposite view: there must always be prior consent. The focus of the commission’s message is that if no consent is given prior to a sexual act, the sexual act is a criminal act.

I am worried about the language of not allowing prior consent. The absence of consent prior to an act is what makes the activity criminal. Unless prior consent is included in the bill, there is no point in talking about withdrawal of consent, because withdrawal of consent presupposes that consent has been given.

What should emerge from the discussion on the bill is that the law requires consent to have been given prior to any sexual act. That said, discussion thus far has focused on the scenario that is embodied in section 10(2)(b). My concern is that the chopping away of prior consent may serve to obscure that focus and lead people to think that prior consent is not something they need—indeed, it may lead them to think that the opposite is the case. As I said, prior consent is an essential part of the definition of sexual offences.

I also worry about what would happen if section 10(2)(b) were to be removed. If parliamentarians want to impose time limits on the giving of consent, you should spell that out in statute. That said, I suggest that that would not be a wise road to take, because it could lead to questions on whether the consent that was given one hour prior to sexual activity had expired or whether that which was given five minutes beforehand remains. It would serve only to miscapture the social dynamics of sexual activity. I see nothing wrong in the concept or principle of people giving consent prior to the sexual act taking place—even some time prior to it.

Robert Brown: From the evidence that we have heard, I sense that people view the provision as an artificial concept. One difficulty is the distinction between consent and prior consent. Also, people are not signing up to a document or saying hours in advance of the act taking place exactly what will happen later on, after they have fallen asleep or whatever. Do you accept the artificiality of the concept?

Professor Maher: I do not see what is artificial about the scenario. By way of illustration, I will set out a scenario and ask the committee to reflect on whether it is so statistically freakish that the law can ignore it. A couple go to bed and one says to the other, “If you are first awake, can you wake me in a nice way?” We could say that their having said so does not matter and we should make that activity illegal, but for me that would be an infringement of sexual autonomy. Removal of
section 10(2)(b) would not solve the problem, but would simply move the focus to section 9. If the bill were to be passed with section 10(2)(b) absent, this question would arise: is it an offence of rape in Scots law for a man to have intercourse with a woman while she is asleep? The answer should depend on whether she has consented to having sex in that state. In my view, the problem will not go away if we remove the provision in section 10(2)(b).

12:00

Robert Brown: Rightly, you say that it goes back to the general definition of consent. Is that not a more flexible and satisfactory way of tackling the issue than the slightly artificial provision in section 10(2)(b), which seems to imply signed documents and so on?

Professor Maher: The implication that signed documents are required is a criticism that can be levelled at the whole consent model, not simply at this definition. My point is that going back to section 9 will not give us an answer. If the question were asked whether it is rape in Scots law for a man to have sexual intercourse with a woman while she is asleep, what would the answer be? In my view, it is better for the definition to be spelled out.

There is another reason why the commission wanted the definition to be included in the bill. Historically, Scots law has had problems dealing with the sleeping person; other legal systems have had the same problem. In some senses, the issue is slightly illogical, but there is a superficial logic. It is true to say that a person who is asleep cannot give consent, but it is a fallacy to say that a person who is asleep cannot not give consent, and that they are therefore either consenting or not consenting. Scots law should spell out that having sex with a person who is unconscious or asleep is rape or sexual assault, except in one defined circumstance—when they have consented to having sex in that state.

Robert Brown: Would spelling out the issue in that way assist juries that are faced by the practical and varied circumstances in which such situations arise?

Professor Maher: For section 10 to be brought into effect, the victim would have had to be asleep or unconscious. The answer is that sex with such a person would be assault or rape unless the exception applied; in most cases, it would not. We are talking primarily about cases in which men find women asleep in the street because they are drunk. In such situations, there has been no previous contact between those persons, so the law should spell out that that is rape.

Robert Brown: You have made your position clear.

My final question relates to section 10(2)(c), which deals with threats of violence. The provision applies to situations in which the issue of historic abuse has been raised. Does the current wording deal adequately with that? Some witnesses have expressed concerns about that point.

Professor Maher: It was the commission’s intention that historic abuse should come into play in such circumstances. The key point about section 10(2)(c) is that it relates to situations in which there is a causal link between violence and consenting or submitting to sexual activity. If the violence took place far back in time, it may be more difficult for the Crown to show that there is such a causal link, but our intention was that the definition would apply to historic violence or abuse.

Robert Brown: We are dealing with a serious criminal offence, so it is important to establish the existence of a causal link between violence and agreeing to sexual activity. We need to do more than establish background circumstances.

Professor Maher: Establishment of a causal link is important because if the Crown proves a case under the definition, that is the end of it—there is no defence in relation to consent, because it has been proved that there was no consent.

The Convener: Are you aware of any cases under the old clandestine injury charge in which the defence was that consent was granted before sleep or intoxication took over?

Professor Maher: That is a peculiar rule. Case law provides no guidance on the scope of clandestine injury. The offence still exists, but it will be removed.

The Convener: It is historical to the extent that it is no longer used by the Crown.

Professor Maher: Yes.

Bill Butler: Section 12 of the bill provides that, in determining whether a person’s belief about consent was reasonable, “regard is to be had to whether the person took any steps to ascertain whether there was consent”.

How do you envisage that section working if the accused declines to give evidence?

Professor Maher: I will outline the scenario that we had in mind. If the bill became law and the law spelled out that there would be an inquiry about what steps, if any, the accused took to ascertain consent, we hope that the proper police procedure would always be to ask about that when the accused was being questioned. In interviewing the suspect, the police could say to him that so-and-so had said that the accused had raped her. He may deny the whole thing and say, “Yeah, I had sex, but she agreed.” We would hope that, as part of
their standard questioning, the police would then say, "Okay. What steps did you take to make sure that she consented?" The suspect would either answer that question or he would not answer it, but the interview would be part of the Crown evidence.

**Bill Butler:** I accept that, but what if the suspect still declined to give evidence, despite that? Would it be possible, as was suggested earlier, to draw an inference if he refused to take the stand?

**Professor Maher:** The response could be, "Well, what would you think?"

You are perhaps asking two questions. One is whether a factual inference could be made, having heard all the evidence—including evidence to the effect that the accused refused to answer the police and refused to go into the box—that no reasonable steps were taken to ascertain consent and that no attempt was made to do anything. That is one thing, and I dare say that juries might consider that in appropriate cases. However, if you are asking whether the law should try to spell that out, which is a separate question, I agree with what James Chalmers said earlier about possible difficulties with the right to be silent under the current law in respect of the European convention on human rights.

**Bill Butler:** Do you agree with Mr Chalmers that the ECHR could be contravened?

**Professor Maher:** Yes—I think there are potential problems with the ECHR.

**Bill Butler:** Okay. That is clear.

May I move on to ask about part 4 of the bill, which is on children, convener?

**The Convener:** I would like to clarify something with Professor Maher. Perhaps I am being characteristically obtuse this morning, but is it intended that the provisions in part 2 of the bill should apply to attempts to commit rape or general sexual assaults? Section 9 refers only to parts 1 and 3 of the bill, section 10 refers to section 9, and section 12 refers only to part 1. You can understand my confusion.

**Professor Maher:** That is an important point—it is not confusion. There is a view that there is a problem with how the English legislation was drafted, in that the consent provisions do not apply to attempts. We had that specifically in mind in instructing our draftsmen about the draft that the committee has. In the light of the provisions of the Criminal Procedure (Scotland) Act 1995, on attempting to commit crimes, we are quite satisfied that for our purposes we need only define consent in relation to committing the crime, and the provisions on attempts will kick in. In trying to get the drafting right, we had it in mind that those provisions would apply to attempted rape and attempted assault.

**The Convener:** That is fine. I appreciate that drafting difficulties are involved, but we may have to reconsider that issue.

**Professor Maher:** Yes. It is essentially a drafting issue. The policy was certainly to apply the consent provisions to attempts.

**The Convener:** That is fine.

We now turn to children and young persons.

**Bill Butler:** The bill draws a distinction between young children and older children, but it has been suggested that that distinction undermines the bill's protective dimension. Children are, after all, children—that is Professor Temkin's contention in her written submission. Does that aspect of the bill undermine what would otherwise be a clear message that it is not right to engage in sexual activity with or towards a person under 16?

**Professor Maher:** There is a danger of making things worse by simply treating all people under 16 as children. The law should mark out a distinction between, on the one hand, an older man having sex with a seven-year-old girl and, on the other, an older man having sex with a seemingly consenting 15-and-a-half-year-old girl. Those are not the same scenarios, and the law should draw a distinction to reflect that difference.

We draw such distinctions in other areas of law, including in relation to sexual offences against children. I accept that there has to be a cut-off point, and the message must be that sex with young children is wrong—end of story, full stop. There is an age below which children are not appropriate for sexual activity, and the law must make that clear. However, the scenario is more complicated when children are maturing—not yet fully mature but developing—so the law has to recognise that. That is why, under the current law, we have different rules for under-13s and over-13s. There are important social and moral distinctions that the law should reflect.

**Stuart McMillan:** The Law Commission's original proposals were to decriminalise all consensual sexual conduct between young persons aged over 13 and under 16. First, why did the commission support decriminalisation? Secondly, what are your views on the bill's position on sexual relations between older children? Thirdly, would the move proposed by the commission not have reduced the legal age of consent by the back door?

**Professor Maher:** I will try to take those questions in the right order; you can prompt me if I forget one.

I was asked earlier about our guiding principles. One that I failed to mention was that the criminal law is not the only or always the most appropriate means for social intervention. As other witnesses
have said, criminal law sends out a particular message to society, but the law provides for other ways of dealing with social problems.

When we consulted on the question of what to do with teenagers in the 13-to-16 category who have consenting sex with each other—teenagers is not the correct technical term, but I will call them that—it struck us that there was a social problem, which other witnesses have explained to the committee. We asked ourselves whether the criminal law was the most appropriate method for social intervention. That problem has plagued legal system after legal system, but we think that we have the answer in Scotland—the children’s hearings system.

To us, there does not seem to be a problem on which we need to send the legal message that such behaviour should attract the stigma of the criminal law. Rather, it is a problem of the social and moral development of children, and the appropriate intervention for that is through the hearings system.

Your other question was about lowering the age of consent. We must make it absolutely clear that the decriminalisation provisions would apply only when both parties were under 16. The age of 16 would still be the age of consent for having sex with someone over the age of 16. The age of consent would not be abolished or lowered.

Professor Maher: It would lower the age of consent only for sex between teenagers. The message would have to be put out that it was still an offence for somebody over 16 to have sex with somebody under 16. The age of 16 as the age of consent would still exist in general law. The question is how to deal with sex between children under 16, who are by definition the parties to be protected—the age of consent is a protective provision. How do we deal with a scenario in which the two parties fall within the category of those who must be protected because they are both under the age of 16?

12:15

Stuart McMillan: What are your views on the bill’s position? Are you happy with it?

Professor Maher: In relation to sex between teenagers?

Stuart McMillan: Yes.

Professor Maher: I adhere to what the commission said in its report, which is that such matters are best dealt with through a welfare intervention by the children’s hearings system. I think that the bill represents the worst of all worlds, because it will extend decriminalisation by listing a wide variety of what would otherwise be offences, but will keep criminal liability for certain acts, which I will not say have been randomly picked, but it is difficult to see where the line has been drawn. Moreover, it does nothing to establish a new ground of referral to the hearings system—that children are engaging in sexual behaviour. To me, that is the worst of all worlds, from the perspective of the position that we in the commission arrived at.

The Convener: Does Cathie Craigie want to pursue that? We have been given a fairly clear answer.

Cathie Craigie: That is fine. I would love it if we had more time to debate the issue with Professor Maher, who has made his position pretty clear, but there is one point that I would like to ask about. We have heard evidence that it is not good legislative policy to enact criminal law provisions that it is broadly agreed will be enforced only in exceptional cases. Another consideration is that the European Court of Human Rights has held that a state cannot claim that the retention of criminal sanctions is necessary while indicating that, ordinarily, there is no intention that the criminal law will be applied. How can we square that with what the bill proposes?

Professor Maher: As a law reform body, it seemed to us that we would not be fulfilling our role if we recommended that the law should change but asked for it not to be enforced. That did not seem to be a good way of making new law.

We should think through the impact of the bill, especially on children, if it goes through in its present form. We will have to explain to teenagers what the law is, which will be complicated. We will have to tell them not to worry, because the bit of the bill that criminalises their activity with their boyfriend or girlfriend will not be applied to them—although it might in some cases. What message will children take from that? There is a serious danger that children will think that there is no point in listening to the law because although they are told that it is the law, they can ignore it. It would be unwelcome for anyone, especially children, to gather that they can ignore the law because somehow it will not be applied to them.

It would be far better if the law said that children who engage in sexual behaviour could find themselves subject to consideration by a reporter to the children’s hearings system. That would send a message to children that they should stop and think, because the hearings system, rather than the criminal law system, could intervene in what they were doing.
The Convener: Let us continue to examine the issue of responsibility through a question from Stuart McMillan.

Stuart McMillan: In the context of the criminal responsibility of older children, will the extension of the criminal law to girls who are under 16 present any practical difficulties as regards enforcement? Are there any circumstances in which the law should treat young men and young women differently in that regard?

Professor Maher: I want to ensure that I understand your question. Are you asking whether the bill’s provisions on teenage sex would be difficult to enforce?

Stuart McMillan: Yes.

Professor Maher: I think that they would. I have enough problems trying to explain the law to law students. In difficult situations, there comes a time when people just have to make their minds up. The commission made its mind up that the law would be in a very unsatisfactory state if you brought in such phantom quasi-offences, which give the appearance of criminal offences but are not really criminal because they are being decriminalised by another route: Crown Office discretion. That makes things messy. If it is decriminalisation that you want, decriminalise; but if you want to punish children through the criminal justice system and give them convictions for rape and sexual assault, put the law in place and give the Crown Office the understanding that those cases must be prosecuted: the police must investigate all such cases and the criminal courts must listen to them all. Decriminalisation by the side door is inappropriate. If decriminalisation is what is wanted, the law should state that.

That is not a direct answer, but it would cause practical problems if there were a law on the books in respect of which the police did not quite know what they were to investigate and the Crown Office was not told how it should exercise discretion.

Robert Brown: You indicated that the bill does not allow referral to the children’s hearings system. Is that correct? Section 27 creates an offence and a child can be referred on offence grounds. Most offences committed by people under 16 would not go to the courts—they would go to the children’s hearings system. Leaving to one side the broader matter, does the bill not continue that pattern?

Professor Maher: I meant to say that the bill does not add a new ground for referral, which would be that children have been engaging in sexual activity. Other witnesses have mentioned that there are problems about the use of the criminal ground of referral anyway, as there is a higher standard of proof and the need for corroboration. If the concern that leads to any teenage child being put before a hearing is that they are engaging in sexual activity, a much more straightforward way of achieving their appearance at a hearing is to have that as a ground rather than relying on the peripheral cases caught by section 27, which must then be processed through another ground of referral. Those are the very children that we want to go through a hearing, but they have to go through a different ground of referral, which might not be as easy to establish on the facts.

The Convener: I will bring us back to an important point, on which we want to be clear. In so far as the law is concerned, rather than in respect of a referral to the reporter or by the reporter, can you see any circumstances in which two people under the age of 16 have sex and one is charged but the other is not? If the provision is retained, would there have to be consistency in that both of them would be charged?

Professor Maher: That highlights one of the practical problems. If both children are in need of protection, but the law says that both are committing an offence, why should we distinguish between them? That is a good example of the practical difficulties to which section 27, in its current form, would give rise.

The Convener: We will now turn to what appears to be a sentencing anomaly.

Paul Martin: Schedule 1 to the bill sets out the penalties for offences introduced by the bill. Can you advise me of any circumstances in which it would be appropriate to impose a fine for rape or for the rape of a child?

Professor Maher: No.

Paul Martin: I understood that such fines were one of the Law Commission’s recommendations.

Professor Maher: We were trying to clarify a technical anomaly, which is that there are certain offences for which there is no option of a fine. It is difficult to think of circumstances in which rape would attract a fine as a sole penalty, but we understood the law to be that if there were a very wealthy rapist, the law could put that person in prison for a very long time but could not fine him. We did not envisage that a fine would be the sole disposal for rape or rape of a child. It would be an additional penalty.

Paul Martin: You have more experience in these areas than I have, Professor Maher, but schedule 1 says that, for rape, the “Maximum penalty” should be “Life imprisonment or a fine (or both)".

Are you advising me that it is not the case that, for the rape of a young child, the penalty could be a fine?
Professor Maher: We did not envisage that the rape of a child would lead only to a fine as a form of disposal. We were more concerned about ensuring that, in addition to imposing a period of imprisonment, the court fined the accused, if it was so minded.

Paul Martin: So the paragraph that I quoted is wrong.

Professor Maher: This may be a drafting point.

Paul Martin: The phrase “Life imprisonment or a fine” is repeated throughout schedule 1. You will appreciate that, if there is a drafting error, it is repeated.

Professor Maher: It may be a technical drafting error. Our instructions were to ensure that the courts had the power to fine, in addition to the power to imprison. The bill’s draftsman drafted that in the way that members can see. There may be technical drafting reasons for that that I do not know about.

The Convener: We will have to pursue that point.

Nigel Don: What circumstances was section 3, which has to do with sexual coercion, intended to cover? I do not think that we have heard anything from anybody about that. Does the section refer to something involving a third party or is it intended to cover two people?

Professor Maher: It could apply to a range of circumstances. An example was given to us in the consultation. We were asked what offence would be committed under current law if a man forced a woman to have sexual intercourse with an animal for pornographic purposes or even just for purposes of sexual gratification. The law at present is not entirely clear on that. If a man forced a woman to masturbate herself for his pleasure, what offence would be committed? It seemed to us that there is an important gap in the law in that regard, which the bill’s sexual coercion provisions are meant to cover. An accused can get sexual pleasure, for a variety of reasons, from forcing someone else to engage in a sexual act. We thought that the law should make it absolutely clear that that is a crime.

Nigel Don: That is my point. You visualise, therefore, section 3 covering a situation in which there is a third party or, in the case of masturbation, possibly not a third party. However, section 3 is not intended to be an addition to sections 1 and 2, which essentially have to do with two parties.

Professor Maher: That depends on whether your question is about the drafting, or the intent of the provisions.

Nigel Don: It is about the intent.

Professor Maher: The intent of the provisions is to cover circumstances to which sections 1 and 2 will not apply. Sections 1 and 2 will apply only where a person is forced to have sex with the accused. However, there can be plenty of scenarios where A, the accused, forces B, the victim, to have sex with somebody else or to engage in sex that does not involve the accused.

Nigel Don: I am with you. Thank you.

The Convener: Professor Maher, thank you for giving your evidence in what was, if I may say so, a stimulating manner.

Professor Maher: Thank you.

The Convener: There will be a five-minute suspension.

12:28

Meeting suspended.

12:35

On resuming—

The Convener: I welcome the final panel of witnesses. Bill McVicar is the convener and Alan McCreadie is the secretary of the criminal law committee of the Law Society of Scotland, and Ian Duguid QC and Ronnie Renucci QC are from the Faculty of Advocates. I welcome you all and thank you for your attendance. I am sorry to have kept you waiting but, as you will appreciate, we are under considerable pressure this morning. We will move straight to questions specifically for the Faculty of Advocates.

You do not appear to agree with the extension of the crime of rape to include oral penetration. That form of sexual assault is widely recognised as rape in other jurisdictions, and the proposed extension of the crime has been welcomed by witnesses from whom we have heard previously. What is your objection to the treatment of that activity as a form of rape?

Ian Duguid QC (Faculty of Advocates): The point of the legislation is to address the underlying issue that there are very few convictions for rape
in cases that are brought before the High Court. We do not feel that the provision to which you refer will change that situation in any way. Judging from our experience, we think that juries will be reluctant to consider oral penetration as a form of rape, which is why we are against it. Anal penetration and vaginal penetration are quite understandable to the layperson as forms of intercourse that can be afforded the description of rape, but we think that oral penetration is in a different category.

Our experience so far has been that there have been perfectly proper prosecutions and convictions for indecent assault, which includes the libel of oral penetration and as forms of intercourse that are brought before the High Court. Therefore, we see no need to change the law in the way that is suggested.

The Convener: Do you adopt those arguments, Mr Renucci?

Ronnie Renucci (Faculty of Advocates): Juries are reluctant enough to convict defendants of rape; to give them another option, and to call something rape that has not previously been called rape, will mean that there will be fewer convictions, as juries might be more reluctant to convict.

The difficulty with rape—no doubt this has been said in evidence before—is that it is unique in Scottish law. A jury is usually given a circumstance that is clearly a criminal activity, such as an assault, and asked to decide whether the person in the dock is the person who committed the offence. In rape cases, juries are given a set of circumstances that would not in the normal course of events be criminal, and they are asked to decide whether the person who engaged in that activity committed a criminal act. It is difficult for juries—rape cases usually boil down to one person’s word against another, and rape is regarded, in many ways, as one of the most serious offences below murder. I think that juries will be reluctant to convict people of that offence if it is called rape.

The Convener: Thank you. The submission from the Faculty of Advocates states:

“It is not easy to envisage a situation in which the actus reus of the offence could be committed ‘recklessly’.

Is it not possible to envisage circumstances in which the accused was reckless with regard to whether or not the victim consented?

Ian Duguid: The issue of recklessness is currently a consideration in all rape cases. It arises in the assessment of the mens rea—the intention of the accused—and the law as it presently stands suggests that whether a man is reckless as to whether the party is consenting becomes an issue in a trial, so recklessness has a place in the ordinary consideration of such cases. Our concern, however, was that the extension of an offence that is substantially an offence of assault to include recklessness is a fundamental change in the law.

One of the alternative verdicts that are open to a jury in the event that the members do not hold that a rape has been committed is common-law assault, which requires that there was an evil intention to commit the offence. If a rape could be committed intentionally or recklessly but under an alternative verdict the offence could be committed only intentionally, we envisage that that would raise a huge difficulty for a court.

The situation that is arising is unfortunate, and will make it difficult for the courts to administer the law in that form.

Recklessness features throughout the proposals in the bill, in relation not only to rape but to sexual assault, sexual coercion and so on. However, we do not see any immediate need to change the law in the way that the bill intends to do.

I have been practising law for the best part of 20 years—prosecuting, defending and sitting as a part-time sheriff to decide on indecent assault and lewd and libidinous cases, although not rape—and, although I accept that, if something is broken, it should be fixed, my experience suggests that the law of rape is not broken in such a fundamental way that it requires a change in the way that is proposed. We think that, broadly speaking, the bill will make the process much more complicated for the public, juries and courts. If you are making the process more complicated for juries, you are simply not addressing the issue of why juries tend to acquit more often than they convict.

The Convener: But juries would have to identify whether the conduct of the accused in, for example, a road traffic case was reckless. The word “recklessness” is well defined in Scots law. Is there a fundamental problem in extending that word to define sexual behaviour that could be viewed, in effect, as rape?
Ian Duguid: I am not sure whether you have in mind the criteria that used to apply around the offence of reckless driving, which, of course, was changed to dangerous driving. However, recklessness was a creation of statute in that instance.

You are talking about changing the common law. In theory, you can change the common law to bring in a consideration such as recklessness, as was done in road traffic legislation before amendment. However, the question is, does that make things clearer or does it blur the images around the cases? As Mr Renucci said, many court cases amount to one person’s word against another’s. Would introducing a question of recklessness make the situation clearer for anyone?

The Convener: Mr Renucci, have you anything to add?

Ronnie Renucci: Only that my reading of section 1 led me to think that the bill itself was reckless. That caused me some concern. The bill is meant to clarify matters, but it certainly did not clarify matters for me.

The Convener: But recklessness is a well-established, common-law concept.

Ronnie Renucci: But the bill appears to suggest that there would be recklessness in the physical act. I cannot envisage a situation in which that would apply. Is it suggested that someone is going to say, “I slipped and fell and somehow penetrated the person”? That does not make sense. Section 1 does not make clear to me that the notion of recklessness applies to the intention as opposed to the physical act. It is difficult to see how someone could be so reckless in the physical act that it would cause penetration. The notion seems unnecessary.

Bill McVicar: Our view was that the recklessness that is specified related to mens rea, and we did not have a difficulty with it being placed in the section. I hear what the Faculty of Advocates has said, and I understand its concerns, but if one considers the idea of recklessness as part of mens rea, there is no particular difficulty.

The Convener: Cathie Craigie will ask questions around rape and sexual assault.

Cathie Craigie: First, I would like to continue the current line of questioning.

The Law Society’s submission says, more or less, that it is not satisfied with the bill because it is intended to consolidate existing law rather than to address or resolve any problems, perceived or otherwise, with the conviction rates. What could be done differently?

Bill McVicar: As our submission says, further research should be done into what exactly the problems are. We do not know why juries do not convict in rape cases. We can speculate and guess, but we do not know. Our view was that, until some proper research is done into that specific difficulty—if there is, indeed, a difficulty—it is difficult to know how it can be fixed. We welcome the bill in the sense that it consolidates existing law and clarifies various factors and definitions. We just wanted to make it clear to the public that the bill is not the answer to the low conviction rate in rape cases.

Cathie Craigie: Do you know what the answer is?

Bill McVicar: I think that further research needs to be done before anyone comes up with an answer. I have been defending people in the High Court and various other courts for the past 25 years and I could give you all sorts of speculative answers, but I would not know whether they were correct.

Cathie Craigie: Is there any research in any other parts of the world that we could turn to?

Bill McVicar: We understand that research has been done elsewhere, particularly in the United States of America. However, we have not embarked on a review of that research as yet. When, in due course, proposals are introduced to amend procedural law and the law of evidence, as I assume will happen, that might be the time for us to consider those comparisons directly.

The Convener: One of our previous witnesses has produced a paper on that matter that might be of interest to you. We will direct you to that later.

Cathie Craigie: Does the Faculty of Advocates have anything to say about the Law Society’s submission?

Ian Duguid: I wholly subscribe to what Mr McVicar said on behalf of the Law Society.

The low conviction rate can be addressed only by asking jurors about it, although at present that would be precluded by the Contempt of Court Act 1981. I am not sure whether some arrangement could be found to suspend the workings of that act for the purposes of conducting a survey, but that would be the way forward, rather than changing the law in the way that is proposed.

Earlier, someone asked what it was about the word “consent” that the public do not understand and why it was thought necessary to replace that word with the words “free agreement”. I note what Professor Maher said, but nobody has yet given an answer to that question.
The way forward is to conduct some proper research. The problem is not exclusive to Scotland; it affects jurisdictions across the world. People have addressed it in various ways, and the suggestion in Scotland is to do that by codifying the law in some way. However, that does not really address the issue that most people—including us—identify as the unacceptable one.

I have been a prosecutor and I have been a defence counsel, so I have seen the issue from both sides, but I can only speculate on the reasons. There is no obvious reason why the situation should be as it is. I read an article by Helen Mirren in The Sunday Times that suggested a reason for the problem, but it was as speculative as the reasons that anyone could suggest. Proper research is the way forward.

Cathie Craigie: The submission by the Faculty of Advocates suggests that there is an overlap between sections 1 and 2, because conduct that might be charged as rape could be charged as sexual assault. Do you think that such an overlap is acceptable?

Ian Duguid: As you may have seen, neither I nor Mr Renucci was a member of the committee that prepared the faculty's submission. I am the chairman of the Faculty of Advocates criminal bar association; it is not clear that the bar that I represent subscribes to all the views that are set out in the submission. However, I will try to answer your question.

Section 1 seems to create an offence of rape. It seems to be the view that section 2 may also provide for an offence of rape, under the description of sexual assault, which includes penetration. Section 2(6) suggests that "the reference in the paragraph to penetration by any means is to be construed as including a reference to penetration with A's penis."

There is a similar provision in section 2(2). Those who read and examined the provisions thought that it was open to the Crown to prosecute a person under section 1, for rape, and under section 2(2) and 2(6), for rape as we would understand it, but under the description of sexual assault. We were mystified by that piece of drafting. That is the best explanation of how the faculty approached the issue that I can offer to the committee.

Cathie Craigie: You have left me equally mystified. Given that the issue has been raised in writing, the committee will want to take it into account. If you think that further clarity is needed, I am sure that the committee will accept—

Ian Duguid: The concern was that the legislation would make the same situation eligible for prosecution in two different ways and that there was no obvious reason for choosing to prosecute a case under section 1 rather than section 2. We thought that you might try to suggest that section 2 relates to lesser offences—in other words, that you might distinguish such offences from rape, as we all understand it. We were not sure what was the intention or purpose of the provisions in section 2.

Bill McVicar: I understood from earlier evidence that it is not intended that the provisions should be seen as creating a hierarchy of offences—both rape and sexual assault can be punishable by life imprisonment. It occurred to me that section 2(6) might cover the bizarre situation in which the victim did not know what penetration was with. If the accused person were tried under section 2 rather than section 1 and gave evidence that penetration was with his penis, it would be open to the Crown to seek a conviction under section 2(6), even if it libelled something else to begin with. The situation that I describe is bizarre and unusual, but it provides a theoretical justification for the provision. Does that help?

The Convener: Yes, but there seems to be a degree of redundancy in the bill. We may need to look at that.

Cathie Craigie: It has been suggested to the committee in oral and written evidence that the bill should create a further offence of rape with an object. What are your views on that suggestion?

Ronnie Renucci: I thought that the issue was covered in section 2. I agree with Professor Maher, who explained why such a provision is unnecessary. The activity that you describe is an offence under the bill. It may not be the specific offence of rape, but it is clearly a serious offence. If we took up the suggestion that has been made, we would be adding another layer to the offence of rape. That is wholly unnecessary.

Bill McVicar: In my view, it would be redundant under the bill to create an offence of rape with an object. We should get away from the notion that the bill creates a hierarchical structure of offences—offences should be considered in the round, rather than on the basis that one offence is more serious than another. There is no need for a separate offence relating specifically to penetration with an object.

Cathie Craigie: Okay.

Nigel Don: The Faculty of Advocates raised the issue of sexual coercion, and you will have heard my previous conversation with Professor Maher. Would you like to comment further on what section 3 does or does not cover?

Ian Duguid: Yes. You addressed that in your questions to Professor Maher. I have nothing to add to what has been said thus far or to what is contained in the bill.
Nigel Don: Thank you. The faculty made the only reference to that section. I wanted to ensure that we do not miss something.

Ian Duguid: No, not from my point of view. I have nothing to add.

Angela Constance (Livingston) (SNP): Witnesses have broadly welcomed the definition of consent as “free agreement”. Is that an improvement on the current law?

Bill McVicar: Yes. I agree that it is an improvement on the current law. It is difficult to express or draft in an elegant way the concepts that are involved in consent. When taken together, sections 9 to 12 set out clearly what a jury must consider in dealing with the question of consent.

That said, I have two matters to raise on section 10. First, in section 10(2)(b), the bill addresses what used to be described as clandestine injury. Many concerns have been expressed about prior consent. Perhaps a better way of putting it is set out at paragraph 2.59 of the Scottish Law Commission report:

“where the person was unconscious or asleep and had not earlier given consent to sexual activity in these circumstances”.

That is a little clearer than the drafting of section 10(2)(b) is.

We addressed the matter in our submission in relation to threats. We suggested that consideration be given to whether a ground might be included under section 10(2)

“where a threat is made that results in consent being given where consent would otherwise not have been given”.

It might be useful to list threat as a separate category under section 10(2). Beyond that, we have no adverse comment to make. We broadly welcome anything that makes it easier to understand the concept that is at the root of this.

Angela Constance: I am not sure whether you heard Professor Ferguson’s evidence, but she suggested that use of the word “consent” is unhelpful to jurors’ understanding of and their preconceptions about the concept. What is your view?

Bill McVicar: I do not agree with the proposition. The definition that is advanced in the bill is as clear as any that I could come up with. In the evidence that I heard today, no one made an improvement on the formulation.

Angela Constance: Does Mr Duguid or Mr Renucci have a comment?

Ian Duguid: I probably answered that in response to an earlier question. I said that no one who practises the law understands what it is in the word “consent” that people do not understand. If one word were to be replaced with two, the cause would not be advanced in any substantial way.

We all understand that the seven examples under section 10(2) are the sort of circumstance that would be placed before a jury as indicative of the absence of consent. No example that is given substantially changes the law; they simply codify what those of us who practise the law understand is already the law.

That said, a couple of the examples make things much more uncertain. Under section 10(2)(a), who is to judge whether someone is “incapable, because of … alcohol”? What happens if the victim’s two friends come along and say, “She was drunk” and the accused’s two friends say, “She was not drunk”? The drafting gives no indication of how incapability will be measured.

The issue caused me to look again at the statute. Since 1847, it has been the law that, if a person is intoxicated, they are incapable of giving consent. It is not as if the change that is proposed in the bill will make things better or more certain; it will do nothing in that regard. All the examples that are set out under section 10(2) can be covered perfectly easily by the common law as it stands.

The other concern that is identified in the faculty’s submission is deception. The example that is given in the submission is a promise to marry, but I will bring it down to a more basic promise. Suppose that a man meets a woman and he says that he is 25 when he is, in fact, 35 and the two engage in sexual intercourse. The woman then contends that as he is not that age she has been deceived. Does that mean that it would be rape? I think that the answer to that question is “Yes, it does.” I am not sure what Crown Office policy to date is. In theory, that would be a common-law fraud and the Crown might choose to prosecute it in that way, but it may choose not to do so. The bill gives no discretion to anyone. It would expose to criminal sanction people who might otherwise never have been exposed to it.

13:00

The Convener: May I interrupt? Looking at section 10(2), I am having a wee bit difficulty in ascertaining precisely where you are coming from with that analogy.

Ian Duguid: Section 10(2)(e) states:

“where B agrees or submits to the conduct because B is mistaken, as a result of deception by A, as to the nature or purpose of the conduct”.

The faculty’s submission gave the example of a promise to marry or something of that nature, but I presume that any form of deception would render someone liable to prosecution.
The Convener: At that stage, we enter into a legal debate as to what is a material fact and what is not.

Ian Duguid: You are, of course, right about that, but we are talking about rendering people liable to prosecution. Mr Renucci may have something else to say about it.

Ronnie Renucci: No; I agree with those comments. In addition to the example that Mr Duguid gave, I would include the example of someone saying that they were not married when they were. In theory, at least, a female could say that she would never have had sex with the man had she known that he was married and that that is deception.

I have concerns that a bill that is meant to clarify the situation refers, at section 10(2)(a), to when B is “incapable”, but we are given no further help or assistance with the definition of that word. I can see that causing all sorts of problems in the course of a trial.

Angela Constance: Since we are on the subject of section 10(2)(e), I wonder whether anyone can help me. What sort of deception was envisaged when it was drafted?

Bill McVicar: I had the advantage, along with Mr McCreadie, of speaking to the bill team about the draft bill. We raised the same issues as the faculty, because at first blush section 10(2)(e) might cause difficulties with regard, for example, to those who pretend that they are not married. I was told that “the nature or purpose of the conduct,” was the most important feature of the section and that what the bill team had in mind was the carrying out of a spurious medical examination or something of that sort. If someone pretended that they were examining someone for medical purposes when they were, in fact, doing so for their own gratification, that would be the deception. That is the explanation that was given to me and it appeared to deal with the issue.

Ronnie Renucci: Unfortunately, people who read the bill or members of the public will not have the benefit of the draftsmen telling them exactly what was in their mind in drafting it. That is the problem with quite a lot of sections in the bill.

The Convener: I hear what you say, Mr Renucci.

Angela Constance: Section 10(2)(e) provides that there is no consent when the complainer agrees to or submits to the conduct because he or she is “mistaken, as a result of deception” by the accused. Is liability always with the accused? Is there never any scope for it to be turned round and for the issue to be with the complainer? I am not being very clear. I am asking whether the issue of deception should always be restricted to the accused.

Ian Duguid: Presumably, the accused is the person facing prosecution, so it would always be an issue of whether the accused had deceived the individual himself or been a party to deception by another. I am not sure whether the complainer’s or victim’s state of mind is important. It is important to the extent that she has gone through an act or acted as a result of a deception. The common-law offence of fraud turns on a pretence followed by a practical result. Presumably in this case, there is a pretence followed by a practical result, but we are talking not about fraud but about rape, because the practical result would be intercourse by deception, on which the victim has proceeded by mistake. I am not sure whether that answers your question, but I think that all the deception lies with the accused person, rather than the victim, in any situation.

Angela Constance: Okay. Thank you.

The Convener: To some extent, you might have anticipated Stuart McMillan’s question, but he also has another issue to explore.

Stuart McMillan: I just want to explore one other aspect. Previous witnesses have suggested that section 10(2)(c) should be reworded to take account of the historical context of relationships where violence and abuse have been present. Would that be a positive step, or is it not necessary?

Ian Duguid: I would think that that was a positive advance. I am not quite sure what sort of drafting amendment was proposed, but I take it that you are talking about the situation of battered wives or partners or persons who are subjected continually to violence over a long period.

Stuart McMillan: Yes.

Ian Duguid: Well, the answer is undoubtedly yes. It would be advantageous at least to address that matter in the bill in some shape or form. I am not sure what form of amendment has been proposed, but I would not be averse to that matter being addressed.

The Convener: Does the Law Society have a view on that?

Bill McVicar: We agree that there is room for reconsidering the way in which that section is drafted. However, I return to the suggestion in our paper that a reference to threats in general could replace what is in section 10(2)(c). That would be a broader brush with which to address the various issues of violence over time, as well as more immediate violence or threats of violence.
The Convener: Ms Constance is satisfied that the issue of deception has been examined fully.

Bill Butler: The bill provides at various points that conduct that was initially consensual ceases to be so if consent is withdrawn and that if conduct takes place or continues to take place after consent has been withdrawn, it is non-consensual. Do you agree with that general principle, or do you think that it has practical difficulties?

Ian Duguid: Yes, it has huge practical difficulties, as I am sure that everyone in the room can envisage. On the issue of consent, there are plenty of instances—certainly in my experience in the courts—when parties have started off in what, on the face of it, seems to be a consensual situation, but consent has been subsequently withdrawn, for any number of reasons. You can think of any number of instances when the potential victim or complainer in a sense changes her mind. Should that be addressed by the law? Absolutely, because there is no longer consent—or free agreement, if you are going to call it that. However, by putting it in a bill in the suggested form, you are placing entirely in the hands of the complainer or victim the point at which they withdraw their consent. There is no indication whether the state of mind of the accused is going to be addressed. How is the accused going to know that consent is withdrawn? What happens if, after the event, the person comes along and says that they decided that they were not agreeable to the conduct, which would technically render the other individual liable to prosecution for rape?

It is an area that is fraught with difficulty. I am sorry to be negative again but, to come back to the original point, if it were an issue that required to be addressed by being put down in black and white, it would have been identified as such before now. The situation occurs regularly in the courts and is addressed by them in a perfectly straightforward fashion that, I hope, juries can understand. If they do not understand something about it, then, as I said in answer to another question, that should be addressed. Are juries proceeding on a misunderstanding of the law? That would be an important consideration for deciding to change the law.

To answer Bill Butler’s question, the provision is fraught with difficulty through interpretation by the courts. As you will appreciate, if the common law is abolished, there will be no precedent to follow and the appeal court will be inundated with challenges to the interpretation of a statute. Therefore, the whole area of law will have to be revisited and matters will have to be discussed and argued at length. The provision will create a substantial difficulty in a situation in which, as far as I can see, the issue is currently addressed adequately and properly by the courts. I am sorry if that was a longer answer than you expected.

Bill Butler: No. What you said was clear. Do the witnesses from the Law Society agree with what Mr Duguid said, or do they have a different emphasis?

Bill McVicar: The difficulty is that, if we legislate to define what rape is, we must legislate on consent, on the circumstances in which it can be withdrawn and on when a criminal offence occurs in that respect. When we read sections 9 to 12 as a whole, there can be no real doubt as to what the law is intended to be. There is no great innovation in section 11, because that is what the current law is, as Mr Duguid said. I suppose the question is whether we need the legislation at all rather than whether there is anything wrong with section 11.

Bill Butler: Do you think that the intention is correct but that the provision would be fraught with difficulties in practice, as the Faculty of Advocates said?

Bill McVicar: I do not share the faculty’s view or believe that there will as many difficulties as Mr Duguid apprehends. The court, in interpreting the statute, will have access to the various cases that existed beforehand on consent and withdrawal of consent because the provision is simply a codification of the existing law, as I understand it.

Bill Butler: So the Law Society’s view is that the provision is workable.

Bill McVicar: Yes.

Bill Butler: In the panel’s view, are the provisions on reasonable belief in section 12 workable, given that the accused cannot be compelled to give evidence at his trial?

Ian Duguid: I think that you raised the issue with Professor Maher, and it is a well-made point. The accused cannot be forced to give evidence. Professor Maher talked about police interviews, but of course the accused is entitled to say nothing at a police interview and may not do so. We considered how the matter could be addressed in the way that Professor Maher suggested. There is a process of judicial examination. Could the question on belief be put to an accused person before a sheriff in judicial examination? However, outside of murder cases, a judicial examination is currently conducted in only a few cases because of pressure of business in the sheriff courts. If the issue of reasonable belief was to be addressed in the way that Professor Maher identified, there would almost certainly have to be a judicial examination in each rape case and the judge at the trial would have to be allowed to comment on any failure by the accused to respond. That is how the law stands according to, I think, the Criminal Justice (Scotland) Act 1980. A judge is entitled to
comment on an accused’s answer to, or refusal to answer, a question.

Bill Butler asked a good question about how the provisions in section 12 are to be addressed. However, aside from these observations, I am not sure that there is an answer.

Bill Butler: You said that there is a possibility of a judge commenting after judicial examination, but would that not raise the possible ECHR problem that I discussed with Professor Maher? Although it would be a judge’s comment, it would channel juries along the way of inferring something from the accused’s silence.

13:15

Ian Duguid: Professor Maher recognised that there was a problem with compliance with the ECHR, and I agree. I was trying to envisage the situation that he suggested might offer an out.

Bill Butler: But would it offer an out as far as the ECHR is concerned?

Ian Duguid: The provision that allows a judge to comment on the failure of an accused to answer a question during judicial examination is in a statute from 1980. It has not been challenged as not complying with European human rights jurisprudence.

Bill Butler: Would it be open to such a challenge?

Ian Duguid: I suspect that it might not be. Each of the member state signatories to the convention has what is called a margin of appreciation, which allows it to legislate in a way that, on the face of it, might appear to be non-compliant with the ECHR but for which there is justification. One would assume that if the 1980 act has not yet been challenged in that way, it must be compliant.

One must understand that Professor Maher suggested that an accused might answer questions from a police officer—I think that that was the first possibility that he mentioned—but, of course, the accused might never say anything. He is entitled not to say anything. He is entitled not to give evidence or answer any questions from police officers. The only way round the situation that I could think of was the process that I suggested but, as I said, account would have to be taken of the fact that every rape allegation would have to be the subject of judicial examination in the sheriff court. That just does not happen at the moment. One can only assume that that is because of pressure of business in the sheriff court. That would place a huge onus on the sheriff court, but it might be possible.

Bill Butler: Do you want to add anything, Mr Renucci?

Ronnie Renucci: I agree with Mr Duguid, although I think that use of the relevant provision would be challenged. It has not been challenged up until now because it is never used. I have not been involved in a single trial in which the judge has used the 1980 act to comment on the silence of the accused. That might be why the provision has not been challenged. I am fairly confident that the first time that that happens, there will be a challenge.

Bill Butler: I hear what you say; I am obliged to you.

What does the Law Society think?

Bill McVicar: It occurs to me that in the trial process, the jury has to consider the evidence that is led. That evidence might come from an accused person being interviewed by the police or his being judicially examined and saying that his position was that he believed that there was consent because of X, Y and Z. On the other hand, there might be no evidence of that sort at all, in which case the jury would be left with the complainer’s account of events. She would, no doubt, be cross-examined about whether she had given consent, but if the accused does not give evidence, says nothing to the police and there is no judicial examination, what evidence is there from which the jury can infer that there was reasonable belief in consent? It is a point to do with the rules of evidence. We are in danger of crossing over into what happens in the trial process instead of considering a point of principle.

It seems to me that if an accused person were unwise enough not to give evidence in those circumstances, the jury might very well just bring in a verdict of guilty anyway because there would be no basis for holding that there was reasonable belief in consent. The judge must direct the jury on the basis of the evidence that is led during the trial. He or she cannot say that in some cases people give information about consent to the police but, in this case, that has not happened. They must focus on the evidence that has been led in the case.

Bill Butler: In such an example, do you see there being a problem with regard to the ECHR?

Bill McVicar: It would depend on what the judge said. If the judge said to the jury, “You can take it from the absence of evidence that there is no reasonable belief in consent,” that would cause a problem, but if the judge simply said, “This is the evidence. You have to be satisfied that evidence exists from which you can hold that consent was given,” there would be no problem.

Bill Butler: Do you think that judges would be liable to phrase their direction to the jury in the latter rather than the former form?
Bill McVicar: I do not know—that would be a matter for the judges. We would have to wait and see what they did. We are embarking on a new definition of reasonable belief, which is subtly different from the present definition, so it is difficult to know what a court or an individual judge would make of it. I do not see how Parliament can offer any guidance to the judge in that context.

Bill Butler: Would you like to add anything to that, Mr McCreadie?

Alan McCreadie (Law Society of Scotland): I have nothing to add, other than that I think that it is a matter of evidence and for the judge’s direction to the jury.

The Convener: Paul Martin will ask questions on the abuse of the position of trust.

Paul Martin: The correspondence that we received from the Law Society highlighted a number of concerns in relation to the detail and practical application of the abuse of trust offence relating to mentally disordered persons, which is dealt with in section 35. Could you expand on that?

Bill McVicar: Since we prepared that submission, we have had an opportunity to consider the submission from Enable Scotland, which raises concerns about whether sections 35 and 36 should be reconsidered. I would defer to that organisation’s greater knowledge of the area. If its view is that those matters should be revisited, I would agree.

Paul Martin: So you agree with Enable that we should not criminalise those who abuse trust but, instead, deal with the matter through regulatory means.

Bill McVicar: I am saying that the situation is not as straightforward as that. The matter should perhaps be debated further.

Alan McCreadie: With the committee’s indulgence, I could seek further comments from the Law Society’s mental health and disability subcommittee.

The Convener: Can that submission be made in writing?

Alan McCreadie: It can.

Paul Martin: Could you confirm that you do not think that criminal action should be pursued against those who abuse trust, and that you consider Enable’s alternative course of action to be better?

Bill McVicar: We have not as yet reached a final view on that. The Law Society would want to consider what Enable has submitted before doing so.

I am not trying to avoid the question; I am simply saying that I do not have an answer to that question at this stage. However, we will formulate an answer in writing, with the assistance of those who have more experience of these matters than we personally do.

Paul Martin: I appreciate what you are saying with regard to those who have more experience than you, but there is an issue concerning the opportunities that are given to pursue legal action through criminal proceedings rather than through the regulatory processes, which is what Enable is proposing.

Bill McVicar: I appreciate that, but I do not have an answer to your question at this stage.

The Convener: The committee is actively seeking further information under that heading.

Nigel Don: I would like to pursue a subject that has been raised by members of the panel but which we have not considered at any stage, which is the question whether the statute is codifying the law or changing it to such an extent that it is not just codifying it. I appreciate that those are technical—and, perhaps, jurisprudential—issues, but I think that Mr Duguid suggested that people would be unable to refer to precedent if they had this kind of statute in front of them and that Mr McVicar is suggesting otherwise. Could you explain—in terms that are appropriate to those of us who are not lawyers—what you think the consequences of passing this kind of bill might be?

Ian Duguid: I can answer that quite quickly. We met the committee that was responsible for drafting the bill, and pointed out that, perhaps, changing the law in such a fundamental way—and, as one section would do, abolishing the common-law offences of rape and so on—would be likely to create a new jurisprudence that would have to evolve out of interpreting the provisions of the statute. We suggested that it might be a good idea to include a provision to suggest that the common-law precedent remained insofar as it was compatible with the terms of the bill, which would, presumably, allow the courts to have regard to decisions on particular matters, which could then become subjects of discussion.

I see no reason to depart from that suggestion, as it would be in everyone’s interests. However, it was not something that the bill committee picked up on, perhaps because it did not think that it was a good idea.

Nigel Don: I have the impression that there is a very fundamental question—if something can be very fundamental—about whether we are changing the law and starting again or are merely trying to nudge the law into a form of words that we think would put everything in one place. I think
that most criminal lawyers would approve of the latter. The bill is attempting to codify what has gone before, so precedents will apply so far as they are relevant.

Ian Duguid: I hope that I am not being misconstrued. In my view, the bill changes the law in an unnecessary fashion. That is not to say that it does not contain some good provisions on the abuse of positions of trust and the extension of jurisdiction to cover offences that are committed abroad. The bill undoubtedly contains some advantageous provisions that will advance the law in a perfectly proper way. However, you asked whether the bill codifies the law or changes it, and my impression is that it changes it. If it were changing the law for the better, I would be in favour of it, but I am not convinced that a case has been made that it will do so. We will lose a lot if a new body of precedent and jurisprudence is established on the back of the bill. That will be expensive because it will inevitably take up court time, legal aid budgets and goodness knows what else.

Nigel Don: If we argued about whether the bill is a good thing or a bad thing, we would be here beyond tea time.

I ask Mr McVicar to comment on the point about codification and precedent. Do you agree with Mr Duguid that it would be a good idea to remove the bit about abolishing the common law, or at least to add a bit about precedent being relevant?

Bill McVicar: I am not an academic lawyer, but I do not think that it necessarily follows that we need a provision in the bill stating that the pre-existing law still applies where appropriate. As you might have gathered from an earlier answer, I rather assumed that the existing law would still apply if the circumstances, offences and themes of the bill were the same as the common law. However, as I mentioned in my response to the question about belief, there is likely to be some debate about that because of what I described as a subtle change in the definition of belief.

Nigel Don: Am I correct to take it that the panel agrees that holding on to previous decisions and precedents, where they are appropriate, is the right thing to do?

Bill McVicar: Absolutely.

Ronnie Renucci: Yes.

Bill Butler: For the avoidance of doubt, is it not the case that, as Mr McVicar said, it is always permissible to consider legislative history? Mr Duguid, do you agree that we do not need to do what you suggested and write into the bill a statement that common-law precedent is admissible? It is always admissible, is it not?

Ian Duguid: It would depend on whether the court decided that there was a sufficient coincidence, not so much in the facts but in the legal argument. If the court was satisfied that there was a coincidental argument, the answer to your question would be yes. However, let us say that you redefine consent with the words “free agreement”. Would any issue that arose about the interpretation of consent in previous cases and what was or was not consent be applicable?

Bill Butler: Is it not always permissible and wise to look at legislative history because it informs the situation as it now is, or as it has been amended by a bill that has been enacted?

Ronnie Renucci: Yes, but acts are usually silent on the common law. Section 40 of the bill specifically makes it clear that the common law is abolished. That is the difference.

Bill Butler: So you could not refer back to the common law at all.

Ronnie Renucci: No doubt that will happen in practice in court, but I fear that, if the bill is passed with section 40 in its current form, the appeal court will become even busier than it already is with some of our more litigious colleagues.

Bill Butler: I am grateful for that answer.

The Convener: Thank you for your helpful contributions, gentlemen.

That brings the committee to the conclusion of today’s consideration of the Sexual Offences (Scotland) Bill. We will finalise our consideration next week, when we will see the Lord Advocate and the Cabinet Secretary for Justice. The contributions from the Law Society of Scotland and the Faculty of Advocates have been helpful in informing what will happen next week.

Meeting suspended.
**Sexual Offences (Scotland) Bill: Stage 1**

The Convener: Today is the final planned evidence session on the Sexual Offences (Scotland) Bill. I welcome the Lord Advocate, Elish Angiolini QC; Fiona Holligan, principal procurator fiscal depute; and Andrew McIntyre, head of victim policy in the Crown Office and Procurator Fiscal Service. We are grateful to you all for giving evidence. We will go straight to questions.

Bill Butler (Glasgow Anniesland) (Lab): Why do you believe that it is now necessary to put the law relating to rape, sexual assault and other matters that are covered by the bill on a statutory footing? What is wrong with the common law in this area of the criminal law?

The Lord Advocate (Elish Angiolini): You used the word “necessary”; what is proposed is probably not necessary, but the question is whether it is desirable and in the public interest. We could continue to prosecute with the common law as it is.

The Parliament must choose what sexual activity it wishes to criminalise. This is a very difficult area because it goes into the realms of privacy and morality. However, in setting the boundaries for criminality in the 21st century, it is appropriate for us to look to what the 21st century’s law should be. Although much of our common law is useful, it originated in Hume’s time, when the status of woman was different. The progress of the common law was such that it was not until 1989 that marriage stopped being considered to be the unequivocal and irrevocable giving of consent to sexual intercourse in whatever circumstances, irrespective of consent.

The common law has developed incrementally but in a startling way during a short time. As you are aware, there was a considerable development when the Lord Advocate’s reference of 2001 removed the need for proof of force. That was a substantial leap for the common law, which has resulted in a significant batch of cases of a new type coming before the courts that would not have been prosecuted hitherto under the common law.

The proposed legislation is not absolutely necessary; the question for the Parliament is whether it wants to have laws that represent the social environment in which we live and which are fit for purpose for the next 20 to 30 years.

I have said publicly that it is a distortion to say that Scotland has the lowest conviction rate worldwide because, under Scotland’s law, rape is a very narrowly defined crime that does not bear comparison with the definitions of this type of crime that are used elsewhere in the world—it is like comparing apples and pears; we are not talking about the same crime. Generally, and almost universally, the crime of rape has a wider definition that would embrace many of our convictions in Scotland that come under the umbrella of sexual assault. The conviction rate for sexual assault in the absence of consent in the cases that we prosecute is approximately 70 to 80 per cent. In relation to the sexual offences that we prosecute, it is a particular type of rape—in America it is called one-on-one rape, date rape or acquaintance rape—that presents a significant challenge, as the committee will be aware from its knowledge of the issue.

Bill Butler: That is very clear—thank you.

In last week’s evidence session, Mr Duguid of the Faculty of Advocates raised the faculty’s worry that,

>“if the common law is abolished, there will be no precedent to follow and the appeal court will be inundated with challenges to the interpretation of a statute.”—[Official Report, Justice Committee, 18 November 2008; c 1386.]

Is the faculty right to have that concern, or will the courts be able to adapt and develop the new legislation to address matters that were not foreseen in it and to make use of existing common-law precedent in relation to matters that are covered in the legislation?

The Lord Advocate: I appreciate that section 41 suggests that the common law will be abolished at the time of commencement, in so far as the provisions relate to offences that take place post-commencement. I am not convinced that that is absolutely necessary. It is for the committee to consider whether to remove law, or simply to allow it to fall into desuetude as we begin to use the statutory offences. There are many instances in which codification or statutory alternatives have been developed by Westminster and the Scottish Parliament but in which we have retained the common law. For instance, the crime of vandalism is a statutory offence that goes back to the Criminal Justice (Scotland) Act 1980 but which has a common-law equivalent of malicious mischief. Although prosecutors use vandalism, malicious mischief is available at common law should they wish to use that. The extent to which we want to have that facility is a matter of choice.

The jurisprudence on the common law will not fall into desuetude for a long time, because we will be prosecuting the old law—if we can call it such—for many years to come. Historical sexual abuse is a large part of the menu of cases that we are prosecuting, with some crimes dating back 30 or 40 years. We will use the common law for such offences that predate the commencement of the new legislation. Therefore, the jurisprudence, case law and precedent that have been established will continue to develop through the cases that we will
prosecute under the current common law. There will be no bar to the courts applying the old jurisprudence to the new law in so far as it is relevant and coincides with that jurisprudence. If a distinction arises because of the use of words or if a different interpretation should be placed on the new provisions, the court will do that.

The bill will undoubtedly be a significant and dramatic change in the law, and with that comes an element of risk, because the provisions will have to be interpreted. I suspect that, if we were plagued by fear of the unknown, we would do very little in life. Every aspect of changing the law involves a degree of risk that something may or may not be left out. That is why I am delighted that the committee has had a comprehensive consultation with many interest groups. The Cabinet Secretary for Justice will take into account the comments and ensure that the bill, which in essence was created by the Scottish Law Commission, and which the Government supports, is as workable, practicable and foolproof as possible. However, it would be a brave Lord Advocate indeed who suggested that the development of a statutory law could not miss out a particular aspect of sexual criminality. As members know, sexual predators have an infinite capacity to be innovative in finding ways of committing crimes that even we as prosecutors could not have envisaged 20 to 30 years ago, such as the use of the internet and of fake images and distorted pictures of children.

We hope that the law that is created will be as flexible as possible. The beauty of the common law is its flexibility. There may be wisdom in retaining some of that, at least in the initial stages after the commencement of the new legislation.

Bill Butler: That was clear. Basically, you are not saying that there is no risk that, by placing the law on a statutory basis, we will lose the flexibility that is inherent in the common law; you are saying that there is little risk.

The Lord Advocate: The common law has been set out and we have a significant body of jurisprudence on it. In some respects, we have a fairly restrictive jurisprudence on rape. If the Parliament passes the bill, it will give a much wider definition of rape—in a sense, it will become a different crime. That has risks attached to it because of the other factors and variables. Many of the people who are selected for jury duty when the indictment is one of rape have a narrow notion of what rape amounts to—they have the classic notion of a woman being dragged off the street. However, at least 90 per cent of cases are not like that, as they involve acquaintance. Rape may occur in the context of a marriage, a partnership or an otherwise consensual sexual relationship. If we are widening the crime of rape, we have to hope that there will also be an education campaign to enable the public to understand that rape is no longer the narrow crime that it was prior to the commencement of the provisions.

10:30

Bill Butler: The term “sexual” appears throughout the bill and at various points the bill provides that conduct is sexual

“If a reasonable person would, in all the circumstances of the case, consider the activity to be sexual.”

Does that provide sufficient guidance for juries and judges on the meaning of the term?

The Lord Advocate: The alternative would be to have a subjective approach to what is sexual. What might be sexual in one person’s mind might be utterly innocuous in another’s. It is a question of how we draw the boundaries. A reasonable, objective test is a sensible way forward.

In these cases, we rely on 15 members of the jury coming to a consensus on what they consider to be sexual. A definition that was too extreme would not work. We know that certain people may obtain sexual gratification from looking at pairs of shoes in a shop window. Unless there is some overt mechanism that demonstrates their arousal as a result of that, it is difficult to prosecute that. The question is whether we would want to prosecute, in the absence of a manifestation of sexual arousal. There are other somewhat bizarre activities that might cause sexual arousal, which means that something could be sexual for one individual and innocuous for another. We must have a reasoned, objective approach to what is sexual. I am sure that we can rely on the common sense of the courts to interpret the term.

Bill Butler: That is very clear. Thank you.

The Convener: We turn to part 1 of the bill.

Nigel Don (North East Scotland) (SNP): Good morning. In your experience, what are the main obstacles to conviction in rape and sexual offences cases?

The Lord Advocate: Using the current law?

Nigel Don: Yes.

The Lord Advocate: They vary, but there are universal obstacles throughout the world. Part of our problem in Scotland has been that some of the debate has been inward looking. In particular, the media sometimes imply that Scotland is a social backwater in relation to the crime of rape.

As I have said, the conviction rate for sexual offences in general is as good here as it is in any other jurisdiction; it is the restrictive aspect of our definition of rape that creates the difficulty. So far
as that is concerned, the problems arise from a number of complex variables.

First, we operate with a very narrow definition of rape; it is a very specific act of male rape against a woman. I do not need to rehearse that point for the committee, so I shall save you time. Secondly, corroboration is required. That is another feature that is unique to this jurisdiction. At least a third of the cases that are reported by the police cannot get off the starting blocks because of the absence of corroboration from a second source of evidence. In some of those cases, we have credible and reliable witnesses, but we cannot take the matter any further. Corroboration is an important part of our justice system and it is a protection against miscarriages of justice. It is for others, not for the prosecutor, to determine what should take place with regard to corroboration, but it is not a factor with which prosecutors elsewhere have to struggle. Some prosecutors elsewhere may look for corroboration if it is available but, in cases that are prosecuted in Carlisle and elsewhere south of the border, the absence of corroboration does not have to cause the prosecutor anxiety when they are considering whether they have enough evidence.

The other variables relate to the subject matter. The crime is, uniquely, made criminal by the absence of consent. In all other circumstances, we are talking about conduct that is enjoyable, consensual and part of normal life for most people. Unlike any other area of criminality, it becomes criminal only because of one ingredient: the absence of consent. It can be extremely challenging to gain proof of that, particularly in the types of case that I have mentioned, when there may be an on-going sexual relationship; there may be a considerable degree of affection between the partners, which would ordinarily be displayed; and there may have been considerable consumption of alcohol or drugs on the part of both the accused and the victim.

The accused in those cases are often very pleasant-looking young boys for whom the jury may build up a degree of empathy. They do not turn up in dirty raincoats with a belt and with balaclavas hidden in their pockets and so on; they are not strange-looking people. The image of a rapist that people have in their minds is of a creature with no remorse. Instead, they see someone who is very well presented and looks like everybody’s very nice next-door neighbours’ boy.

There are issues that are unique and which present a challenge but, ultimately, such cases often come down to the word of one person against the word of another. That is difficult when there is ambiguity about the circumstances.

Among the other variables is a significant one that has been identified by Amnesty International, Rape Crisis Scotland and Scottish Women’s Aid: the attitude of all of us. It is about our social approach to the deserving victim and the notion that the victim who deserves to be protected by the law is one who has not contributed in any way by dressing provocatively or by their sexual activity. However, as the committee knows, the law does not restrict its protection to that type of individual. The law is available for the most vulnerable and weak among us, who are likely to be the persons who are preyed on by sexual predators. The law protects those who are, inconveniently, not a Doris Day-type of figure, who comes in utterly sober to give evidence in twinset and pearls, but a young girl who may have been dressed in a suede bikini-type outfit and who may have had five or more Bacardi Breezers and two Aftershocks. The typical member of the public passing by that girl will go, “Well, you know what’s going to happen to her tonight.” To an extent, that clichéd view represents in-built prejudices, which can be held by females as well as men; they are not confined to one gender. Some women would say “Well, I simply wouldn’t get into that situation,” and judge the victim according to their own standards, rather than looking objectively at the fact that these are the very people who are much more vulnerable and more likely to be sexually assaulted than those who are assertive and in control of their life.

Nigel Don: Thank you for that comprehensive answer. To what extent will the bill improve conviction rates?

The Lord Advocate: There is no panacea for the low conviction rates for these types of crime. It must be made clear that there is no magic bullet. I hope that a package of changes and reforms and consideration will adjust the situation. It is not about improving the conviction rate; it is about ensuring that sound cases are put before juries, that juries are placed in a position where they are able to test the evidence that is available and that the process has been expeditious and supportive for the victim as well as fair to the accused. That balance must be achieved because this is a very difficult area of criminality. It is not about looking at a barometer and saying that we want to achieve a certain quota of convictions next year. That would amount to a drive towards miscarriages of justice.

We do not coach witnesses in Scotland, although that is done in some jurisdictions, where witnesses are trained in how to give their evidence. We allow witnesses to give their evidence without any form of training in that respect because that would be considered unethical in this country and, indeed, under our current law, it might amount to an attempt to pervert the course of justice. Certain steps that could be taken are outwith our powers and not something that we would do.
I hope that, by modernising the law as it relates to the crime of rape, the bill will give us greater understanding. Equally—it is important that this message is conveyed across the Parliament—I hope that, by removing the hierarchy between sections 1 and 2, we will ensure that we do not have references just to conviction for rape. I hope that people will embrace the two sections. There is little distinction in terms of seriousness between some of the crimes in section 2 and those in section 1. Therefore, that change will assist with providing greater clarity. The change from the criterion of subjective honest belief to the bill’s criterion of reasonable belief will be of some assistance to that, too, as will the statutory exclusions of certain circumstances that might currently be inferred as a basis for consent—for instance, intoxication and incapacity.

There are ingredients in the bill that will assist with the clarity of the law but not assist universally in curing the low conviction rate. The other variables are also important. The law of evidence in particular is crucial in relation to the conviction rate in Scotland. That law must be examined and a decision must be made as to whether it remains as it is or whether consideration should be given to variation—for example, in relation to the Moorov doctrine and its operation. Equally, our attitudes are important. There must be education about autonomy and the right of individuals not to have sexual intrusion without their consent, and a consistency of belief across the community about that because, undoubtedly, significant numbers of people simply do not believe that such victims deserve the protection of the law.

Nigel Don: On that point, would it be appropriate to do what I think was suggested by a witness at last week’s committee meeting, which is to undertake research into why jurors come to the conclusions that they do in rape cases?

The Lord Advocate: Research on jurors’ decisions is currently prohibited by law. That is partly in order to protect jurors from intrusive, invasive questions that may render them more vulnerable and perhaps less willing to do jury service. Again, that is an issue for the Parliament to consider because we would need an amendment to the law to allow such research.

Jurors are generally not very different from the public. Well, they are not different—they come from among the public; in essence, they are 15 people taken off the pavement and put into a courtroom. From surveys carried out by Amnesty International, Rape Crisis Scotland and Scottish Women’s Aid, it is clear that there is a preponderance of one view. The view permeates society, and you do not need to do a great deal of research to find that out. When people come to try a rape case, they still start off with a rebuttable presumption that some woman has been dragged down an alley and forcibly engaged in intercourse, rather than a presumption that it will be the type of situation that I described earlier. There is a significant psychological obstacle to overcome when a jury suddenly realises that the two people were boyfriend and girlfriend, had been partners for 20 years, and were in their bed when the rape occurred, after having engaged in some form of consensual sexual conduct. That is a significant challenge for us all. The Parliament, the media, education services and prosecutors can all help to change attitudes, if society wants to provide protection.

Before we can begin to change, there has to be an honest dialogue about what it is that we seek to protect. Of course, research of any description would help, but that would be for the Parliament to determine.

Nigel Don: Witnesses to the committee have been exercised about the use of the word “rape”, and have endorsed your view that the current use of the word is far too restrictive. What are the distinctive characteristics of rape?

The Lord Advocate: They are about to change. Are you asking about the current law, or—

Nigel Don: What should the definition be? We acknowledge that the current definition is restrictive—and any new definition ought to include it—but what criminal offences should the word “rape” cover?

The Lord Advocate: Section 1 of the bill relates to penetrative abuse with a penis—and it relates to abuse committed by both men and women. I think that there has been a suggestion in the committee that such abuse could be committed only by a man, but it could be committed by a woman with an artificial penis or by a woman who has a surgical prosthetic. Equally, it can be committed by a woman art and part, or in concert, with a man. There is no intention to abbreviate or adjust the common law or the statutory provisions on art and part as they appear in the Criminal Procedure (Scotland) Act 1995. Such provisions will still apply.

The characteristic that section 1 embraces at the moment is penetrative abuse that is penile in nature and relates to any orifice of the body. We have to give this issue balanced consideration, and my perspective is based on my experience as a prosecutor. As I have said before, penetration with an object can be one of the most horrific forms of sexual violation. It is just as serious as penile penetration. There have been cases, in Scotland and abroad, where knives, guns, batons and other objects have been used to cause huge sexual humiliation and desperate physical damage, with horrendous consequences for the
victim. It will be for the Government, and the Parliament collectively, to consider whether such abuse should be embraced in section 1. It is currently dealt with in section 2. However, I want to make an important proviso: there should not be any discrimination or hierarchy between section 1 and section 2.

You could replace the word “rape”; you could call the offence “penetrative sexual assault” if you wished. The crime is very old. It was a most serious plea of the Crown; it was a capital crime along with murder, restrictively. For a woman in the 17th and 18th centuries, the consequences of being raped were cataclysmic in terms of her reputation and social value. The emphasis on penile penetration at that time was clearly part of the social environment.

The consequences for a victim of penile penetration can be extremely serious because of HIV and hepatitis as well as pregnancy. An aggravation can come from that. However, other forms of penetration can also cause massive psychological destruction and physical injury. I would say that that also characterises the crime of rape.

**Nigel Don:** Can I therefore take it that you would support the idea that there might be a further statutory crime of rape with an object, or possibly another body part?

**The Lord Advocate:** The penis of an animal is another object that can be used. We have had to deal with such a case.

10:45

**Nigel Don:** So you would be supportive of such a further statutory crime.

**The Lord Advocate:** It is a matter for the Parliament. Sections 1 and 2 do include such crimes—there is no question about that. It is a matter for the Parliament to determine whether it wishes to identify such a crime as something separate and distinct from what is covered by sections 1 and 2, or whether it is content that the fact that the two crimes rank equally means that it would be of no particular consequence to cover such offences in either of those two sections.

**Nigel Don:** Quite a number of witnesses were exercised by the fact that section 2 does not include the word “rape” under circumstances where they felt that it would be appropriate. Many people have told us that they would like there to be some mention of rape with an object, in addition to the provisions in section 2 as they stand.

**The Lord Advocate:** It is important to listen to such requests, and I hope that the committee will give consideration to such matters.

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**Cathie Craigie (Cumbernauld and Kilsyth) (Lab):** I have a point about the overlap between section 1 and section 2—section 2(6) in particular. Some people who have given us evidence believe that an overlap is created between sexual assault and rape. Are there any cases where it might be appropriate for the Crown to charge penetration with the penis as a sexual assault, rather than as rape?

**The Lord Advocate:** Not if it could be proved. The difficulty would be in cases where it might not be possible to corroborate the fact that it was a penis that made the penetration. Victims might be blindfolded in some cases, and they might have no idea with what they have been penetrated. That is why I mentioned the somewhat grotesque descriptions of what is possible.

The victim has the opportunity to give her evidence, in the context of section 2(6). She will be able to articulate that it might have been a penis but that she is not absolutely sure, or evidence could emerge in the context. Our policy would be that if there is a crime that supports the offence of rape, we will prosecute it as rape.

**The Convener:** I turn now to the coercive aspect that is dealt with under sections 3 to 5. With your experience as a prosecutor, can you describe some of the situations that those sections are intended to cover?

**The Lord Advocate:** There is an infinite selection of scenarios. My colleagues might be able to provide more examples than I can. The classic situation would be where an individual is detained and obliged to watch other people engaging in sexual activity in front of them, or they are forced to watch hardcore pornography, with the clear inference that it is being done for the sexual gratification of the individual or for the purposes of humiliating or distressing the individual.

In relation to that aspect of sexual coercion, I note that it is unusual to have the purpose or motive defined in a section. That could present a further challenge to prosecutors to corroborate the matter. The mens rea, or the mental element of a crime, is usually intention or recklessness in such situations. The actual motivation, or the reason why something has been done, is not something that we ordinarily have to prove. The only exception would be assault with intent to ravish or assault with intent to rape, when we consider the objective of the individual—their purpose in dragging someone to the ground, for instance. If someone intervened, the individual might never have got to rape the other person. In such cases, we might try to show what the individual’s motivation was.
It is fine that the purpose is there, as it expresses the nature of the offence, and anchors it, but I am not sure that it is absolutely necessary to have it—I wonder whether it is implied in the nature of sexual coercion and whether it is therefore not necessary specifically to address the purpose that the accused had in committing the offence. Some of the worst sexual offenders are utterly inanimate, according to how the victim describes their conduct during the res gestae—the event itself. The victim might be suffering terribly but not expressing a great deal, with no florid crying or distress being expressed, although she will be in a state of fear and anxiety. The accused might not be expressing anything; he might not be telling his victim what he is thinking or doing.

We have to provide evidence from the circumstances that will infer what the purpose of the accused was in doing what he did to the other individual. To be able to prove that it was sexual coercion is one thing, from the actus reus, or physical acts, that have taken place. Inferring that he intended to do it is fairly straightforward, but showing what his purpose was can be a bit more of a challenge. We might want to consider that particular qualification before stage 2.

The Convener: We always have to look for the unintended consequences of certain situations. For example, what would happen with a situation in which a couple have consensual sex in the bedroom where their infant child is? The child might be aware that some activity is going on and clearly has not consented to sex taking place. Technically, that would stand as an offence under the bill.

The Lord Advocate: Let us consider people’s economic circumstances. Many people in Glasgow lived in single ends, and if they were ever going to have a family, they had no choice but to have sex in the presence of their children because they all slept in the same bedroom. To an extent, one has to consider the prosecutor’s common sense. When conduct takes place in a flagrant, reckless way—with wilful blindness—and people who are out of their minds with drink strop about naked having intercourse in an obvious way in front of children who are conscious and running about, even if the act was perfectly reasonable, it would not be reasonable to infer that the conduct met that test.

The Convener: Do both the conditions that are outlined in paragraphs (a) and (b) of section 4(2) have to apply, or does one in isolation suffice?

Andrew McIntyre: As I read it, only one condition has to apply. My reading of section 4(1) is that we would have to prove that one of those conditions, rather than both, applied.

The Convener: We will have to look at the matter again.

The Lord Advocate: To further clarify the matter, we could simply insert an “or” between paragraphs (a) and (b) of section 4(2).

The Convener: It will not be beyond the wit of the Scottish Government to come up with a drafting amendment at stage 2. Thank you for that, Mr McIntyre.

We will now consider consent and reasonable belief with Robert Brown.

Robert Brown (Glasgow) (LD): Section 9 defines consent as “free agreement”. Does that definition advance the law? Does it offer a scintilla of extra meaning? If that is what consent means, why is the phrase “free agreement” not used
That is one argument. I agree that there is
with all new law, one might make things simpler.
throughout the bill? Using two words rather than
one might make things simpler.

**The Lord Advocate:** The term “free agreement”
is readily understood in that context because of its
breathtaking simplicity and beauty. The term
“consent” is in use, but we know from the
authorities and case law that, in developing
jurisprudence, people have struggled with the
extent to which consent can be inferred.

I do not see any difficulty with the term “consent”
as an overarching legal test that includes the
specific definition of free agreement. Someone
who is suffering from Alzheimer’s can consent to
go on holiday to Jamaica in June with another
person, and whether that is free agreement
depends on the state of their mental capacity and
whether they understand the proposition and its
consequences. That is the nature of the definition.
I do not think that it is tautologous. It will be a
useful tool for us in helping juries to understand
what consent means, especially in the context of
rapes that take place in a domestic violence
environment or when someone has been
abducted and detained. Although those
circumstances are referred to in section 10—they
are specifically listed in section 10(2)—it is still
helpful to be able to explain the term to a jury.

**Andrew McIntyre:** I agree that there is
something attractive about replacing “consent”
with the term “free agreement” throughout the bill.
I have said in the past that that would be better as
it would remove one of the layers of definition. The
only thing that makes me pause is the extent to
which the common law will continue to apply,
which we discussed earlier. There is a great deal
of common-law interpretation of consent. I do not
know authoritatively, but I wonder whether
retaining the term “consent” in the bill will allow us
to introduce more easily its interpretation in the
circumstances of a case, which has assisted us in
the past. That is one thing to bear in mind. If we
decide that the term “consent” should no longer
apply, we might be putting a pen through all the
authorities that have considered what consent is—
and what it is not.

**Robert Brown:** If I understand correctly, there
are two issues. First, there is a language aspect,
in that the words “free agreement” are more easily
understood by the public—they are a clearer,
more common expression in the English language.
Secondly, as the Lord Advocate indicated, it goes
a bit further, in that there are nuances of meaning
in the expression. However, I challenge your last
point. If we redefine consent, will we not, almost
by definition, be throwing out previous definitions
of consent?

**Andrew McIntyre:** That is one argument. However, the other argument would be that in
redefining consent, we would be widening the
definition, rather than restricting it. We would be
adding a dimension to it—it has to be free
agreement, not just agreement. There would still
be a kernel of consent, which would be the same
as it always was—simply, the agreement part of it.
How we view it will change, depending on the
circumstances of the case and the authorities that
we rely on in future.

**Robert Brown:** The circumstances in which
conduct takes place without free agreement have
given the committee a bit of trouble in a variety of
ways. Section 10 and all the different situations
that it lists sound terribly complicated. In general,
will section 10 make it easier for you, as
prosecutors, to convince a jury that what took
place was done without consent—without free
agreement—or do you anticipate any practical
problems?

**The Lord Advocate:** With all new law,
particularly a radical change such as the bill, we
anticipate challenges in court. Challenges are
inevitable, and they are why, if one were risk-
averse, one would never change the law: one
would just take the safe course of action and stick
with what one has. The nature of litigation is that if
something is new, it may be worth testing in court.
It is not a bad thing if, early on, we have
interpretation from the courts of a statutory
definition. As we all know, what legislators want
and what they achieve can be quite different. The
courts must interpret the law that they get, and not
what the parliamentarians hoped they would get.

My understanding from the Scottish Law
Commission was that the situations that are listed
in section 10 are commonly used as examples of
circumstances that do not amount to consent.
Section 10 simply bolsters that down—it codifies it
and puts it into statute. However, the list in section
10 is not exhaustive. There is an infinite variety of
circumstances that may elide free agreement, but
section 10 gives examples of those that have been
accepted by the courts previously. The situation is
more complex because free agreement is not part
of the existing definition, but it is part of the
jurisprudence that supports that definition.

Rape might be defined in common law by a
simple phrase but, behind that phrase, hundreds
of cases explain and interpret each word in the
phrase and the jurisprudence that supports it. If
the notion is that the situation is simple, I am sorry,
because it is far from simple for prosecutors. Even
the recent jurisprudence that developed on
consent in the cases of Cinci and McKearney
meant that we had to rework to an extent the
definition as we had understood it.

It is not the case that the common law provides
certainty; the common law also develops and
changes. I suspect that the provisions will require
Robert Brown: Should other circumstances be added to the list in section 10?

The Lord Advocate: Circumstances could be added—that is the nature of the issue.

Robert Brown: I appreciate that a general provision applies.

The Lord Advocate: Yes.

The bill says that consent is not present when a person “submits to the conduct because of violence used against B or any other person, or because of threats of violence”.

The extent to which that provision applies will be important. I hope that it could be used in the context of domestic abuse, when the threat of violence does not immediately precede the rape—when the perpetrator does not say, “Take off your clothes—I’ll thump you if you don’t have sex with me.” The provision could apply to something that had taken place the night before, when the woman had been battered. It could apply when the woman knew, and the facts and circumstances—the evidence of their lifestyle—supported the conclusion, that if she refused to have intercourse, she would be assaulted.

A woman in such circumstances lives under a permanent threat of violence. We will have to prove that—it will not simply be asserted. We will have to establish the circumstances of the relationship to show the absence of free agreement. The court will interpret the extent to which the provision applies to the circumstances that prevailed at the time of the crime.

Robert Brown: Are you happy with the phraseology? As you know, some witnesses have expressed reservations about the extent to which situations of historic abuse will be covered. Would the words “threats of violence made then or at some previous occasion”, or another elaboration, do the trick? As a prosecutor, are you happy that the phraseology is adequate to cover such situations?

The Lord Advocate: The committee must look carefully at the drafting. Further consideration would be helpful. A causal nexus would have to exist between the previous incident and the event. Something might have happened 30 years ago, but everything might have been a honeymoon since then, so the problem might not have recurred. We would have to show in evidence how the previous incident affected consent on the relevant occasion, which would be extremely difficult to do. The wider the gap between the incident and the threats or violence, the more difficult it will be for the court to infer an absence of free agreement and the awareness of the accused. Part of the mens rea is that the accused was aware that the woman did not agree in the circumstances.

Robert Brown: The concept of prior consent in section 10(2)(b) has caused some difficulty. First, it sounds a bit odd—it suggests somebody signing a form to agree to sex later, after they have fallen asleep. Some people have suggested removing the phrase “prior to becoming asleep or unconscious” or removing the whole of paragraph (b) and leaving the question to be subsumed in the issue of consent. Do you have a view on that and on the difficulties of prior consent that some witnesses have described?

The Lord Advocate: The issue is difficult. At the moment, if a woman is sleeping or is unconscious from alcohol and someone has intercourse with her, the Crown proves its case on the basis of the circumstances and the absence of consent. However, we would still have to take into account any evidence that, 10 minutes before, she had said, “I’m very happy to have sex with you under any condition whatever. Just have your wicked way with me”, giving the man carte-blanche.

That is an extreme example, but an issue is the right of individuals under article 8 of the European convention on human rights to enjoy a private, sexual and family life as they wish to without undue interference from the state. A danger lies in criminalising conduct that is currently lawful—if people who are in a long-term or even a short-term relationship agree explicitly or impliedly to such activity, it is not criminal.

The important thing is to protect people who find themselves in that situation, and it strikes me that the provision on reasonable belief for the defence assists in that respect. Is it absolutely necessary to have prior consent if reasonable belief exists? The consideration whether something was reasonable in the circumstances must be one of the ingredients. Indeed, I wonder whether the concept of prior consent needs to be defined or further refined to ensure that it does not cover a situation in which, for example, someone who makes a casual suggestion in a state of sobriety wishes, five hours later, to exercise some autonomy or even, in sobering up, takes a very different view of what happened when they were sleeping. A person should not be tied to a decision that they might have made earlier. If an accused was clearly aware that someone was unconscious or sleeping, they cannot cite as a bar to prosecution some distant recollection of consent given hours or days before in very different circumstances.
Andrew McIntyre: Making prior consent an explicit part of the defence would shift the burden of establishing such consent on to the accused and would have the same practical effect as the approach that exists in the current operation of prosecutions.

Robert Brown: I appreciate that a lot of this comes down to practical circumstances. What about circumstances involving, say, a husband and wife or long-term partners who routinely sleep together? A lot of alcohol might have been consumed and if one party fell asleep the other might touch them in a sexual way—as, indeed, they have done before with consent. If these matters are not tightly defined, there might be a lot of potential for all sorts of criminal difficulties to arise from intrusion into personal circumstances. If, as you have indicated, these are criminal offences of a capital nature—

The Lord Advocate: They are not of a capital nature.

Robert Brown: Well, they are serious offences that are prosecuted in the High Court. Does the bill do the trick in excluding more ambiguous situations—if I can describe them that way—from criminal liability?

The Lord Advocate: That is the aim that the bill seeks to achieve, and I believe that it achieves it. However, it might be beneficial and worth while to consider before stage 2 whether the notion of prior consent should be refined to ensure that it does not have some meaning that the legislation did not intend to convey. It would certainly not be the intention of the prosecution to prosecute, for example, a husband who might wake up his wife by kissing her on the stomach or by any other action that might be expected in a perfectly happy, consensual sexual relationship. The provision is intended to protect women and their autonomy from people who might take advantage of them when they are at their most vulnerable, such as when they are in a state of utter intoxication, are unconscious or are asleep. Many serious rapes of that nature have taken place and have been prosecuted.

Robert Brown: On a slightly different point, the Faculty of Advocates, in particular, has suggested that, under section 10, a man who induces a woman to have sexual intercourse by deceiving her about his age is committing rape. I have to say that I did not read the section in that way, but is that a possible interpretation of the provision?

The Lord Advocate: The intention behind section 10 is to address deception in relation to purpose. For example, doctors have been prosecuted for rape or sexual assault when the nature or purpose of a medical examination or other activity that they were undertaking turned out to be very different in quality. At a de minimis level, it would all depend on how important the factor of age was in the circumstances. The same might apply if, for example, a person pretended to be a man or unmarried to have sex with a woman, although technically some of those cases might be prosecuted as fraud rather than as rape. The prosecution would have to consider the material nature and purpose of the deception and whether, as a result, the victim did not give true free agreement to the activity.

Robert Brown: So in broad terms it is unlikely that section 10(2)(e) would cover the circumstances that the Faculty of Advocates highlighted.

Andrew McIntyre: The point is that the provision would cover all such situations. However, as the Lord Advocate says, it would become a matter of materiality and discretion as to whether the factor was sufficiently important to merit prosecution. Prosecutions on such grounds are the very cases on which we need the courts to make decisions and establish a line of authority. The aspect that you mention could conceivably be covered.

The Lord Advocate: As long as I am Lord Advocate, the prosecution of a person on the basis that they deceived someone about their age will not materialise. We prosecute serious sexual offences, rather than indicting someone for what may be a trivial deception or something that is not of particular significance. My own gender is often guilty of not telling the whole truth about age in social encounters.

Robert Brown: I have a question on the objective nature of the consent that is implied in section 12, and how it applies to the position that is set out in section 10. Is there any danger that we are creating an offence of strict liability in relation to any of the situations that are listed in section 10? We are talking about an allegation of a serious crime against a person.

The Lord Advocate: No, because there must be mens rea—intention or recklessness. Mens rea is part of the process—the offence involves not only the actus reus of a person having sex with a woman who is unconscious or asleep, but that person’s knowledge that the woman is unconscious or asleep and their intention to have sex with them in circumstances in which they have no reasonable belief that the woman consents. That is not strict liability.

Robert Brown: In section 10(2)(a)—the alcohol provision—the issue is that consent is defined as being absent. However, the only indication of expression of consent is that the conduct occurred when the person was drunk. Does that not come very near to creating an offence of strict liability?
The Lord Advocate: No, because it must be shown that the individual intended to have sex with the woman and that they were aware, or had a reasonable belief, that the woman was incapable. It will be for the courts to determine incapacity in those circumstances. We know that there are degrees of sobriety and that people manifest insobriety in a variety of ways—some very floridly, by falling across the pavement, and others by sitting quietly in a semi-fugue state in the corner. Much will depend on the facts and the circumstances, and I think that the court will apply the law fairly in circumstances in which it was patent to all who were present that the individual was intoxicated and not in a state to make a free agreement.

In one case, a girl had consumed a huge amount of alcohol in the presence of the accused while they were at a party, so he had that knowledge. She had to be carried out of the room and placed in bed, where she subsequently vomited on to the bed sheets. She was in a state of semiconsciousness; the accused went into the room and she was raped. We are talking about that type of circumstance—not someone who was a bit tipsy on two martinis. We are talking about circumstances that are clear and in which the case can be safely prosecuted on the basis of objective facts.

Robert Brown: So in short, the phrase “incapable” is a substantial challenge to the prosecution?

The Lord Advocate: Yes—the court will interpret that subsequently.

Johann Lamont (Glasgow Pollok) (Lab): I appreciate the opportunity to ask a question—I will be brief, so as not to take away time from committee members who have a significant number of questions.

With regard to the list of circumstances in section 10, has the inclusion of prostituted, trafficked or bonded women been considered, on the basis that they do not have free control? I know that the Equal Opportunities Committee has heard evidence on that. There is a concern that although the list is not exhaustive, there is an implied hierarchy. Will you examine that further? I would welcome your comments.

Secondly, given that we accept that emotional abuse and controlling behaviour are part of the spectrum of violence against women, does unlawful detention include situations in which a woman has been so controlled by her partner over a period of time that she has no control over her own life and therefore submits to his wishes, as she does not know how to get out of those circumstances?

The third issue that I want to raise is that of reasonable belief. As we are all aware, in 2002, changes were made to the way in which sexual history evidence is treated under the law. How has that worked out in practice in the courts? Does not the danger remain that the person complained against could use the reasonable belief provision in the bill to say, “I am aware of the victim’s sexual history. She has been like this in the past. Other people have told me that—she has told me that herself.” What protection does the victim have in court?

Finally, when asking whether the circumstances of prostitutes or trafficked women should be included in the list, I should also have asked you to consider the circumstances of women who are groomed and become victims of sexual assault and abuse.

11:15

The Convener: Before the Lord Advocate answers, I confirm that we have received correspondence from the Equal Opportunities Committee that, to an extent, deals with the circumstances that Johann Lamont has raised.

The Lord Advocate: Obviously, the Cabinet Secretary for Justice is also considering those matters in relation to stage 2.

The list is intended to be neither exhaustive nor a hierarchy, as I have said. People are extremely innovative and circumstances that we may not be able to conceive of at the moment may arise. The intention is not to say, “This is it.” I hope that the Parliament will make that clear when the bill is passed.

Whether someone who is trafficked can be said to be “unlawfully detained” will depend on the available evidence. For example, someone may come to this country under false pretences—they think that they have come to work but are then detained and in a trafficked situation. Any case would depend on mens rea or on knowledge of that individual’s circumstances. If it was patent that they had been detained in a room against their will in circumstances that meant that there was no reasonable belief other than that they had been unlawfully detained, we would be able to prosecute on that basis.

Whether those who have been trafficked can be added to the list will depend on construing detention in circumstances where that might not be obvious. Those who are trafficked are not always detained at the same premises; they may have some freedom—for example, to visit friends. The ability of the Crown to prove knowledge on the part of an individual who had sex for financial exchange with such a person—or with a prostitute—will therefore depend on the facts and
circumstances. Certainly, we would not rule out such prosecutions because, in some circumstances, they would come under the general detention provision.

I turn to the second issue of those who have suffered over time severe emotional and controlling abuse that has affected their self-esteem, their will to live and so forth. Again, whether such abuse amounts to unlawful detention depends on the circumstances. If an individual had been subjected to mental torture, including threats and isolation, over a number of years by a partner such that they were effectively detained, we would have to prove that detention and the extent to which the partner’s threats, implied threats and controlling behaviour had overcome the individual’s will. An individual is taken to have free will. We would have to prove, in evidence, that the individual had been detained. Obviously, there are extreme examples; some cases will be more difficult and challenging. In terms of domestic violence, in arguing the case, we would bring to bear the “threats of violence” provision in section 10(2)(c).

I turn to the third issue of sexual history and reasonable belief. I hope that the point that the member raised will not be the case. Reasonable belief relates to the res gestae, and the sexual history shield is available to us. Two weeks ago, I said in the chamber that protection under the legislation on sexual history evidence is not universally successful. When a rape victim gives her precognition to a procurator fiscal, we cannot give her a guarantee that her character will not be attacked. Undoubtedly, the victim’s sexual history is one of first routes of attack for the accused in cases in which that can be explored.

It is important to ensure that legislation is made to work. The jurisprudence that has developed has limits. We cannot guarantee with absolute certainty that evidence about character, and previous character, will be excluded. Indeed, there is an inherent risk in excluding it. Some months ago, we lost a conviction in the appeal court—I think it was the case of Macintyre. The exclusion of the fact that the complainer had previously worked as a prostitute—both judge and prosecutor objected to the evidence being led—was held to have amounted to a miscarriage of justice and the conviction was quashed on that basis.

There are difficult judgments to be made, but I do not think that they will be affected by the reasonable belief provision. That said, there is undoubtedly a need to continue to examine how the legislation on sexual history evidence is working in practice and what the Parliament wants to do with it.

Andrew McIntyre: It will be difficult for the Crown to establish that a history of domestic abuse, without immediate threats of violence, is sufficient to come under one of the circumstances listed in section 10. If we are ever able to do that, it will be through section 10(2)(c). It is important to recognise that section 10(2)(c) is not restricted by time. It relates to threats that were made at any time—not just threats of violence, but threats in the wider sense. In situations of domestic abuse, threats are not restricted to violence. The accused can threaten to kill himself, to make disclosures about his intimate relationship with the victim or to humiliate them in some other way. If we accept that the provision has wide latitude in time and is not restricted to threats of violence, it could be used to establish lack of consent in cases of domestic abuse.

The Convener: We move on to the question of reasonable belief. You will have noted that last week we heard evidence that section 12 is not as effective as it might be because it does not provide for the accused to be compelled to give evidence. Do you see that as a problem?

The Lord Advocate: There is no difference from the current situation. The only alteration that the bill will make is that we will move from an entirely subjective test—the accused’s honestly held belief, however unreasonable it may be—to a test based on reasonable belief, which is more objective. That should make matters easier because what is reasonable in the circumstances will be inferred from the facts and circumstances that are put before the court in proof. Individuals may speak to the conduct of the accused and the victim at the time of the alleged offence. They may describe how the accused and the victim were behaving—at a party, for example—and how the victim appeared to them. Was she happy? Did she look safe and content in the accused’s company? Those factors, as well as anything that the accused said to his friends, when he was being interviewed under caution by the police or—more rarely—during judicial examination, may be derived from the evidence.

The bill does not shift the current position in any way and places no obligation on the accused. If there is an irresistible case crying out for an explanation, under common law the judge may suggest that the accused needs to rebut it, but that mechanism is used very rarely and conservatively. The bill does not shift the position in a way that will make a practical difference for us.

The Convener: Has conservative use of the power that you describe been governed by the fact that more frequent use could cause difficulties under the European convention on human rights?

The Lord Advocate: There is no absolute right to silence under ECHR—there is a presumption of innocence, which does not require the accused to indicate his position in all circumstances.
However, European jurisprudence views some degree of proactivity on the part of the accused as acceptable in a criminal trial. In solemn proceedings, an accused cannot plead an alibi or self-defence without giving prior notice. The notice does not establish the defence—the accused must find a basis for the alibi or defence of self-defence in the Crown case, or must lead evidence that raises reasonable doubt about the Crown case and establishes the defence. There is no expectation of utter passivity from the accused in the trial process. Cases such as we are discussing will be no different.

The Convener: I accept that an accused cannot argue a special defence unless he gives evidence in support of it. However, we are talking about a slightly different situation, in which the accused stays completely quiet throughout proceedings. Would that put the Crown behind the 8-ball?

The Lord Advocate: At the moment, we must prove mens rea: we must show that the accused intended to do wrong, or acted recklessly, which, incidentally, shows that he had no reasonable belief as to consent or knowledge. When we investigate cases as prosecutors, we do not do so with a view to obtaining a conviction at all costs. Our role is to ensure that the evidence is fair and balanced to the victim and to the accused, not to skew the case or exclude evidence that may support our case but be inconvenient to the proposition that the prosecution is putting before the court. That is an important part of the prosecutor's function as an officer of the court.

The Convener: Last week it was stated to us in evidence that the Scottish Law Commission intended that the provisions relating to consent and reasonable belief should apply to attempts to commit rape and sexual assault. How that will be achieved?

The Lord Advocate: I do not see a distinction between the complete offence and an attempt to commit that offence. The latter is also a crime, and the same provisions would apply. However, evidence must be available to support that, therefore much depends on what prevented the crime from becoming complete. It is particularly challenging to provide such evidence in rape cases.

There can be circumstances in which people are engaging in consensual intercourse, but there is a change of behaviour on the part of the accused. There is something odd, or the individual just decides that they do not fancy the accused any longer and changes their mind. If the complainer indicates that she does not wish to continue, there is from that point onwards the potential to prosecute for rape. The act becomes rape when consent is withdrawn, provided that it is reasonable, in the circumstances, to infer that the accused had the mens rea to know that consent had been withdrawn, or was utterly reckless in respect of whether there was consent. As members can imagine, the challenge of proving such circumstances is immense.

There is no distinction between the complete offence and attempts or assaults with intent to rape.

The Convener: I cannot see, in the bill, any provisions that deal with attempts.

The Lord Advocate: If the offence is available for the completed crime, it has to be available for an attempt. It is the same with theft. A defence in the case of theft is that the person is the owner of the property or had no intention to steal—that applies equally to an attempt to steal. We can consider the matter further if the committee would feel more comfortable if it was specified in the bill. However, the difficulty is that there are also conspiracies to commit crimes. It might be necessary to list all the inchoate offences, not just the attempts. The offence would also need to be made available in cases of conspiracy to rape.

The Convener: We will consider that in due course.

Part 4 of the bill is on children. Our questions will be led by Angela Constance.

Angela Constance (Livingston) (SNP): The offences against young children that are set out in sections 14 to 19 are designed to protect young children, but can also be committed by young children. Is it correct, as a matter of principle, that offences that are designed to protect young children can also be committed by members of that protected group?

The Lord Advocate: Whether that is right is a matter for Parliament. I am the prosecutor and I implement the law and interpret the public interest when that law is in place.

The current position is that I do prosecute children for non-consensual offences against other children when my doing so is in the public interest. However, that is extremely rare because we have a strong system in which most cases of offences by children are reported to the children's panel.

As chief prosecutor, I have no wish to criminalise children unnecessarily, but when there is an absence of consent and someone under 16 commits an offence against a younger child, prosecution is considered. If a 15-year-old abducts a four-year-old and sexually assaults them, prosecution is considered, particularly where the
behaviour was aggressive and where there might be a propensity to reoffend. The individual could become a lifetime sex offender, so we have to consider the facts and circumstances of such cases carefully.

Cases vary considerably, from children simply experimenting with each other in an innocent, explorative way—which we would never dream of characterising as criminal by way of prosecution—to serious offences that can permanently damage children or cause serious psychological or physical damage.

**Angela Constance:** I ask you to consider examples in which both the alleged perpetrator and the victim are under 13. If a 12-year-old girl invites a 12-year-old boy to touch her in a sexual manner, will both be guilty of an offence?

At 11:30

**The Lord Advocate:** The provisions in the bill suggest that there should be equality in relation to gender. In contrast with the law that we had in the past, when we consider how to legislate, we now have to ensure that the law complies with article 14 of the European convention on human rights and is non-discriminatory. We can justify a departure from that only where there are good reasons to discriminate between the genders.

A case involving the scenario of a 12-year-old touching another 12-year-old would never see the light of day in the criminal courts. It would possibly not even be reported to the children’s panel, because such a scenario probably takes place in numerous neighbourhoods during the summer holidays. There may be some form of exploratory touching by children within a normal childhood.

It would be very different if a 12-year-old was bullying another 12-year-old, aggressively coercing them, and showing conduct that might illustrate a propensity on the part of the aggressive 12-year-old—female or male—to commit sexually aggressive behaviour for the course of their life. In those circumstances, the reporter to the children’s panel would consider whether care and protection were necessary under the Children (Scotland) Act 1995 or whether the conduct was so serious that prosecution was merited.

I must say that, as the prosecutor, I consider the age of criminal competence of eight in Scotland to be extremely low. Consideration needs to be given to that, although not in the context of a particular bill.

**The Convener:** Yes. That is for another day.

**The Lord Advocate:** It is a much wider issue that needs substantial consideration by Parliament, and not just in the context of one bill. However, my policy is clear: I do not prosecute children when it can be avoided, because the children’s hearing system is more appropriate. I will take children into court only when I consider it necessary and in the public interest. That was the policy of my predecessors; I am continuing it.

**Angela Constance:** You have given us comprehensive answers. You spoke about the circumstances in which you would consider prosecution. Will you say more about the circumstances in which you would consider prosecution when both children—the alleged perpetrator and victim—were under the age of 13?

**The Lord Advocate:** It would be exceptionally difficult to give such hypothetical circumstances. The scenario would be extremely serious. I suppose one example would be the Jamie Bulger case, in which a young child was abducted and tortured. If the scenario involved two 12-year-olds, it would have to involve behaviour such as serious torture or a serious rape in order to bring the case to court. In such circumstances, the court would have to be modified considerably, for example to allow the court to instruct counsel. Ultimately, the court would refer the matter to the children’s panel for advice. Knowing that, and that the consequences might not be dissimilar to what the children's panel could do, I would have considerable pause before taking such a case to court. However, that decision would be balanced in the light of the circumstances and information from, for example, psychologists and psychiatrists on the likely path of the individual’s behaviour. Unfortunately, research tends to suggest that, if a person is behaving in an extreme manner at the age of 12, the prospects for their future conduct are not great. For sexual offending, past behaviour tends to inform intelligently what happens in the future.

**Stuart McMillan (West of Scotland) (SNP):** My first question is on section 19. Having read through the bill a few times and listened to what has been said today, I would like clarification on what would happen in a situation involving two children under 13, in which a boy sent to a girl a joke of a sexual nature via a text message or link in an e-mail. Could an unintended consequence be that the boy had committed an offence under the bill?

**The Lord Advocate:** Yes. If it is competent to prosecute people from the age of eight, in theory it would be competent to prosecute such a case in law. However, it would depend on whether the message satisfied the definitions and purposes as currently described, and whether mens rea was present. Whether or not such a case would be prosecuted is another matter altogether.

**Stuart McMillan:** The Scottish Law Commission proposed that consensual sexual relations between older children should not attract criminal
sanctions. The bill does not adopt that approach in relation to various penetrative sexual activities. However, Professor Gerry Maher stated in evidence that

"the bill represents the worst of all worlds, because it will extend decriminalisation by listing a wide variety of what would otherwise be offences, but will keep criminal liability for certain acts".—[Official Report, Justice Committee, 18 November 2008; c 1370.]

How frequently are older children prosecuted for consensual sexual relations?

The Lord Advocate: They are prosecuted very rarely. From our research, I think that there have been eight prosecutions in the past three years.

Stuart McMillan: Under what circumstances are such prosecutions brought?

The Lord Advocate: That depends on the circumstances, which can be very varied. We would consider the circumstances of both the victim and the accused. Some cases will relate to aggressive conduct on the part of the boy in the relationship—in the past, only boys could commit the offence. There might often be allegations of non-consensual intercourse for which we do not have the corroboration that would allow us to prove that. That is an important factor. In many cases, we have insufficient evidence to prove rape.

We prosecute under section 5(3) of the Criminal Law (Consolidation) (Scotland) Act 1995 for consensual intercourse with a child where we believe that the case is sufficiently serious, such that it is in the public interest to prosecute. It is very unsatisfactory for a victim to go through that process when the assertion is that she consented and her position is that she did not. However, if consensual intercourse with a child is all we can prove, that still allows us to get a conviction and it allows for the individual to be placed on the sexual offenders register, when we have a clear account from the police report that there is a real danger that the individual’s offending will continue and that his disposition is such that he is an aggressive sexual offender. The eight cases that have been brought probably represent such circumstances.

We would consider whether there was exploitation of vulnerability, for example if the other child has learning disabilities. There might be a Euston-station situation, whereby an adult has got another child to go out and fetch a vulnerable child and groom them to engage in relationships. Their vulnerability, which would cause them to consent, might have been exploited cynically by the other individual. That sort of situation would be rare, but we would examine such exploitative situations in which the power balance in the relationship was clear and where there was aggression or bullying in the background.

Parliament might give me, as the public prosecutor, a clear signal that you wish children in such situations to be prosecuted, irrespective of the circumstances. Where there is fresh legislation, and there is a clear message from Parliament that it is to be enforced rigorously, the exercise of prosecutorial discretion is very much more limited. However, there might simply be recognition of the need for the provision for public health purposes, to protect children from exploitation by others, or to give some children a point of reference.

I do not think that anyone in this country wishes to criminalise unnecessarily children who may be involved in exploratory sexual behaviour. Most people would be concerned about the public health issues that may arise and about the welfare of individuals who commence relationships in circumstances that might be dangerous to their health, welfare or morality—they might be thrown into situations in which they are way out of their depth. I have seen cases in which 13 or 14-year-olds attend an apparently innocuous party at which, in fact, group sex is going on. They are utterly bewildered by the circumstances and are sucked into that scenario without having the emotional maturity, communication skills or assertiveness to get themselves out of it.

There might be value in there being a signpost in law to say that certain behaviour is criminal. People could shelter under that. I am not saying that prohibiting something necessarily makes people stop doing it—we know that that is a wish too far. However, the provision could be used as a point of reference to allow some victims not to find themselves obliged to consent because of peer-group pressure or bullying in circumstances that are immensely outwith their capability to deal with.

The Convener: I do not want us to get ourselves into difficulty.

Let us consider a situation in which you prosecute on the valid ground that you have enunciated. If you think that you cannot sustain the idea that there was coercion and a charge is therefore made under section 5(3), do not both people have to be charged?

The Lord Advocate: Discretion is exercised in a full range of circumstances. We would have to treat both people equally. If a girl had behaved in such a way towards a boy, it should be remembered that women can be sexually aggressive sex offenders.

Andrew McIntyre: The important point is that we would not be able to prosecute the female in those circumstances, because section 5(3) protects only females. That is an anomalous
situation. However, on what is to be proposed, either could be prosecuted.

The Convener: Either or both?

Andrew McIntyre: Yes. Either or both.

The Lord Advocate: It is difficult to envisage circumstances in which there would be sufficient evidence relating to both, unless they had done something in the middle of the park with all their friends around them, for example—although that happens.

The Convener: Unfortunately, it does happen, as you say. Therefore, we are left with a welfare or protective offence, and the question has to arise whether it is legally competent to prosecute a member of the protected or defended class with the offence of having had sex with someone under the age of 16.

The Lord Advocate: Parliament must make that choice and determine where to draw the line. I think that the Cabinet Secretary for Justice’s view is that there are circumstances in which what has been proposed can benefit public health. I accept that there are valid considerations to do with the fact that suggesting that such things have happened might subject a person to the possibility of prosecution, which might deter young girls from seeking medical support or psychological counselling, or from disclosing to an adult. That factor must be taken into account.

Simply to refer such circumstances to the children’s panel, as the Scottish Law Commission has suggested, is one way forward, but the type of situation that I mentioned would be lost by doing so. In some circumstances, we would focus on prosecution and would not be able to prove the absence of consent. Statistically, eight prosecutions are not many, but eight children or teenagers who go on to become serious sexual offenders represent a significant threat to the community in which we live. Therefore, Parliament must strike a balance. I am content to leave it to Parliament to determine where the appropriate line should be drawn and how such conduct should be controlled.

Robert Brown: I entirely understand the motivation behind what you say, but do you have any concerns about prosecuting for a more general crime, for which other people are not prosecuted in circumstances in which you cannot prove the things that you are concerned about?

The Lord Advocate: Yes. However, I suppose that the answer would be to remove the requirement for corroboration, which is another test. I am not suggesting that, but that is the reality. In other circumstances in other jurisdictions, one would be able to prove such things. We can work only with the evidence that we are able to get; if evidence does not exist, we cannot make more of what we have. As the committee knows, people often accuse others of rape and all that we can prove in law in such circumstances is that assault with intent to rape had occurred or that there had been lewd and libidinous practices. That is unsatisfactory for the victim, but it is all that we can achieve within the law, which determines the parameters within which we behave. We use the law where doing so is appropriate and in the public interest. It is therefore timely that Parliament is able to consider whether it wishes to maintain in that way that aspect of criminality for people aged between 13 and 16.

Nigel Don: My question may pre-empt what Stuart McMillan wants to say. Is there a risk that we are generating trials by the Lord Advocate rather than trials by court? In other words, you and your colleagues will decide what should be prosecuted. Forgive me—as you will appreciate, my question is not intended to be personal in any way, and I do not intend to attack the office that you hold.

11:45

The Lord Advocate: That situation applies across the board in Scotland. Of course the prosecutor in Scotland determines what cases will go to court—we are the gateway to the court. We do not apply the principle of legality in Scotland. We imbue, and have imbued, the Lord Advocate and her representatives, the procurators fiscal and Crown counsel, with the discretion to interpret the public interest. That autonomy is not exercised in isolation from the community and the people who provide information to us. We base our decisions on information that is provided by the police about the level of crime in the environment. For example, in Scotland we have a problem with knife crime, and we can adjust policies to take account of the seriousness of the problem. Such flexibility is a core part of our justice system.

Nigel Don’s question suggests that the situation might have somewhat sinister connotations. I hope that we are not exercising our discretion to make decisions about what is in the public interest in a patronising or isolated way. If one thing characterises the nature of prosecution during the past 10 years, it is that we are reaching out to the community and listening to Parliament, interest groups and expert groups. An expert advisory group on sexual offending has been established and we are listening to its advice; we are not working in glorious isolation. However, decisions must ultimately rest with the prosecution and must be made independently of any other person, in terms of our statutory obligation.
Nigel Don: Thank you for putting that on the record.

Stuart McMillan: Would a welfare intervention in relation to consensual sexual relations between older children give rise to issues under article 8 of the European convention on human rights?

The Convener: Article 8 is about the right to privacy.

The Lord Advocate: Article 8 protects privacy and the rights of the family, but Strasbourg gives a margin of appreciation to states. There might be different cultural phenomena in different societies in Europe. In some states, the age of consent for sexual intercourse is as low as 12—I think that it is 12 or 11 in Spain. The situation varies considerably in Europe from one jurisdiction to another. Strasbourg has not put in place a high threshold for interference; there is a low common denominator on the extent to which the state can interfere with private lives, family choices or individuals’ sexual lives.

There is recognition that states are entitled to consider protection of their most vulnerable citizens. People who are young or emotionally immature can be at risk of all sorts of diseases, the consequences of which they might not be aware of when they are only 13, 14, 15 or 16. Therefore, a margin of appreciation is afforded. I have not looked at the matter in detail, but I think that the short answer to your question is that it is perfectly legitimate to take a welfare approach.

If, as a result of taking such an approach, action is taken that limits or restricts the rights of an individual in a way that would engage article 6 as well as article 8, there must be some form of article 6-compliant tribunal, to deal with the article 6 rights that are inherent in any action that is taken on the basis of article 8.

Paul Martin (Glasgow Springburn) (Lab): Schedule 1 to the bill sets out penalties. The maximum penalty for rape of a young child would be “Life imprisonment or a fine (or both)”, and the same maximum penalty would apply to other, equally serious, offences. Do you understand that to mean that a person who raped a child could receive a fine?

The Lord Advocate: The bill replicates the current law, which is that a fine is available on conviction for rape. I am subject to correction on this, but I think that the last time that a fine was imposed for a rape was in 1999—I cannot remember the name of the case, but it is somewhere in the back cells of the brain. No fine has been imposed for rape in the past decade. I suspect that if there had been such a case I would have immediately considered it in the context of unduly lenient sentences. I find extraordinary the prospect of only a fine being imposed.

As I understand it, it is intended that the fine would be a cumulative and not an alternative penalty, so that if an accused were very rich they could be fined as well as imprisoned. That could be cleared up in the drafting of the bill, if the situation is not currently clear.

Paul Martin: Should the implications of the move from common law to statutory law—where different minimum and maximum sentences apply—have been considered in that context?

The Lord Advocate: I am not sure what the Scottish Law Commission recommended in that regard.

In the context of cumulative penalties, I would like consideration to be given not just to a prison sentence but to a compensation order—that is not a matter for me, but I make the suggestion.

In circumstances that involve a very wealthy accused with a big mansion, for example, who rapes four or five children, it is very nice to be able to sell it and to make a compensation order in favour of the victims. That could be considered, although certainly not as an alternative to imprisonment in those circumstances—

Paul Martin: Lord Advocate, I understand the current position, and I appreciate and thank you for that point, but does the bill not offer an opportunity to refresh the legislation to ensure that the opportunity to impose a fine—

The Lord Advocate: Yes. You might want to consider amending the wording at stage 2 if it is considered that it is ambiguous and would not achieve the intention of imposing a cumulative penalty. However, I do not believe for a second that it is intended that a fine would be an appropriate penalty on its own.

Paul Martin: But your reading of the wording is that there is a possibility of the sentence being a fine only.

The Lord Advocate: Yes. The wording at the moment says “or a fine”. That would have to be changed.

The Convener: Perhaps you can satisfy my personal curiosity by letting us know in which case in 1999 it was felt appropriate to impose a monetary penalty for rape.

The Lord Advocate: I may be wrong. With the passage of time, my memory is not what it was. However, I think that 1999 was the last year in which a fine was imposed.

Non-custodial sentences are sometimes imposed by the court for rape. There have been instances of probation and community service
being used. In a number of those cases, I have taken appeals against the sentences as being unduly lenient, but I have been unsuccessful. The Parliament might want to consider that in its consideration of the penalties.

The Convener: Well, that comes within the discretion of the courts, and is subject to your appeal.

The Lord Advocate: Absolutely.

Cathie Craigie: At present, the criminal law does not extend to a girl who is aged under 16 who engages in consensual sex. However, the bill will extend the criminal law and the girl will be committing a criminal offence. Over recent weeks, we have heard evidence of concerns about that. We have also heard that a pregnant girl who is at risk of being prosecuted might suggest that she was raped. How might your office deal with such cases?

The Lord Advocate: As I have said, very few cases of that nature are prosecuted and the evidence is likely to show patently what took place. The current trend is to suggest that, when someone young suggests that intercourse has taken place, they do so only because they were late and their parents were going to give them a row. There are trends and fashions regarding the defence that is put to the victim, but it is likely that that suggestion might be put to victims in the future when cases are prosecuted. Nevertheless, I expect such cases to be relatively rare, and I hope that even if that suggestion is put, it will not be borne out by the evidence that is available to the court.

Cathie Craigie: Is there justification for extending the criminal law to girls who are under 16?

The Lord Advocate: It is not a question of justification; it is about compliance with the European convention on human rights. Article 14 of the convention states that, when a right or obligation is created on the part of citizens, it should be applied without discrimination to particular groups. However, application can be varied if there is objective justification for doing so. The issue is whether there is justification for not applying rights or obligations to a particular gender.

The psychologists will correct me if I am wrong, but I think that girls mature emotionally more rapidly than boys. I am not sure at what stage boys catch up, but at that stage there is no objective basis for taking a different approach. A girl pushing a 12-year-old boy about and forcing him to have sex is clearly a matter of concern to the public as well as to the boy. Justification is a matter for the Parliament to determine. Given that one of the attractive prospects of the bill is the fact that it makes rape a gender-neutral crime—it will apply to male victims as well as female victims and whether the accused is male or female—there is an issue of consistency in how far that is taken, which must be balanced on the basis of the evidence that the Parliament has heard and weighed.

Cathie Craigie: Sticking with the group of older children for the moment, will there be any practical difficulties in prosecuting or dealing with under-16 consensual sex, since both parties could be guilty of an offence?

The Lord Advocate: We will have to decide whether to use one of the parties as a witness, which currently happens in many cases where we have an insufficiency. For example, with some of our serious crimes, such as a murder where there are two people in a room with a dead person and there is absolutely no evidence other than uncorroborated forensic evidence, we know that two people were involved and we have to decide who was the principal actor and how we can prove that in the public interest. In those circumstances, we sometimes have to use accused persons as witnesses. So the decision that you are talking about is not different from the decisions that prosecutors have to make every day on the full spectrum of offending.

Cathie Craigie: You will be aware of the evidence that we have heard that there is a strong body of opinion that under-16 consensual sex should be treated as a welfare issue, not as a criminal offence. That leads us to looking at past decisions of the European Court of Human Rights, which has held that a state cannot claim that the retention of criminal sanctions is necessary while at the same time indicating that ordinarily there will be no intention of applying them. However, you said that you use your judgment about whether to apply the criminal law, and the Government’s policy documents in support of the bill indicate that there is no real intention to use the particular provisions in the bill. How do we balance the situation?

The Lord Advocate: That does not quite state the position. The Strasbourg jurisprudence relates to a blanket disapplication of the law, but I am saying that we will look for facts and circumstances that are consistent with the criteria that I have pointed out where there is absence of corroboration.

Registration on the sex offenders register achieves something very different from what the welfare system achieves. Registration is not available to the children’s hearings system, because under-16 consensual sex is treated not as an offence but as a ground for care and protection, so there are distinctions. There is no blanket non-application of the law; we do not
intend not to use the law. However, as long as I am Lord Advocate, guidance will be given to the police, whether or not in statute—I already have the power to issue guidance under section 17 of the Police (Scotland) Act 1967—that recognises that I have discretion and that the law will be applied with discrimination, not universally. If the Parliament signals otherwise and tells the prosecution in Scotland that it wishes there to be ubiquitous and widespread prosecution of children between the ages of 13 and 16, I will have to take that into account. However, if the Parliament supports a discriminating approach, I will be able to continue with our current approach to this aspect of criminality.

The Convener: That is the way out of that one.

Cathie Craigie: I will move on. Section 27(7) says:

“The Lord Advocate may issue instructions to chief constables in relation to the reporting”—

I will not read it all out. Section 12 of the Criminal Procedure (Scotland) Act 1995 has a similar provision. Why is it necessary to restate that?

The Lord Advocate: It is not necessary. It states what my powers are already. I think that it is in the bill to acknowledge explicitly the Lord Advocate’s powers when Parliament passes provisions that create a new offence for girls between the ages of 13 and 16. On summary justice reform, for example, there has been some debate about the use of the discretionary power, and whether the power was intended to be used for such crimes.

If the Parliament gives a clear signal that it is not expected that the power will be used in the manner that I have described—in other words ubiquitously, whereby all cases will be reported by the police—the provision can be removed, but it may be that the Parliament wants to reinforce the message. I do not think that section 27(7) in any way compromises the Lord Advocate’s independence; it simply restates what is in section 12 of the Criminal Procedure (Scotland) Act 1995 and section 17 of the Police (Scotland) Act 1967. The provision is harmless; it is simply a signpost to what the Parliament intends, but it is not necessary.

12:00

The Convener: Arguably, it is redundant.

The Lord Advocate: That is a matter for the Parliament to determine; the Parliament might not consider that that is the position. Whatever view—whether majority or unanimous—the Parliament comes to on that, I as Lord Advocate will take cognisance of it.

Cathie Craigie: Last week, I heard you talking on the radio about guidance that you had issued. I do not want you to go into details, but does that guidance include the older children age group?

The Lord Advocate: That guidance includes instructions on the investigation of crimes against children, but it does not relate to the prosecution of children. It is about how the police investigate serious sexual crimes that involve adults and children. It is not a determination of prosecution policy or an instruction to the police about how to report crimes; it is about how they set about their investigations. It is quite different from the guidance that I will issue to the police following the enactment of the bill.

The Convener: Finally, we turn to the abuse of a position of trust.

Paul Martin: You may have heard that on 11 November, Enable Scotland set out that, in the case of mentally disordered persons, criminalising sexual abuse of trust “does not seem to work”—[Official Report, Justice Committee, 11 November 2008; c 1313.]

and that the application of the criminal law in such cases is counterproductive, as it acts as a disincentive to disclosure of possibly inappropriate sexual conduct. What are your views on that, from your experience of dealing with cases of sexual breach of trust in such circumstances?

The Lord Advocate: I have not seen Enable Scotland’s written submission; I can speak only from my experience as a prosecutor over some 25 years. People in institutions or care homes who suffer from mental disorder or disability—I include children as well as the elderly—are among the most vulnerable individuals in our community. When I was a young prosecutor, there was a culture, even among the police, of wishing to deal with domestic abuse privately, outwith the courts. The exploitation of mentally disordered people’s vulnerability must be dealt with in the most draconian way and should include a deterrence element. I consider the physical, sexual or mental abuse of any such person to be a matter of the most serious nature. When such conduct amounts to a crime, it can be dealt with properly only by the criminal courts.

Paul Martin: So you do not accept Enable Scotland’s point that, given the low level of reporting of such cases and the low success rate of prosecutions, another approach should be considered.

The Lord Advocate: Over the years, there have been many reports of the abuse of people with mental disabilities, including the elderly and children, by people in positions of trust. I dispute that it is not possible to prosecute in such cases. It
is extremely challenging to do so, but we have been successful in a significant number of cases. The fact that the process is challenging should not dissuade us from treating the issue with the greatest seriousness.

I do not see the attraction of disclosure as opposed to prosecution—I am talking about cases involving criminal sexual conduct rather than some breach of regulations—other than that it would obviate criminal responsibility. I presume that the matter would be dealt with on a disciplinary basis or through counselling. Members of our community who are trusted to look after those who suffer from mental disability are in the greatest position of trust. A breach of that trust has to be responded to seriously and openly in our courts.

**Angela Constance:** I note what the Lord Advocate says about the seriousness of breach of trust by people who, because of their employment, have power over vulnerable people. Enable Scotland has asked about scenarios in which the client—for want of a better word—has a mental disorder but would normally have the capacity to consent to sexual activity. What are your views on the criminal law in such scenarios?

**The Lord Advocate:** I do not see a difference. In those circumstances, one person would be in a position of care, and exploiting that position in a sexual way or allowing a romance to develop would be a failure of duty. If the person in the position of care sees that a relationship may be about to occur, they must desist. There are means by which they can get themselves out of the situation, so that they are no longer in a position of care or trust, and so that they are able to pursue a lawful relationship. A relationship should not happen while the person is in a position of care or trust. If it did, it would be exploitative, irrespective of how we characterise it.

**The Convener:** Lord Advocate, that concludes this evidence session. I thank you, and I also thank Ms Holligan, who has sat quietly all morning—they also serve who only sit and wait—and Mr McIntyre. I am sorry that the session has taken so long, but you will appreciate the importance of these matters. We needed maximum input from you. Thank you very much.

12:06

**Meeting suspended.**

12:11

**On resuming—**

**The Convener:** Our second evidence session is with the Cabinet Secretary for Justice, Kenny MacAskill; Gery McLaughlin, the bill team leader with the Scottish Government; Patrick Down, who is from the bill team; and Caroline Lyon, from the Scottish Government’s legal directorate.

We will go straight to questions. What are the main justifications for the changes to the current law that are proposed in the bill?

**The Cabinet Secretary for Justice (Kenny MacAskill):** Significant public concern has been expressed by politicians of all parties and beyond in civic Scotland. There is a problem with ensuring that those who commit such heinous offences are dealt with properly. Our law has been built up over many years, so the bill is not an all-singing, all-dancing solution that will sort everything, but it is meant to ease a particular problem with the definition of consent and to deal with legal matters that came up in legal challenges. It also seeks to continue our country on its journey in trying to deal with sexual offending in a better way. Some measures have been taken internally, such as the changes in Crown procedure. The bill’s aim is to improve matters. On its own, it will not resolve everything, but it is part of a general strategy by Government, Crown and police to deal with the issues better and to seek to assist when there are interpretation difficulties in judicial matters.

**The Convener:** The policy memorandum that accompanies the bill draws attention to the “wider context” of the bill, particularly the need to address matters of evidence and procedure in relation to the criminal law more generally. Why does the Scottish Government think it appropriate to introduce this bill before the work on the wider context has been completed?

**Kenny MacAskill:** The bill is one aspect of our approach to addressing those significant issues. The Lord Advocate commented on how we deal with evidence and corroboration and the Moorov doctrine. Those are on-going issues. Rather than waiting until we get all the ducks in place, we are doing what we can, but at a reasonable rate to ensure that we get it right. We are pressing on with appropriate measures while other processes take place in parallel. Depending on what the Scottish Law Commission comes back with on, for example, the law of evidence, more measures may be taken at a future date.

**The Convener:** Will the bill result in an increased rate of conviction for rape and sexual assault?

**Kenny MacAskill:** We hope that it will help in a variety of ways. On its own, it simply tries to provide consolidation and clarification, as well as assistance for juries in reaching decisions—whatever the Faculty of Advocates may say—and indeed for the judiciary. That is the intention and we hope that it does so. We do not expect the bill to be the sole, simple solution. If there were such a solution, it would have been found a long time
ago. We must also change attitudes because of how individuals in Scotland, including, sometimes, those who sit on juries, perceive matters. The bill is meant to improve what we accept is a lamentable situation in Scotland. The bill will not be the only solution, but we hope that it will be part of a broader effort to tackle a dreadful situation.

12:15

Cathie Craigie: Many witnesses to the committee have broadly welcomed the extension of the definition of rape in section 1. However, can you explain why the crime of rape has been confined to penetration with the penis?

Kenny MacAskill: We accepted the Law Commission for Scotland’s proposals in that regard, but made two particular changes. We made one because of representations on sadomasochism and the difficulties that that might imply. The other change was to address the problem of under-age consent. We acknowledge the view of the Crown and others on matters that are finely balanced.

Apart from the two aspects that I mentioned, the bill that is before the committee simply confirms what we said at the outset, which was that we regarded the matter as non-party political and would bring in the Law Commission’s proposals. However, we are more than happy to consider comments on the bill, particularly those made by my learned friend the Lord Advocate. We will also consider the committee’s reflections on the bill.

As I said, the bill’s definition of rape comes from the Law Commission’s proposals. However, the Crown has suggested in evidence, and it has been said privately to me, that the definition should include the horrendous incidents of penetration with an object as well as penile penetration. We will certainly be happy to consider those views.

Cathie Craigie: Are you confident, cabinet secretary, that the bill’s definition of rape is consistent with current public understanding of the term? The Faculty of Advocates was concerned that juries might have difficulty with the bill’s definition.

Kenny MacAskill: Debates about nomenclature are always difficult. However, the bill’s criterion of free agreement is standard for such matters in many countries throughout the world, and certainly in Europe. There is no simple definition that will suit 100 per cent of the population. However, the bill’s proposal gets us close to making it as clear as possible to a jury of our peers what is required. The criterion of free agreement is the best one that we can see at the moment. If there are other, whizz-bang suggestions, we will be more than happy to consider them. However, we have taken it on board that the current position is unacceptable, that there is a problem and that there must be change. Whatever my learned friends in the Faculty of Advocates may say, juries have had difficulty with the definition, so we must improve it. Is the bill’s definition word perfect? Well, we hope so. Our view is that the bill gets it as clear as is possible. Our understanding of various groups’ evidence to the committee is that they accept that we are on the right track.

The Convener: Perhaps we can explore that a little bit further. You have obviously appraised what the Faculty of Advocates said at last week’s committee meeting. Have you any views on extending the definition of rape to include oral sex and so on?

Kenny MacAskill: We have taken the bill on board, but we are more than happy to look at the wise counsel that the committee and others will come back with. We accept that some changes need to be made, so we will propose amendments at stage 2. We will be more than happy to take the view of the committee and the wider public on the question of oral sex. However, it appears to us that there are problems around how it would be detected and how a law on it would be enforced, and whether it would be better dealt with through a sexual health and education strategy. As I said, we will be more than happy to take the question on board, but it seems to us that we are addressing most of the matters that we need to.

We accept that certain proposals must be amended at stage 2, and we will deal with that. We will take on board others’ views on the question of oral sex, but we think at the moment that the bill’s definition of rape is satisfactory.

The Convener: We go to Stuart McMillan, although to some extent you have anticipated his questions, cabinet secretary.

Stuart McMillan: Yes, that was regarding rape with an object.

What is the distinctive wrong inherent in the crime of rape, and what is the value in maintaining a separate and distinct crime of rape?

Kenny MacAskill: From discussions, both private and with the Lord Advocate, you will know that in other jurisdictions rape is simply described as a sexual assault. However, rape is within the public understanding. There is a clear requirement to define it, which is what the bill is about, and the circumstances in which it occurs, which is why we require to clarify consent. I tend to think that the serious nature of the offence should be marked and differentiated from a wider offence of sexual assault.

The Convener: We now turn to questions on consent and reasonable belief, with Robert Brown.
Robert Brown: Cabinet secretary, you may have heard the evidence on free agreement and consent, whether there is a difference in meaning between the expressions, and whether “free agreement” should be used throughout the bill. Do you have anything to add to the Lord Advocate’s helpful comments?

Kenny MacAskill: No. I did not listen to the whole of the committee’s evidence session with the Lord Advocate, but I heard most of it, and we are more than happy to accept the wise counsel of my learned friend.

Robert Brown: There are some areas of difficulty in section 10. Section 10(2)(a) deals with people being under the influence of alcohol or other substances, and you might have heard the evidence about that. Do you think that the provision does the trick in giving sufficient guidance to the court and juries on when a person is incapable of consenting? We are dealing with a common human position.

Kenny MacAskill: The provision is supposed to provide a non-exhaustive list of factual circumstances. The details may change, although it might take the wisdom of Solomon to define them at any specific juncture, as society and matters change. Our view is that the current list in the bill is adequate, but we will happily take on board any additional circumstances that people feel it would be appropriate to specify. We have the flexibility to make changes if we discover that we have not addressed all the matters or if circumstances change.

Robert Brown: We are dealing with serious criminal cases in which there has to be a high standard of proof. Is there any risk that section 10(2) introduces a strict liability version that undermines the ability to prosecute in some instances. It is about striking a balance. We should not interfere with legitimate behaviour that is not criminal or that is intended to be perfectly innocent in a relationship between individuals—even if it is not behaviour in which some would indulge. We think that the bill strikes a reasonable balance but, if others, including the committee, think that that is not the case, we will be happy to review the position.

Kenny MacAskill: If we leave it out, we will undermine the ability to prosecute in some instances. It is about striking a balance. We should not interfere with legitimate behaviour that is not criminal or that is intended to be perfectly innocent. As Robert Brown and I both know from practising in our adversarial system, there are checks and balances. There was a clear perception, which I agree with, that the scales of justice were not weighted appropriately. We are seeking in the bill to redress the situation, but we still maintain the presumption of innocence and require cases to be proven beyond reasonable doubt.

Robert Brown: We have received a lot of evidence about section 10(2)(b), which refers to prior consent. On the one hand, it has a slightly artificial look about it—with the idea of someone signing a form in advance of the situation—but on the other hand there is perhaps the risk of the defence making spurious claims of advance consent. Do you have any thoughts about that? For example, we have received representations about removing that reference and leaving courts to deal with the situation more generally.

Kenny MacAskill: You are correct: section 10 rules out consent but does not exclude a reasonable belief in consent. That may be difficult to establish in the circumstances as set out.

I am aware of the evidence. It is a matter of balancing where we can go under ECHR with whether we have not gone far enough. We would be more than happy to consider the views of both the committee and those who have made representations to the committee. The scales are not tilted appropriately or are tilted too much in one direction, we are happy to address that. We must ensure that we do not interfere with what happens in the marital bedroom; hopefully, such issues will be dealt with through sensible policing and prosecution. At the same time, we wish to ensure that victims are protected and do not have to endure spurious assertions or defences.

Robert Brown: Section 10(2)(c) relates to conduct that is agreed or submitted to because of violence or threats of violence. We received evidence—you may have seen it—that that provision may not deal adequately with situations involving past abuse or on-going relationships in which an implied threat is lurking in the background. Do you have any thought about the provision, in light of the evidence that we have heard?

Kenny MacAskill: That is a good question. The issue causes considerable concern to those who deal with domestic abuse issues. Domestic abuse has a history and leaves a legacy. We believe that...
the current provision is adequate, because it covers instances of domestic abuse that have happened in the past. I accept that it is difficult for the Crown to prove such cases, but the law allows past abuse to be used as evidence that consent was given because of threats and coercion. The problem is more with persuading juries of that than with the law, which allows past instances of violence or threats—not simply those that have happened within 24 hours or a similarly short period of time—to be taken into account.

Robert Brown: In short, as the Cabinet Secretary for Justice, you are satisfied that the phraseology of section 10(2)(c) allows that to be done in a sensible and reasonable manner.

Kenny MacAskill: As I said at the outset, the Scottish Law Commission drafted the phraseology of the section. If the committee or others think that it is inadequate, we will be more than happy to consider that. At the moment, it appears to us that the problem is not that the law does not allow us to take into account past incidents but that we need to persuade juries to do that. If it is felt that the phraseology can be tightened in any way, I will be more than happy to do that.

Bill Butler: Section 1 makes it clear that a belief in consent will not exclude responsibility for rape or any other offence set out in parts 1 and 3 of the bill if it is not a reasonable belief. Does that mean that rape can now be committed negligently? For example, A may intentionally commit a sexual act against B in the belief that B is consenting, but

Kenny MacAskill: No. At the end of the day, under mens rea and other principles that have always existed, for an act to be a crime, it must be committed with the intention to do wrong. I find it hard to think of circumstances in which someone could negligently commit the crime of rape. It comes back to the issues of how we deal with free agreement and reasonable belief. Some of it comes down to commonsense interpretation.

12:30

Bill Butler: That was a clear answer, cabinet secretary.

The committee has heard concerns that section 12 may not operate appropriately if the accused declines to give evidence. In such a case, it may be difficult or impossible to determine what steps the accused took to ascertain whether there was consent. Is there a potential difficulty there?

Kenny MacAskill: These are difficult issues—not only for those who draft the legislation but for those who interpret it and those who prosecute using it. I think that the balance in the bill is right, but we will be more than happy to make amendments if they will improve the bill.

A jury will be capable of inferring whether there was prior consent, based on matters that were not commented on, investigations that were not made, or refusals to answer or to say what investigations were required. There is a limit to what the law can specify in the nature of some defences. We therefore have to allow inferences to be made; we have to allow the jury to use common sense.

Bill Butler: You have answered the question that I was about to ask, which was on the idea of a jury drawing an inference.

Could an onus be imposed on the accused to show that he had taken steps to ascertain whether there was consent? Would you be open to such an amendment?

Kenny MacAskill: I would certainly be happy to consider it—but it would run contrary to the idea that, in Scotland, people are not required to state their defence and are entitled to hide behind a denial. We have to challenge such ideas, although society has usually been reluctant to change them. However, I think that the balance at the moment is correct. A case can be founded on a line of questioning by the police: during the prosecutors’ line of questioning, they can ask why particular issues were not mentioned earlier. Then, if those issues are still not mentioned when the opportunity is given, prosecutors can ask the jury to draw the appropriate inference. That will doubtless be commented on by the judge.

I do not rule out an amendment along the lines that Mr Butler suggests. However, it would be a fairly major step, and some people might point out that such an onus was not required in other types of defence.

We would not rule out an amendment out of hand, but the police will assume, and the prosecution will certainly home in on, the jury’s ability to draw an inference.

The Convener: Part 4 of the bill deals with children.

Paul Martin: On 4 November, the committee heard evidence from the Commissioner for Children and Young People. She said that children under the age of 13 should never be held criminally responsible. What are your views on that?

Kenny MacAskill: That is a separate and wider issue. There are specific and general issues. Some issues have been raised by the United Nations and other issues have been raised about the age of criminal responsibility in this country. The issue that Mr Martin raises has been considered in years past, and it is under review by the Government.
Earlier, the Lord Advocate spoke about the number of people who are prosecuted, and such issues will have to be considered in due course. At the present time, they should be left to the discretion of the Crown.

**Paul Martin:** Sections 14 to 19 have been designed for the protection of children. However, those crimes can also be committed by children.

**Kenny MacAskill:** As I have suggested, there are two separate issues, one of which is the age of criminal responsibility in this country. If you want to argue for a change in that, we could have a debate at an appropriate time. The issues are under consideration. There have been comments from the UN, but those are separate issues.

We are talking about the Sexual Offences (Scotland) Bill and about protecting our children. Therefore, the issue that Paul Martin raises is one for the discretion of the prosecution service.

**Paul Martin:** Is treating children who are under 13 as not being mature enough to make decisions about sexual conduct inconsistent with holding them criminally responsible for engaging in that conduct, especially when no evidence of coercion or exploitation exists?

**Kenny MacAskill:** I return to what I said. We are dealing with two issues, one of which is the age of criminal responsibility. If people want to revisit that, that can be done, but that is what applies at present. The bill is intended to make the law better and more fit for purpose and to protect our children.

Does a clear dichotomy exist between having the ability to prosecute a child and at the same time protecting that child? The answer is, of course, yes. However, the solution with regard to the age of criminal responsibility lies elsewhere. The bill’s purpose is to protect children who are under 13, who we do not think are capable of consenting to sexual activity. The Crown will consider how to deal with any child who is under 13 who carries out such conduct.

**Paul Martin:** I appreciate that you have said that the issue is not a matter for the bill, but the children’s commissioner said in her evidence that children who are under 13 should not be criminally responsible. All that I am asking is whether you support that suggestion—yes or no?

**Kenny MacAskill:** That is a matter for another day.

**Paul Martin:** I appreciate that, but we have received that evidence from the commissioner in response to the bill.

**Kenny MacAskill:** I as an individual and the Government are considering and reflecting on the matter.

**Paul Martin:** So you have no response to that evidence that we have received.

**Kenny MacAskill:** We are considering it. We have had representations from the United Nations. I am more than happy to take on board your view, if you are willing to give it.

**Paul Martin:** I am asking the questions.

**Kenny MacAskill:** I have given you the answer.

**Paul Martin:** You are not giving me an answer—

**The Convener:** We are not getting terribly far.

**Robert Brown:** I understand that a slightly more subtle aspect is that a legal doctrine links offences that relate to the protection of victims to situations in which it is not normally regarded as appropriate to prosecute people who are in that category of victim. If we forget about the underlying general ability to prosecute children who are over 8, does a major inconsistency remain not just in practice, but in legal principle, in the idea of prosecuting children who are under 13 for conduct from which they are supposed to be protected?

**Kenny MacAskill:** The short answer is yes. As I told Mr Martin, such matters must be examined. The Government, the Parliament and the country have received representations from the United Nations and others, which must be considered. If members have views, they should let us know them and the Government will reflect on them.

We must allow the Crown to act on the basis of whether a crime has been committed, whether it can be proved and whether prosecuting it is in the public interest. The Crown has always had to and will always have to answer those three questions. We always fall to the third question: is prosecution in the public interest? That judgment is exercised with great discretion and judiciousness by the Lord Advocate and the Crown. I have great faith in them.

**Robert Brown:** Would the issue be squared off by an understanding that, in the circumstances under the bill, perpetrators who were under 13 would not be prosecuted but would routinely be referred to a children’s panel?

**Kenny MacAskill:** The intention is that such matters will routinely go to a panel. We must consider the facts and circumstances and trust the Lord Advocate and her successors to act in the public interest.

**Stuart McMillan:** The Scottish Government has departed from the Scottish Law Commission’s approach to decriminalisation of sexual conduct between older children.
Professor Gerry Maher gave evidence to the committee that

"the bill represents the worst of all worlds, because it will extend decriminalisation by listing a wide variety of what would otherwise be offences, but will keep criminal liability for certain acts."—[Official Report, Justice Committee, 18 November 2008; c 1370.]

Why did the Scottish Government follow the route that it took?

Kenny MacAskill: We understand the Scottish Law Commission's general intention, but a great deal of public concern was felt that the message that would be sent and the inference that the public at large—not necessarily legally qualified people—would draw would be that consensual sexual relations between 13 to 16-year-olds were being legalised. That would be a retrograde step. We have problems with sexually transmitted diseases, teenage pregnancies and all the difficulties in which children become involved. It would be inappropriate to allow the inference to be drawn that the bill legitimised and decriminalised underage sex for kids who were aged between 13 and 16.

We think that it is necessary to make that clear in the law, even if the intention is, in the main, not to prosecute but to refer to the children's panel for care and welfare. We felt that we struck the appropriate balance by making it clear that we do not condone underage sex between those aged 13 to 16, nor do we want it to be suggested in any way that we wish to legalise it. Equally, we recognise that prosecution is not necessarily the best way to go. We think that the correct balance will be struck by maintaining the law, so that nobody draws any false interpretation from our approach; at the same time, we will ensure that the care and welfare that are often what is needed are provided by a reference to the children's panel.

Stuart McMillan: I have a couple of examples of cases in which such issues could arise. First, why should it be a crime for a 15-year-old boy to have consensual sexual intercourse with his 15-year-old girlfriend, but not a crime if a 15-year-old boy has oral sex with a 13-year-old boy?

Secondly, in a case in which an adult who is 16 years and one day old had sex with a girl who is 14 years and one week old, could not section 29(3) on age proximity does not apply to intercourse. On oral sex, as I say there are issues about how it is proven and how it is seen. Our view is that if the committee suggests that the matter should be dealt with in the bill, we would be more than happy to consider and reflect upon that option, but it seems to us that many such matters are best dealt with through education and health counselling. We must take into account the difficulties in locating such activity, proving it in court and progressing such cases. It is about striking the right balance.

Stuart McMillan: What is the justification for extending the criminal law to girls under 16, who currently do not risk prosecution for engaging in consensual sexual conduct?

Kenny MacAskill: That relates to the ECHR's requirement for gender neutrality. I do not want to be flippant, but it could be argued that perhaps many of those girls should be referred to the children's panel so that we can look after their care and welfare, because teenage pregnancy is a considerable problem for our society and it causes great difficulty and distress for the girls and their families.

Stuart McMillan: Paragraph 174 of the policy memorandum states:

"The Scottish Government is satisfied that the provisions of the Bill are compatible with the European Convention on Human Rights."

However, it makes no mention of the privacy rights of older children. Does the Scottish Government believe that older children have rights to sexual privacy under article 8(1) of the convention?

Kenny MacAskill: Our view is that they are children and that children are covered by the ECHR in the same way as adults. Those matters relate to how we interpret the convention and the broader views that we take as a society on children's rights. We think that we have struck the appropriate balance. That is why we differentiate between children who are aged under 13 and older children. It could be argued that those things relate to the maturity of individual children—a younger child may be very mature and an older child may be immature—but, as a society, we have to set down some provisions that trigger messages and lay down the rules and parameters within which we operate. We believe that we have got the correct age balance. We do not believe that under-13s are capable of providing appropriate consent.

We must protect the rights of children between 13 and 16, who we believe are not in a position properly to consider their own interests on such matters. It is a question of balance. Of course
children have rights under the ECHR, but, as the Lord Advocate said, there is a margin of appreciation. Society has a choice about where to set the parameters and we have decided to make provision for 13 to 16-year-olds. Other jurisdictions take a different approach, but I do not think that anyone is suggesting that we change our approach.

12:45

**Stuart McMillan:** If intervention can be made through the children’s hearings system to deal with under-age sex, why is it necessary to resort to the criminal law to deal with the issue?

**Kenny MacAskill:** There was a considerable view that if we did not do that and simply adopted the Scottish Law Commission’s initial view, the Parliament and the Government would pass a law that would trigger the message that we were decriminalising consensual sex between 13 and 16-year-olds, which seemed to be a retrograde step. We want such matters to be dealt with sympathetically in most instances, given the clear need to consider a young person’s care and welfare, but we must also trigger a message on the issue to the public, young and old, and there must be a caveat in relation to the—thankfully—few instances in which there might be doubt or a requirement to prosecute.

**The Convener:** Further to your response to Stuart McMillan, where do you place your reliance on the bill’s compliance with article 8.2 of the ECHR?

**Kenny MacAskill:** We place our reliance on the advice of our legal team and consultation with the Lord Advocate. It would be incompetent of the Government to ask the Parliament to pass a bill that was not ECHR compliant. The best advice that we have is that it is ECHR compliant.

**Cathie Craigie:** I am sure that you have followed the evidence that the committee has received in recent weeks. There is overwhelming evidence from the majority of witnesses who work with young people that the age of consent should not be lower than 16. However, people are concerned that the bill will criminalise young people who might be better served by welfare intervention. People still think that to enshrine in legislation provision for referral to the children’s reporter would be a better way of dealing with the problems that you described, such as STDs and teenage pregnancy. I think that we all agree that it is not good for young people under 16 to be sexually active. Would it be better to engage with the public and discuss using the children’s hearings system to try to resolve something that has been a problem for a good number of years?

**Kenny MacAskill:** We are open to the committee’s suggestions. Our view is that the approach that we are taking provides for what you describe. We are making it clear that we think that it is wrong for young people under 16 to engage in sexual intercourse; we are giving the Lord Advocate flexibility to ensure that children’s care and welfare are considered; and we are making provision for the fiscal to address the issue in the odd instance in which there is good reason to do so. We are leaving it to the Lord Advocate to provide guidance and we are satisfied with that approach, but if the committee wants us to enshrine matters in the bill we will consider doing so.

**The Convener:** Let us see whether you can convince Mrs Craigie that your approach is sufficient.

**Cathie Craigie:** The approach that is proposed in the bill is already being taken. Cases are referred to the Lord Advocate for decisions. However, while we consider the bill the problem is growing and we are not able to deal with it. Sexual activity carries risks for the future wellbeing of the young person. For those reasons, do you not think that the bill provides the opportunity to consider something slightly different that would ensure that young people who are engaging in sexual activities would be referred on to the children’s reporter and would be provided with the necessary welfare responses, education and support through a difficult time in their life?

**Kenny MacAskill:** I agree fully with your intention and share your sympathies. However, we are dealing with specific legislation on the criminal law on sexual offences. The matters to which you refer would be dealt with appropriately by other agencies, by colleagues in other Government departments, or by local government and voluntary organisations. As you correctly said, we believe that, to some extent, the bill simply seeks to maintain the status quo in the law as it pertains to sexual intercourse between people under the age of 16. There is merit in the maxim, “If it ain’t broke, don’t fix it.” We do not need to change that law; we can tackle sexual acts between those who are under the age of 16, but there are other problems and we have to consolidate the legislation. Your points about how we deal with the other aspects of the issue are valid and I share your sympathies. However, they would be best dealt not with by legislation but by health and education.

**Cathie Craigie:** We would all agree that, “If it ain’t broke, don’t fix it”; however, it is broke. More and more young people are presenting with sexually transmitted diseases and we do not seem to be able to tackle the problems of teenage
pregnancy, which can have a huge effect on a young woman’s future prospects.

If it comes to the attention of the authorities that a young person is engaging in underage sex, and the legislation provides that they will be reported to the children’s reporter, they could be offered the support that they would otherwise miss. At the moment, not every young person who becomes pregnant under the age of 16 is reported to the authorities so there must be a large group of young people who do not get any help or support and have to rely on their families.

Kenny MacAskill: When I say, “If it ain’t broke, don’t fix it” I refer specifically to the law on underage consensual sex between children aged 13 to 16. If you wish to suggest further changes by referring to oral sex, for example, I am more than happy to look at them.

However, there is a wider problem. That is why we have the getting it right for every child programme, health strategies, advice, and working groups elsewhere. Some aspects of the problem have to be dealt with in a way that is not simply legislative or related to criminal justice; other departments and organisations have to deal with them, too.

Today, we are dealing specifically with the question of offending. The Government wants to ensure that we continue to make it clear that sexual relationships between people who are under the age of 16, consenting or otherwise, are not acceptable. Will a law on its own solve the problem? No, it will not. We have to educate our young people, warn them and provide them with health and education.

We are happy to consider any proposals for changes to the legislation, but many of the other issues that you have raised would be better dealt with by health and education, or other departments, rather than justice and legislation. That is why we have GIRFEC.

Cathie Craigie: One of my colleagues will probably raise this point later, but I am pleased that you are talking about the health and education departments being involved. We might be able to discuss that issue later, but I do not want to steal a colleague’s thunder.

The Convener: It is an important issue.

Robert Brown: I want to approach the same issue from the other side. The Lord Advocate said that only a small number—between 10 and 12 a year—of section 27-type cases of sex between older children are prosecuted. She said that there were often situations in which coercive elements, for example, could not be proved. Is that a rather unsatisfactory, narrow base on which to build a more general law that applies to people across the board?

Kenny MacAskill: It is unsatisfactory, but I cannot think of anything else that can be done. Either we do not proceed against people when there is clearly a reason to believe that something untoward and illegal has happened, or we do the best that we can. The situation is not ideal, but we should try to ensure that something is done, with at least some caveat. That is the position that we find ourselves in. To some extent, the Crown deals with such matters reluctantly, on the basis that other options that are open to it would be incapable of being proven.

Robert Brown: The vast bulk of children under 16 will end up at a children’s hearing anyway, even if the prosecution route is gone down. Would it not be more sensible to put things to a children’s hearing in the first place?

Kenny MacAskill: No. In some instances, if the Crown has been unable to prove that a more serious sexual assault has taken place, we should, at the minimum, seek to record matters. There is a good reason why that option should be available to authorities. Such matters would not be best dealt with simply by leaving them to a children’s panel.

Nigel Don: Good afternoon, cabinet secretary. You will be aware of the substance of section 27(7), which states:

“The Lord Advocate may issue instructions to chief constables”.

The Lord Advocate said that she regards that subsection as redundant in the light of section 12 of the Criminal Procedure (Scotland) Act 1995, and I think that you would share her view. I understand why we should restate the Lord Advocate’s discretion and why we would want to put the provision next to the preceding subsections, but is there not a risk that, by including it, every subsequent statute will have to include such a provision, as leaving it out would mean that a different approach was being taken? That is a statutory issue. In addition, is there not a risk that, by including the provision, we will read its absence into previous Scottish Parliament statutes? Will we set a dangerous precedent by including a redundant provision?

Kenny MacAskill: I do not think so. I must accept the best advice of people who are professionally qualified in such matters. It seems to me appropriate to include the subsection, and I do not see why it should set a precedent. There is no clear evidence that it will undermine previous legislation in any way. If it is appropriate for the bill, we should do what is right.
The proposal is part of a journey, not all of which is about what we do in legislation. The issue is how we tackle a particular problem. I am satisfied that the provision will not undermine the criminal law as it applies across the broader sweep of Scottish society.

**Nigel Don:** On a completely separate issue, Scotland’s Commissioner for Children and Young People, among others, suggested to the committee that we should have consulted the young people who will be affected by section 27. Not many 15-year-olds have been consulted about a law that will affect them. What is your perspective on that, please?

**Kenny MacAskill:** We have spoken to various organisations and people, including Scotland’s Commissioner for Children and Young People, Barnardo’s and Children 1st. We went out of our way to ensure that we consulted 13 and 14-year-olds, if not specifically and directly. We consulted organisations that articulate and advocate for them and represent them.

**Nigel Don:** But is it fair that they represented those young people? I am not disparaging the organisations and person you referred to, but if you want to talk to 14 and 15-year-olds, should you not do so?

**Kenny MacAskill:** Obviously, Governments seek discussions with stakeholders and interest groups as a matter of course, and we have done that. We will get into difficulties if we ensure that in considering any legislation we must speak to X or Y percentage of people or people who are this, that or the next thing. We took a broad range of views. As I have said from the outset, we are still listening, and we are happy to discuss matters, but we have acted appropriately and obtained the appropriate information. The caveat is that we are still happy to listen and make changes if need be.

**Cathie Craigie:**: You say that you are happy to listen and make changes. In the evidence that we have heard, children’s organisations and church organisations strongly expressed the view that we should be consulting young people. This is perhaps the last chance we will get for a good number of years to consider and legislate in the area, so it is right that young people should be consulted. If the committee’s report suggests that the Government should extend the period between stage 1 and stage 3 to allow a consultation exercise to be undertaken, will it consider doing so?

**Kenny MacAskill:** That would cause a great deal of difficulty. I would have to speak to parliamentary business managers. If the committee wishes to extend its evidence-gathering sessions, I am more than happy for the Government to facilitate that. If you want to ensure that groups of children are brought in to give evidence, that is fine. The Government will help you with that. I cannot commit the Parliamentary Bureau or the business managers beyond that, but if that is what you want to do, because you feel that we have not done it appropriately, we will happily help you to do it.

**Cathie Craigie:**: Convener, I do not want to do that; it is the responsibility of the promoter of a bill—in this case the Government—to consult properly on the legislation that they propose. It is not the committee or the Parliament that should do the consultation. Witnesses have identified a serious flaw in the process that the Government undertook to produce the bill. If we want to take seriously the people who come along to engage with the Parliament—and, through the Parliament, the Government—by giving evidence to committees, surely we should listen to them.

**Kenny MacAskill:** Absolutely. Legislation is about checks and balances, though. That is why we have a committee structure in the Parliament.

I do not believe that the Government has got the bill wrong. I believe that we have appropriately checked with stakeholders and representative bodies, but if you think we have not, the opportunity lies with you to seek to do so. I am not prepared to undertake to extend the consultation process, but I am prepared to facilitate things for you as an individual or the committee as a whole if you wish to carry out an investigation and discussion with others to whom you think we have not spoken.

**Cathie Craigie:**: That is a disappointing answer and I am sure that other members of the committee will be equally disappointed by it.

Before Nigel Don came in, we were discussing the involvement of the Government’s education and health departments. Do they agree with the way forward that the Government proposes in the bill? Is there agreement between the justice department and the health and education departments?

**Kenny MacAskill:**: Yes.

**Cathie Craigie:**: Okay.

**Robert Brown:**: The minister will be aware of the broad thrust of the UN Convention on the Rights of the Child, the Children (Scotland) Act 1995 and the like, under which previous Governments have taken the view that proper consultation with children and young people on matters that affect them is part of the process. Such consultation is an obligation that falls on a Government, is it not? Has the cabinet secretary taken guidance from the Cabinet Secretary for Education and Lifelong
Learning about the process that she would advise should be gone through?

Kenny MacAskill: I think I have already answered that, convener. We are more than satisfied that we have gone through matters. If we have been remiss, Parliament has been set up with checks and balances. The same offer applies to Mr Brown as applies to Ms Craigie. The Government will support them in whatever ways we can if they wish to investigate matters, but having spoken to a broad variety of organisations we are satisfied that we have done what is appropriate.

Robert Brown: Does the cabinet secretary accept that there is an obligation on the Government to take on board the spirit of the UN convention—in respect of which, incidentally, a report was made recently about certain deficiencies in UK and Scots practice? Does the cabinet secretary realise that that is an obligation on the Government?

Kenny MacAskill: Well, these obligations fall upon our Government just as they fell upon previous Governments. Our position is that we believe we have consulted appropriately. If individuals or the committee believe we have not, they have the opportunity to sweep that up as part of the checks and balances that we have in a democratic society.

The Convener: We will move on to questions about the abuse of a position of trust.

Angela Constance: A few weeks ago, the committee heard evidence from Enable Scotland, which claimed that criminalising sexual breach of trust in the case of mentally disordered persons “does not seem to work”.—[Official Report, Justice Committee, 11 November 2008; c 1313.]

According to Enable, the potential application of the criminal law in such cases is counterproductive because it acts as a disincentive to the disclosure of possible inappropriate sexual relations.

Kenny MacAskill: We heard that, but we are not persuaded. Enable gave evidence that was contrary to its initial position. The legislation that we are introducing has been discussed with organisations including Enable and the Mental Welfare Commission for Scotland. We feel that some protection is necessary. These issues are a matter of balance. We have to ensure that we do not cast the net too widely and interfere with organisations and individuals who are acting legitimately and thereby jeopardise a variety of aspects of the care and wellbeing of individuals, but we have to protect those who have mental disabilities. We believe that we have struck the correct balance. That said, we will reflect on what the committee concludes at the end of its evidence-gathering sessions on whether provisions should be extended to youngsters.

The Convener: Finally, we have a question on penalties from Paul Martin.

Paul Martin: I would like you to clarify whether I am misreading schedule 1, which relates to penalties. I understand that, for the rape of a young child, the maximum penalty on conviction is life imprisonment, or a fine, or both. Is it possible that a court’s disposal for the rape of a young child could be a fine?

Kenny MacAskill: I think I heard the Lord Advocate answer that question earlier. I can only repeat that we view rape as a heinous offence, which is why we are taking action in the bill. There have been problems in Scottish society that we are seeking to address. We expect those who perpetrate rape to be dealt with severely. Gerry Maher and the Lord Advocate indicated that the general intention was that the fine should be an add-on rather than an alternative. Having checked, I can confirm that in the past 10 years nobody has been given a fine for rape. I assure you that we will check the drafting to ensure that if there is a drafting error, it will be addressed.

You have my assurance that the situation you fear has not happened and that we will not allow it to happen. However, there was merit in what the Lord Advocate said. A fine would not benefit the victim, but I could be persuaded that a compensation order should be added on to the sentence of a rich man who committed such a heinous offence and who could afford to pay. I hope that you accept the Government’s assurances that the situation that we inherited does not seem to present a problem but, for the avoidance of doubt, we will ensure that it does not.

Paul Martin: I just want to clarify what you said. Are you disappointed with the current drafting of the bill, which results in the possibility of a fine being imposed?

Kenny MacAskill: No. I said that if there is a problem or ambiguity, we will address it. The current circumstances are the circumstances that have always existed. If what you are concerned about is that previous Administrations have not addressed matters appropriately, you can rest assured that we will seek to do so. I am giving you an assurance that nobody has been fined, instead of being imprisoned, for rape since 1999. It is our intention to ensure that people who commit that offence are dealt with severely. It is our understanding that the fine was to be cumulative; it was not meant to be an alternative. There was a great deal of merit in what the Lord Advocate had to say about that, particularly in relation to compensation orders. We will ensure that there is no ambiguity about these matters.
Paul Martin: You referred to previous Administrations, but the issue is too serious for us to try to score political points.

Kenny MacAskill: Perish the thought.

Paul Martin: The point I am making is that the current law is common law. We have an opportunity in the bill to introduce minimum standards in relation to sentencing options. What I am trying to extract from you is humility about the fact that the current position in the draft bill is unacceptable and an assurance that you will lodge an amendment to it.

Kenny MacAskill: I thank you for that selfless, non-partisan interpretation. I reiterate that the Government will ensure that our people are protected, that the victims of rape are treated with dignity and respect and that the perpetrators are appropriately punished. As I said, if there is a drafting flaw—I am not qualified to comment on drafting—it will be addressed, so you can sleep easy.

The Convener: I want to do a bit of sweeping up on sections 40 and 41. Is it the Government’s intention to do away with only the common law offences that are defined in those sections?

Kenny MacAskill: Yes, that is the case as per those sections.

The Convener: Will the common law offences that are mentioned there as being taken off the statute book be used only in historical cases?

Kenny MacAskill: Yes, that is our intention.

The Convener: Can you enlighten us as to which situations are potentially envisaged under section 41?

Kenny MacAskill: I think that they will probably be matters of an historical nature—clearly, it is more for the Crown to comment on what circumstances are envisaged—that come to light once the bill has been enacted. We all know that many matters that are—thankfully—successfully prosecuted may be of an historical nature. The fact that matters occurred many years ago does not mean that the perpetrators should be able to avoid punishment.

The Convener: Basically, the bill takes a belt-and-braces approach?

Kenny MacAskill: Yes.

The Convener: I thank Mr MacAskill—

Robert Brown: Convener, if I may, I would like to catch up with the minister on a couple of equalities issues.

Section 1 uses phraseology that refers to “artificial penis” and “artificial vagina”. As you may be aware, equalities groups made some criticism of that phraseology and suggested that the reference in the English legislation to “surgically constructed” parts was more in tune. Do you have any views about that? Are you sympathetic to looking at that again?

Kenny MacAskill: Mr Brown, both you and I are legally qualified, so we are very conscious that legal draftsmanship is a technical matter. I am more than happy to leave such matters to those who are better qualified, but I am also happy to seek the views of the Scottish Government’s legal department. If the committee is persuaded that the nomenclature that is used south of the border is better, I will not have a difficulty with that unless those advising me say that there is some technical problem in Scots law.

Convener, perhaps I may advise the committee on what other matters we intend to lodge amendments at stage 2. I can confirm that they include extending the offence at section 5 to catch sexual images such as genital nudity as well as images of sexual activity; extending the offence at section 8 of administering a substance for a sexual purpose to cover circumstances in which the substance is administered by a third party albeit that the offence is committed by another; redrafting the offence at section 7 to ensure that the same approach is taken as in sections 4, 5 and 6; and amending the non-physical sexual offences at sections 4 to 7 to ensure that the purpose of such acts is subject to an objective, rather than a subjective, test. We intend to lodge amendments on those provisions as well as on other, minor, technical matters.

As I said at the outset, we view this as a non-partisan bill, so if, upon reflection, members think of other amendments—whether they relate to equal opportunities issues or to other matters—we will be more than happy to consider them. We seek to improve the law. The bill will not take us into a perfect world of how to deal with rape—that requires other things—but we believe that it will make it easier for justice to be done.

Robert Brown: That is very helpful.

Another, more general, point concerns the references to outdated phraseology in section 13—“Homosexual offences”—of the Criminal Law (Consolidation) (Scotland) Act 1995. It may or may not be appropriate to deal with that in this bill. Does the cabinet secretary have any thoughts on how the inappropriate language in that section can be got rid of? Is there any intention to consider that in a subsequent bill or to revisit it in this one? The equalities organisations made some valid points about that.

Kenny MacAskill: I am happy to consider that. I tend to think that the purpose of the bill is to build on the views of the Scottish Law Commission,
which addressed the specific problem of sexual offences in relation to ensuring that we improve on current circumstances, in which far too many people who perpetrate rape are not brought to justice.

There are other issues relating to how we deal with homosexual offences and the perception thereof in Scottish society, but I think that this is not the appropriate juncture at which to bring those in. I am not aware of any current proposals to change the legislation as Robert Brown suggests, but that is something we can discuss. Our priority in the bill is to improve the plight of the victims of rape by ensuring that those who have to go through the ordeal of court cases are treated with dignity and respect. It is hoped that some of the people who have managed to fall from the clutches of the system when justice has not been served will be brought to book.

13:15

The Convener: Have you finished, Mr Brown?

Robert Brown: Yes. I am sorry about that.

Cathie Craigie: I have a final question about consultation in general. The Government launched its consultation on the bill following the publication of the Scottish Law Commission’s report on rape and other sexual offences. It is not clear from the documents that accompany the bill who was consulted on the bill. Can you advise the committee on that? It appears that there was consultation on the Scottish Law Commission’s report, but I am unsure who was consulted on the bill.

Kenny MacAskill: I do not have a list of the consultees, but I am more than happy to write to the committee with a full list of everybody we consulted.

The Convener: That is covered in paragraphs 26 and 27 of the policy memorandum.

Kenny MacAskill: Thank you.

The Convener: I am doing your work for you, Mr MacAskill—not for the first time, I may say. I thank you and your officials for your attendance and for the prior notification of some of your intentions at stage 2. That is particularly helpful.

The committee will now move into private session for the remaining agenda items.

13:17

Meeting continued in private until 13:49.
Written submissions received by the Justice Committee

Association of Chief Police Officers in Scotland
Alexander Lennox
UK Men’s Movement
Lesbian and Gay Christian Movement (LGCM) and the Reformed Churches Caucus of LGCM
Sense Scotland
Lesbian, Gay, Bisexual and Transgender Domestic Abuse Project
The Sheriffs’ Association
Perth and Kinross Domestic Abuse Forum
Sandyford, NHS Greater Glasgow and Clyde
Family Planning Association
Engender
James Chalmers, University of Edinburgh School of Law
Brook
Equality Network
The Christian Institute
Victim Support Scotland
Stonewall Scotland
Zero Tolerance
Scottish Women’s Aid
NHS Tayside
North Lanarkshire Council
Equality and Human Rights Commission Scotland
Association of Scottish Police Superintendents
Community Planning Partners in Highland
CARE for Scotland
Jane Carmichael
Catholic Parliamentary Office
National Development Group: Working with Children and Young People with Sexually Harmful Behaviour
Scotland’s Commissioner for Children and Young People
Professor Michele Burman, University of Glasgow
Scottish Children’s Reporter Administration
ENABLE Scotland
Rape Crisis Scotland
Lifeline Pregnancy Counselling (Scotland)
Barnardo’s Scotland
Scottish Child Law Centre
Church and Society Council, Church of Scotland
Scottish Trades Union Congress
The Law Society of Scotland
Children 1st
British Naturism
Faculty of Advocates
Crown Prosecution Service
Professor Jennifer Temkin, University of Sussex
COSLA
Children in Scotland
British Medical Association
I refer to your correspondence dated 26 June 2008 in connection with the above subject, which has been considered by members of the Crime Business Area, and can now offer the following by way of comment.

ACPOS has previously been afforded the opportunity to comment on both the Scottish Law Commission Discussion Paper on Rape and Other Sexual Offences and the subsequent Report and draft Bill. It is acknowledged that the Bill presented to Parliament is broadly the same as the draft contained within the aforementioned report. ACPOS was generally supportive of these proposals, however did take the opportunity to highlight some areas of concern.

In general, the significant changes in the Bill as presented are reflective of the issues highlighted by ACPOS. That being the case ACPOS does not propose to comment on the entire contents of the Bill and relevant Policy Memorandum, but will concentrate on specific issues and any additional proposals included following the consultation process.

Sexual Activity between Older Children

ACPOS welcomes the inclusion of Section 27 in the Bill, which clearly defines as an offence sexual intercourse between children aged between 13 and 15. Furthermore, the proposal to ensure that the legislation applies equally to male and female children is welcomed.

The consequential removal of the provision for the new ground for referral to the Children’s Reporter in relation to sexual activity between older children, as contained in Section 29 of the Bill, is also therefore endorsed.

ACPOS would welcome further guidance both from the Scottish Government in relation to interagency risk assessment and information sharing, and from the Lord Advocate on the investigation and reporting of cases of underage sexual activity.

“Age Proximity” Defences

The proposal to introduce a defence in relation to a person over the age of 16 engaging in non penetrative sexual activity with an older child, provided that he or she was no more than 2 years older than the child, is supported by ACPOS. The clarity provided by the Bill as presented in providing that the age difference is measured by date of birth is welcomed as it sets straightforward, unambiguous parameters that are easily understood, not least of which by older children themselves.
It is also noted that the comments provided by ACPOS in restricting the application of this defence to those not previously charged with a like offence have been adopted in the Bill.

**Decriminalisation of Consensual Sexual Violence**

The decision to remove the proposal to decriminalise consensual sexual violence is supported by ACPOS and is reflective of the comments made during the consultation process. It is suggested that such provision would not have been entirely in keeping with the protective principles of the Bill and that the inclusion of such legislative reform would have had the potential to provide a means by which rape and domestic violence defendants could have evaded justice.

**Offences Committed Abroad**

The inclusion of Sections 42, 43 and 44 are necessary to ensure that both existing legislation in respect of offences committed abroad and new requirements in respect of the Council of Europe Convention on the Protection of Children Against Sexual Exploitation and Sexual Abuse are consistent and sufficient.

**Free Agreement**

Whilst unnecessarily complex legislation should be avoided, it is suggested that the definition of consent as ‘free agreement’, as outlined in Part 2 Section 9 of the Bill, may be too simplistic and prove to be insufficient in providing juries with guidance and direction. Expanding the expression ‘free agreement’ to include the terms ‘voluntarily’ and ‘with knowledge of the nature of the act’ would provide further clarity.

**Sexual Abuse of Trust**

ACPOS welcomes the provision in the Bill to extend the offences relating to abuse of trust from under 16 year olds to those under 18 year olds. However, persons who have attained the age of 18 but who are nevertheless extremely vulnerable within society will not benefit from the overarching protective principle the Bill endeavours to achieve.

**Harry Bunch**  
*General Secretary*
Justice Committee

Sexual Offences (Scotland) Bill

Written submission from Alexander Lennox

Section 29 of the Bill contains a “Proximity of age defence” exempting from the criminal law those who are sixteen or over who engage in certain forms of sexual activity with those no more than two years younger than themselves. This I fervently oppose.

I am a father of five children; my youngest will start college soon. I also have four grandchildren.

1. The proposal to allow underage sex appears to be contradictory to the Governments own target of reducing unintended teenage pregnancy. Allowing sexual activity below 16 is contrary to the Governments goal. And could be seen by the electorate as the introduction of paedophilia via the back door.

2. It is the duty of the Government to assist parents like myself to protect our children and grandchildren from exploitation and abuse. The Government should not undermine parents by agreeing to the section 29's “Proximity of age defence”

3. The emotional and physical differences between 14-year-olds and 16-year-olds can be extensive and yet are not acknowledged by the Bill. A considerable amount of child abuse is carried out by young people, therefore, this Bill could be a weapon in the hands of the bully, to bring further misery to those who are already victims. Children of 13 to 14 do not know their own minds especially when it comes to sex.

4. The rates of STI is already rapidly increasing amongst young people in Scotland and this Bill will only make the infection rates worse. The “The proximity of age defence” is ill conceived and has not been thought out. If the Government has any respect for parents and their children, they should show it by rejecting section 29.

As a parent, and grandfather I oppose vehemently any proposal that will put children in danger of being abused, as does section 29’s “Proximity of age defence”, also, the thinking behind this proposal is suspect indeed.

I, or my family could not support any party that puts its name to this shameful proposal.

No! to section 29 “The proximity of age defence”
Justice Committee

Sexual Offences (Scotland) Bill

Written submission from the UK Men's Movement

(NB. As there is some dispute as to whether the term “Scottish Government” is constitutionally accurate, we will use the term “Scottish Executive” throughout this response.)

“Corruptisima republica plurimae leges”. (The most corrupt state, the very most laws)

Tacitus, Annals III 27

Overview:

We protest this attempt by The Scottish Executive to codify the common law: We hold to the view expressed by the great English jurist Sir William Blackstone on changes to the common law

“And all these rights and liberties it is our birthright to enjoy entire; unless where the laws of our country have laid them under necessary restraints...so gentle and moderate...that no man of sense or probity would wish to see them slackened.”


This Executive and the previous UK Government have a history of usurping the common law with statutes that are neither “gentle or moderate” i.e. The Criminal Procedure( Scotland) Act 1995. The Sexual Offences (Procedure and Evidence ) (Scotland) Act 2002 and The Criminal Procedure (Amendment)( Scotland )ACT 2004.

The UK Men’s Movement response to this consultation cannot be properly understood without an overview of the Executive’s motives in initiating this review. We are of the firm opinion that the Executive’s motives are dishonourable and sinister, driven by political posturing and the need to appease feminist zealots in the body politic. The brief starts from a flawed premise which is based on the much-publicised(and much misrepresented) attrition rate in cases where rape is alleged. The Politically Correct theory runs thus: the conviction rate for rape complaints is low, ergo the justice system is failing complainers.

An objective view would be that attrition rates in rape cases are very low, therefore it would be prudent to investigate all the possibilities with an open mind. The possibilities are:

* The guilty are evading justice.
* There is a plague of ill-founded or criminally false accusations, aided by police procedures and by other agencies such as rape and abuse charities trawling for “victims” and manufacturing “victims” in order to secure their careers and advance their socio-political objectives.

* The justice system is working reasonably well, by examining all complaints and taking them to the correct level before the facts indicate that no crime can be proven beyond reasonable doubt.

* Any combination of the above.

The UK Men’s Movement are of the opinion that the combination theory is the most likely, with the strongest element being the existence of a plague of false or “manufactured” victims.

The Establishment view is that the vast proportion of the guilty are evading justice. We are of the opinion that some of the guilty are evading justice: his is very regrettable, but it is true of all criminal cases, and, failing perfection, is a price a civilised society must pay to avoid oppressing the innocent. The guilty escape justice in crimes that have even more heinous consequences: murderers evade justice, the drug barons who rot the moral character of entire communities evade justice, the vast majority of City fraudsters escape justice, but there are no comparable measures taken to change the laws governing these and other crimes.

Rape, however, is a useful tool for extreme feminists to advance their cause, as it is largely committed by men against women: it therefore excites special pleading to reduce the safeguards against injustice.

In the law governing sexual offences, and in other areas of law, this Executive and it’s a predecessor (and many others in Parliament) are seeking to impose an inherently unsafe bias against in criminal proceedings that reflects their instinctive totalitarianism. In concert with the UK government, they are constantly seeking to weave an ever-wider legislative net that will criminalise many people needlessly, “manufacturing victims”.

We believe that the “rape and abuse Establishment” are seeking to impose a political outcome on judicial proceedings. They seek to replace the judge’s gavel with a rubber-stamp marked “guilty”. This was the case in the failed Marxist tyrannies from which their rationale is regurgitated, and we believe that this policy is prosecuted with either malice aforethought or with a reckless disregard for the damage done to innocent individuals, the public purse and to justice itself.

Centuries of tradition, experience and sometimes brave and brilliant jurisprudence have made Scottish criminal law inherently safer than most other judicial systems.

Despite a few well-reasoned exceptions, this draft bill is an ill-advised and malevolent attempt by an over-weening State to use the blunt instrument of
the law to over-regulate complex and private human behaviour. It is State aggrandisment, ever-expanding, ever-restricting. Under the cloak of seeking to end wrongs, it seeks to remove liberties. Sexual offences are unpleasant subjects, and those who attempt to bring reason and balance to the debate attract opprobrium and are therefore few. We stress that neither author of this response have ever been convicted of, accused of or suspected of, any sexual crime in any jurisdiction. We have no axe to grind, other than defending liberty against ideologues and feminist bigots. We are well aware that degrading standards of proof in this area that is uncomfortable and difficult to champion leaves the door open to degrading standards of proof in other areas of law.

We made a much more detailed response to The Scottish Law Commission’s consultation of proposed reforms to the laws relating to sexual offences, wherein we expressed our concern over the ever-broadening definition of rape, and the State’s ever-increasing criminalisation of normal sexual conduct, (whilst de-criminalising the abnormal sexual conduct of the beneficiaries of politically correct dogma).

We believe that these proposals are the product of an unexamined populism of the hang-em flog-em variety and a body politic that is in thrall to the lobby of man-hating feminist extremists.

These proposals are inherently dangerous and are a serious attack on centuries-old liberties, which were wrested at great cost from tyrants. A jury of our peers, is the greatest defence this nation has against the excessive zeal of police and prosecutors, or the ideological zealotry of politicians.

Of particular concern to us are:

1. The stated wish to change the law and court procedures in order to increase the conviction rate.

2. Jury nobbling by the Executive.

3. The proposals over “withdrawal of consent” which are surely the product of a malign imbecility.

4. The proposals on expanding the definition of rape in terms of who penetrates who with what and where.

Although we are have many other concerns, and realise that in these proposals the devil will be in the detail, we will primarily address these four main areas.

1/ Conviction Rate

The function of the court should be to establish the truth, and punish accordingly. The Lord Advocate should only be concerned with determining the truth. Senior legal figures seeking to manufacture convictions are the
hallmark of tyrannical regimes, and have no place in a free society. In addition, (see Appendix 1), the conviction rate has been deliberately manipulated downwards over the last 20 years due to feminist pressure to have all allegations, even ones which have no evidence to them, marked as 'crimes' by police forces. Prior to this, up to 40% of allegations were marked 'no crime' by UK police forces. This kept the apparent conviction rate much higher.

2/ Jury Nobbling

The undertone running through the Policy Memorandum of the Sexual Offences (Scotland) Bill 2008 is that, somehow, the thinking and moral beliefs of jurors, and the general public, must be altered, by a re-education process, to fall into line with that of the Scottish Executive. This is fundamentally dangerous and it must be stopped. The independence of the jury system and its freedom from political pressure is a fundamental safeguard against injustice. In the history of these islands juries were imprisoned for bringing in the "wrong" verdict against the wishes of the State. We believe that The Scottish Executive (and the previous Executive) have seized upon this emotive issue as an opportunity to degrade standards of justice. The instinct of this Executive, and, we believe, the previous Executive, is to over-regulate and to criminalise "wrong-thinking".

In section 2 of the Policy memorandum they state:

“There has been widespread public, professional and academic concern that the Scots law on rape and other sexual offences is out-dated, unclear and derives from a time when sexual attitudes were very different from those of contemporary society.”

In section 2, the Executive is responding to 'public' concerns. Later, the 'public' is not thinking right and needs to be (metaphorically) sent to a re-education camp run by feminist extremists. The Executive have funded Rape Crisis so that they may produce advertising to “correct” the attitudes of the general public. What contradictory nonsense this is! This is having your cake and eating it.

To quote the much-respected jurist Clarence Darrow in debate with Judge Alfred J. Talley, Oct. 27, 1924 during the trial of Tennessee V Scopes - the “Monkey Trail “ where scopes was on trial for teaching the theory of evolution):

"Why not reenact the code of Blackstone’s day? Why, the judges were all for it -- every one of them -- and the only way we got rid of those laws was because juries were too humane to obey the courts. That is the only way we got rid of punishing old women, of hanging old women in New England -- because, in spite of all the courts, the juries would no longer convict them for a crime that never existed."
In addition, we would add the words of Lord Chief Justice MATHEW HALE (2 Hale P C 312, 1665):

"...it is the conscience of the jury that must pronounce the prisoner guilty or not guilty."

"...it was impossible any matter of law could come in question till the matter of fact were settled and stated and agreed by the jury, and of such matter of fact they [the jury] were the only competent judges."

3/ Consent

The proposal to find a man guilty of rape after he has started consensual sexual intercourse and consent is then withdrawn is the realisation of the extreme aversion many feminists have to heterosexual intercourse. It is an malign imbecility to attempt to define it in statute. What is the time scale between consent being withdrawn and cessation before a crime is committed? The moods and intensity of sexual intercourse vary with individuals and situations, from near-boredom to transcendent ecstasy of physical, emotional and spiritual sensation. Is a man in the throes of orgasm expected to desist immediately? Many would find it impossible.

How does a court determine the intensity of the act?

It is conceivable that circumstances may arise (for example when a perverse masochism manifests during intercourse that a woman may no longer consent to the sexual act. However, we believe that the old standard of strenuous resistance should be the determinant here, and that juries are more likely to take all the factors into account?

Some of these are seemingly reasonable proposals and the instinctive response would be “yes” but for the fact the concept of sexual assault covers a very wide area of human behaviour. For this reason we believe that consent should continue to be defined by the jury.

There are proposals to define the “sexual” in sexual assault as any unwanted touching where the intent was sexual.

To understand the dangers in this approach, it would be informative to recognise the atavistic impulses that govern much of our behaviour- whilst as thinking civilised individuals we can exert intellect over these impulses, it is impossible and unwise to detach ones self from them entirely.

Sexual intercourse throughout the entire mammalian kingdom (including apes and humans) has evolved as a complex ritual. This ritual conforms to patterns which zoologists classify as “social biology” and it is well documented, and well understood- it was certainly well understood by those who, over the centuries, formed the common law that governs sexual affairs in mankind.

In most species, it generally follows a pattern of display, scenting or calling or any combination of these by either the male, the female or both in order to
attract the attention of the opposite sex. This is followed by eye contact, then eye aversion, then renewed eye contact and vocalisations. The male advances, is rebuffed, and he either accepts the rebuff and desists, or he continues to advance, making incremental gains in intimacy, and receiving incremental reductions in rejection (although he may be emphatically and finally rebuffed at any point in the courtship ritual.)

Humans are little different: perfume, dance, music, all of these are human sophistication of the same behaviour. Both sexes generally follow the pattern dictated by their social biology—male advances, female rejects or makes a token of rejecting. At every point, the male risks being seen as an unwelcome suitor, as does the woman who metaphorically “trails her scent”.

The crucial importance of these inherent traits is that normally the female behaviour has the appearance of passivity (even when she is “the hunter”) but the male suitor who wishes to mate will at some point have to touch the woman in a sexual manner. Even nowadays, most women would be very uncomfortable, and would be very unwilling to overtly initiate sexual contact by making the first sexual touch: it still obtains that the man leads, and the woman, if willing, follows.

(If course, in a marriage or a long-term relationship, more women are comfortable initiating sexual contact, which leaves them prey to the same danger of criminal conviction as the man).

It thus follows that every unsuccessful wooing following the normal human mating ritual would likely cause (as expressed in question 2(a) of the Scottish Law commission’s consultation) “actings against the will of the victim” (sic). It is patently ludicrous to legislate to accept this as an objective standard. To do so would poison the human condition, and would create a more efficient tool for population control than China’s ruthlessly enforced one-baby policy. It would needlessly criminalise almost the entire adult population. He standard should be “wicked recklessness”. To do otherwise would make criminals out of the merely insensitive, stupid or callow.

For the reasons given above, we feel it would be a folly to attempt to specify all the circumstances in which a sexual assault can be committed. Juries are composed of men and women. They are not robots or computers: they have souls, they have life experience, and they can observe the demeanour of the accused and witnesses. They are not universally attached to any particular political creed or social dogma, and therefore have a much better likelihood of understanding the complex nuances of human courtship and of human offending. Justice would be better served allowing them to exercise these qualities. Feminist activists and their fellow-travellers recognise that the one weakness in their campaign to control and criminalise innocent men is a jury of our peers.

In conclusion, we feel that the very core of this matter is that the constituent element of an offence should be not “a lack of consent” but “a lack of consent where a presumption of consent was “displaying such a wicked (my italics)
recklessness as to imply a disposition depraved enough as to be regardless of the consequences” (as advanced by McDonald when considering the mens rea in murder cases where there was no intent to murder). Lord Justice General Lord Rogers in Drury v HM advocate (2001) ruled that “wicked recklessness” was the yardstick for determining mens rea.

This definition guards against unjust conviction.

We recognise, and sympathise with the view that this may on occasion make the complainer feel that he/she has been denied justice. However, the cornerstone of our justice system is that the prosecution must prove its case in any criminal case, including murder. This may on occasion allow the guilty to go unpunished, which is regrettable but the onus is upon the police and the prosecution to present the evidence, not to shift the goalposts for political ends.

Consent when one or both parties have been drinking or abusing drugs.

A man and woman both drink an equal number of drinks at a club, party, pub etc. They end up having sex. The next morning, the woman regrets the experience and decides that she had been raped. The alcohol which both consumed has had a very different effect. It has absolved the female for any responsibility for her actions of the night before but has made the man totally responsible for his actions during that same night.

This concept of dual-action alcohol illustrates the bigotry of feminist thinking which is “man evil, woman innocent” in all situations. It places women in exactly the territory that feminists claim they wish to liberate women from- poor, helpless creatures, unable to think or act for themselves in a responsible manner. It is patronising to women, but feminists will patronise women if by doing so they may demonise men.

The effect of alcohol on an individual’s judgement is entirely subjective. It can be affected by a person’s weight, when and what type of food they had consumed that day, their state of tiredness or otherwise or their metabolic rate, which can change constantly over any 24 hour period.

There is no feasible method for one party, i.e the male, being able to determine with any accuracy what state of inebriation the other party, i.e the woman, may have reached, especially not if they have been matching each other drink for drink.

To expose the man, and only the man, to the possibility of criminal charges as a result, exposes the sham of “equality” in modern political thought for what it is - misandry disguised as egalitarianism.

This issue is simply not amenable to determination by a judicial process some months later. Any attempt to define ‘Capacity’ is, therefore, completely
mistaken. The only sensible way ahead is to advertise public information making it clear that anyone who indulges in excessive drinking / drug taking and thereafter complains of a sexual offence against them may not be able to be assisted by the judicial process. It is well past time for the concept of personal responsibility for one’s own actions to be placed centre stage once more.

4/ Why Rape should be only designated as the penetration of the vagina by the penis.

Rape should be designated only as the penetration of the vagina (including the uterus) by the penis.

Modern thought (or lack of thought) has lost sight of the unique damage done by society by rape. Modern thought focuses entirely on the trauma experienced by the woman, which varies from subject to subject. Some woman suffer long-term damage, but some women who have been victims of acquaintance rape are not greatly troubled by the experience and “get over it” despite unhelpful feminist exhortations to make it their life-defining experience. Historically, the severity of punishment imposed on those guilty of rape was justified by three factors:

- The violation of the woman against her will, and the distress so occasioned.
- The damage done to the woman’s marriage prospects by her being “ruined”.
- The reckless disregard of the possibility of a child being created.

The punitive element is rape sentencing does not reflect the changes in societal values over the many centuries. Society used to regard a woman who had had sexual intercourse (willing or otherwise) prior to marriage as “second hand goods” and this hugely affected the woman’s ability to prosper through a favourable marriage. In an age, such as the present, where many women’s sexual experience is blatantly promiscuous, this no longer obtains, thus the first and second factors above are generally much reduced.

However, we believe that rape should still be viewed as an offence that is uniquely damaging because of the third factor above, the reckless disregard of the possibility of a child being created as a result of criminal wickedness. This is commonly ignored in deliberations about rape, but in our view it is the single most important factor to consider. The historical notion that a child should be conceived in an act of love between a man and a woman married to each other is still the best template by far for raising children. Risking the creation of a child through rape is injurious to the woman, to the child if one be conceived, and to society overall. Historically it was much more injurious: the child, who would have been a bastard born in an age where illegitimacy was a huge disadvantage. It would have been conceived as a result of a wicked criminal act by one parent against the other. Given that the father would have been executed or jailed, the child was unlikely to prosper. The mother’s lot...
would have been a miserable one indeed, with her chances of her material well being greatly affected.

However, even today, in an age of social security provision and law sexual morality, this remains extremely injurious, if less so than in centuries or even decades past. . If the rape victim is not on the contraceptive pill, she must endure months of torment until she knows whether or not she is pregnant. If her moral position is one of opposition to abortion, her distress is greatly exacerbated. If she accedes to an abortion, she may be troubled by guilt. If she has the child, then according to the research into single-mother raised children, her child is statistically much more likely to have many more problems than a child raised in a normal family, such as a greater likelihood of poor educational and employment achievement, a much greater likelihood of substance abuse and other mental health problems, greater likelihood of physical health problems, greater risk of self-harm and suicide, greater risk of being seriously abused, and many other negative outcomes, Given that this greater incidence of negative outcomes for singe-mother-raised children was conducted from random samples, the likelihood is that they will be even higher among children raised by single-mothers who became so as a result of rape.

(Single mothers are the largest by-relationship group to inflict serious abuse on children—(Dr. Patricia Cawson et al (NSPCC report “The Incidence of Child Maltreatment in the UK, 2001) and many others.) The mother’s relationship with the child, and her love for the child, may be further negatively influenced by the circumstances of its conception.

For this reason, "the reckless disregard for risking the creation of a forced pregnancy out of a wicked criminal act" we believe that rape should be a unique crime within the range of sexual offences and it should attract a uniquely serious punishment.

This does not preclude added weighing been given in sentencing rapists to the other subjective factors quoted above that reflect the injury done to the victim.

**Additional Areas of concern**

*Sexual Offences (Scotland) Bill 2008*
*sections 43 & 44.*

It strike us that, if the concept of the nation state is agreed, then the jurisdiction of Scotland (or UK) ends after one has left the sovereign territory and / or the territorial waters surrounding Great Britain. It is somewhat ironic for a party that campaigns for an Scottish independent Scottish state should seek to reduce it’s independence and to infringe the sovereignity of other nations. Mr McAskill appears to think his jurisdiction to be without limits.
The exception to this concept is extradition, which traditionally applied only when a crime contravening UK law had been committed abroad against a British national.

These sections are lacking in legality and rationality.

sections 71-76

These sections are entirely flawed.

'Policy Memorandum'

Some parts of the accompanying Policy Memorandum attached to this Bill we find disturbing. i.e sections 10, 12 15, 16.

It seems that further efforts are to be made to train both the general public and jury members on the need to think the "right" way i.e. the Scottish Executive's way. This is such an affront to the very idea of a fair trial that we would like to think that MSPs have already railed against Mr. McAskill on this very point.

Democracy involves listening to the wishes of the people. Here, the Scottish Executive proposes funding a feminist pressure group to indoctrinate the public. It is clearly expressed in the Policy Memorandum that this is intended to influence the behaviour of potential jurors in rape cases. This is no more than 'jury nobbling' a bit more sophisticated than gangsters bribing or terrorising jurors, but no less dangerous to justice. It should be condemned outright.

APPENDICES

Appendix No. 1

Home Office Research Study No.196, (1999)

'A Question of Evidence? Investigating & Prosecuting Rape in the 1990s'.( by Harris & Grace)

This document echoes and, indeed, strengthens many of the points made earlier.

The Research Study No.196 shows

1/ Two thirds of defendants reaching Crown Court are convicted of some offence. Just over one quarter were convicted of rape or attempted rape.

2/ Lawyers and judges, when interviewed for the report hinted that juries were reluctant to convict in cases where both parties were acquainted / intimate previously.
3/ Half of all detected crimes were NFA-ed (No Further Action). The most common reasons being that the complainant withdrew allegations for insufficient evidence.

4/ The actual number of ‘stranger’ rapes has not changed in 15 years. The increase is in the area of acquaintance/intimate rape allegations.

The % figures decline (‘attrition rate’) from allegation to conviction as follows (starting at 100% for all allegations),

100% - all,
75% - crimed, i.e. police think a crime happened. Thus, police believe that the other 25% are false/malicious allegations.

64% - suspect detected.

31% - defendant charged.

23% - CPS prosecute.

21% - court proceedings.

13% - conviction (of some offence).

6% - conviction is for rape.

These figures present a very different picture from the headline grabbing propaganda that ‘Only 6% of rapists are convicted’. Firstly, a full 25% of allegations are discounted by the police. Only 64% of all allegations result in a suspect being found. It is obvious that, without a suspect, no further progress can be made. The CPS, within this document, reveal that they have had to drop proceedings in many cases because the complainant will not testify or there is insufficient evidence.

Given that 13% out of the 21% of defendants entering court proceedings are convicted of an offence, this is a successful prosecution and conviction rate (of those entering a trial as ‘innocent until proved guilty’) of 62%.

H.O. 196 contains many other gems of information.

Page 26/

‘With most other crimes it is clear that a criminal act has occurred’ (Note: this echoes comments made by UKMM in earlier response)

Page 35/

‘...’ the filtering of cases by the police and CPS was less rigorous than in the past.’

‘...you used to get only the strong cases going to court, whereas now ..you’ve
got far more weak rapes going to court than any other category of case” (Barrister)

“What is happening now ... is that a very much larger proportion of cases of rape now depends on one person's word against another's.” (Barrister)

'Nevertheless, judges and barristers interviewed did not believe that juries have too much problem with rape trials. There was a view that the prosecution prefers to see a jury made up predominantly of men as it was thought that women tend to be judgemental of their own sex and might have less sympathy for the complainant'.

An analysis of Home Office figures for rape allegations (1996) shows up the following:

25% of allegations were evaluated as false or malicious by the Police or else the complainant withdrew the allegations

39% of cases were where both parties were acquainted, and the circumstances were ambiguous

7% of cases resulted in an acquittal.

There was a fall in conviction rate (i.e. from 100% of total original 'allegations') of 24% down to 9% from 1985 to 1997. This is in inverse proportion to the rise in acquaintance rape allegations from 1300 in 1985 to 5,000 in 1996.

False allegations may well run much higher than the 2% quoted by Rape Crisis. Home Office figures suggest 25%. USAF figures showed 60% false allegations.

The FBI investigated hundreds of men who had been convicted and jailed. One third of them were proven in the FBI study to have been innocent using DNA tests.

The headline conviction rate used for rape is inaccurate and is calculated on a different basis for other crimes. This is a partisan misuse of statistics.
Pressure from feminists caused the police to alter their basis for recording rape. All alleged rapes are now ‘recorded’ crime rather than ‘reported’ crime. This has led to an automatic fall in the ‘apparent’ conviction rate.

The greatest rise in rape allegations is for ‘acquaintance’ rape. Many of these allegations are impossible to determine judicially and it would be therefore be unsafe to convict in many such allegations.

*Appendix No.2*

Why Do Women Lie About Rape?

A U.S. Air Force study, "The False Rape Allegation in the Military Community"(1983), by Dr. C. McDowell et al. investigated 556 cases of alleged rape, and found a 60% rate of false rape accusations! As part of the study, women who were found to have made false accusations were asked "Why?"

*Motivations Given by the Women Who Acknowledged They Had Made False Accusations of Rape (See Table below)*

<table>
<thead>
<tr>
<th>Reason</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Spite or revenge</td>
<td>20</td>
</tr>
<tr>
<td>To compensate for feelings of guilt or shame</td>
<td>20</td>
</tr>
<tr>
<td>Thought she might be pregnant</td>
<td>13</td>
</tr>
<tr>
<td>To conceal an affair</td>
<td>12</td>
</tr>
<tr>
<td>To test husband's love</td>
<td>9</td>
</tr>
<tr>
<td>Mental / emotional disorder</td>
<td>9</td>
</tr>
<tr>
<td>To avoid personal responsibility</td>
<td>4</td>
</tr>
<tr>
<td>Failure to pay / extortion</td>
<td>4</td>
</tr>
<tr>
<td>Thought she might have VD</td>
<td>3</td>
</tr>
<tr>
<td>Other</td>
<td>6</td>
</tr>
</tbody>
</table>

Total 100

The study found that most false accusations are "instrumental" -- they serve a purpose!

Paul Duddy

UK Men’s Movement
Introduction
1. LGCM and the Caucus welcome the invitation by the Committee to make comments on the draft Bill. We do not include in this submission the basic information about LGCM and the Caucus which was given in our response to the earlier consultation, dated 11 March 2008.

Overview
2. We welcome the main purposes of the Bill, and in particular the principle that the terms of the law should be neutral as regards both gender and orientation. Its passage will mark a milestone in establishing legal equality for those of differing orientations, and so also for those who, like ourselves, believe in such equality not only before the law, but before God.

3. However, there is often a wide gap between the principles of the law, and the extent to which those are honoured and accepted by society at large. People with a minority orientation often rightly fear that they will not be regarded as equal if they are open about their sexuality. In particular, this fear affects young gay and lesbian folk, including those still at school.

4. Paragraph 16 of the Policy Memorandum rightly endorses an intended public information campaign designed to help address public attitudes towards rape. We strongly recommend that that campaign effort should be widened or complemented, so as to drive home into the public mind the essentials and implications of the new law as a whole, including, but not restricted to, the principle of equality as regards same-sex and different-sex conduct. This campaign, like that on rape, should extend to pupils at secondary schools, regardless what authority is running them.

Rape, sexual assault and related crimes
5. We believe, in general, that the main purpose of those committing rape or other non-consensual assault is the humiliation and distress of those attacked, and NOT the sexual gratification of the actor (except insofar as that gratification is indissolubly linked, in that person’s psyche, to violence). This has been so throughout history, from ancient Egypt through Biblical Sodom to areas of conflict like Darfur in the present day.

6. But whereas this purpose or motive is specifically recognised in Clauses 4 to 7 and in the comparable provisions elsewhere (eg 17 to 19) of the Bill, it is not cited in Clauses 1 to 2. We think these should be re-
examined, and redrafted so as to recognise the alternative (and, to us, more central) motive of humiliation for both rape and sexual assault.

7. However, even with the double motivation already cited in some Clauses, we wonder whether these two provisions as they stand cover the field adequately. We have in mind the possibility of conduct which does not confer immediate sexual gratification, nor involve coercion, but is designed to “soften up” the other person(s) involved so as to entice them, in sexual negotiation, to consent eventually to intercourse at a later stage. (For children this is sometimes called “grooming” but that is not a very satisfactory term.) A good example of where this might arise is in Clause 6 (“Communicating indecently etc.”). Could not a defence be set up against a charge under that Clause that the defendant had no prospect or expectation of obtaining sexual gratification? If so, perhaps the matter could be cured by inserting “immediate or later” before “sexual gratification” wherever those words occur in all the relevant Clauses.

8. In the context of this Clause, we note that e-mail messages would presumably be caught by “verbal”, and drawings - however sent - by Clause 5.

9. Definition of “rape”. We have followed the argument that “rape” should involve only penetration by the penis - which is the case also in the parallel Sexual Offences Act 2003, applying elsewhere in the United Kingdom - but we do not agree with it. There are two reasons for maintaining a wider definition which involves penetration by other instruments than the penis. First, the humiliation and degradation which we maintain is the prime purpose of non-consensual invasion is just as destructive of the psyche of those invaded, whatever the means. Second, the law as now proposed implies gender discrimination. It is not only men who seek to humiliate and hurt in this way.

10. If, however, those arguments are not accepted by the Committee, we still disagree that other non-consensual penetration is appropriately dealt with by sweeping all other types of coercive behaviour into a single category of “sexual assault”, as in clause 2. This fails to recognise the serious and humiliating effects to the sufferer of forced penetration by other means, and in particular by objects such as bottles, broom handles, dildos etc. The penalties laid down for offences under Clause 2 of the Bill (in Schedule 1) could be as little as 12 months’ imprisonment, or a fine, or both, if such offences were tried summarily. If it cannot look again at the wider definition of “rape” which we advocate, the Justice Committee should instead consider creating a separate offence of “Assault by Penetration”, and distinguishing that from other (lesser) types of sexual assault, thus following the idea incorporated in Sections 2 and 3 of the non-Scottish Act.

11. Sexual exposure. It is not clear why the same rules are not to applied to the deliberate exposure of the breasts, buttocks etc. in circumstances where the
intention, or recklessness, is the same as proposed under sub-Clause (1).

12. Administering a substance (Clause 8). This only covers cases where the purpose intended is “stupefying or overpowering” the person concerned. But what about such actions as person A deliberately causing B to take sildenafil, tadalafil, or another drug intended to provoke sexual arousal and performance?

Consent and reasonable belief
13. We support the general approach in this Part of the Bill, in particular in Clauses 9 to 12. However, we note that no attempt has been made to tackle those situations when consent has been obtained by promises or inducements of a direct kind. For instance, if A procures “free consent” to intercourse on the promise of a benefit, and during the act makes clear to B (or B suspects) that this will not be exactly what the latter expected, and B then withdraws consent, what offence is committed, and why? If, in those circumstances, an offence is committed under Clause 11 (4), is the law not then in effect encouraging the offering and substantiation of benefits, ie prostitution and the practice of venial or “casting couch” sex? These are murky waters. We understand that the Committee intends to revert to the issues surrounding “prostitution”, and what that term actually means, in a second stage of its work. We look forward to having the chance to comment on its intentions at that stage.

14. We agree with the solution proposed for the treatment of cases where B has been or become so intoxicated as not to know what is happening, provided the word “only” remains in Clause 10 (2) (a) of the text.

15. We deal below with the vexed issue of “consent” and sado-masochistic practices.

Children
16. Subject to any drafting carry-over from our earlier comments, we support the provisions in Part 4, with the caveats below. In particular we agree with the division of children into “young” [below 13] and “older” [13 to 16] groups, and with maintaining the illegality of under-age sex, subject to the exceptions and defences given. However, we feel some unease at the risk of any touching, by anybody, of any child being adjudged “sexual” in retrospect by the courts. There is already wide concern about the withholding of perfectly normal and necessary expressions of affection - completely non-sexual in form and intention - affecting adversely the social and personal growth of children, and, indeed, the attitude of adults to each other (eg parents insisting on collecting their own child from school instead of allowing him/her to share lifts with other parents).

17. Sexual activity between older children. The main issues arising here are dealt with in paragraphs 126/127 of the Policy Memorandum and Clause 27 of the Bill. These exempt sexual conduct between older children (over 13 and
under 16), other than penetrative sex (including penetration by an object). We do not feel that the Committee has been entirely frank in describing the relevant conduct in relatively innocent terms such as “touching” and “kissing” or “cuddling”. It would have been wiser to say frankly that this would legitimise oral sex (vulgarly known as “blow jobs”) and masturbation of the partner, both of which are quite clearly covered by the drafting.

18. For our part, we should want to see some public debate about this. We have two reservations about oral sex:

(a) there may still be a risk of sexually transmitted disease from such practices. NHS Direct lists ten S.T.I.s which can be passed on to partners during vaginal, anal and oral sex. So we ask the Committee to review the evidence with the appropriate medical experts. Preserving the personal sexual health of children seems to us an adequate justification for seeking to discourage risky behaviour through the law.

(b) secondly, in different-sex relationships - although there are no statistics on this, so far as we know - it is the girl who is usually expected to perform fellatio on the boy, and this can link up with views, thus reinforced for both parties, of male dominance and female submission.

We see no similar difficulties about legalising behaviour in the circumstances described which involves masturbation.

19. Defences. Although it maintains the existing position, we are not happy that a defence under Clause 29 (1) is ruled out simply on the basis that the alleged perpetrator has previously been “charged” by the police with a similar offence. We believe that this does not protect the basic freedoms of the citizen. The Clause should add wording such as “unless he has subsequently been acquitted of that charge”.

20. Marriage and civil partnership. We agree with the Committee’s attitude as in paragraph 137 of the Policy Memorandum. We pointed this out ourselves in our earlier response.

Abuse of position of trust

21. These provisions adequately cover the protection of children and mentally disordered persons. But they do not include abuse of the elderly, eg in care homes or by carers. What provision does the Committee consider appropriate for this category of the vulnerable?

Sadism and masochism in sexual relationships

22. The Committee takes a look at this question, but dismisses any provision to legitimise consensual sexual violence (paragraphs 170-171 of the Policy
Memorandum). We do not agree that all such behaviour should be subject to legal penalty; but we do believe that the circumstances in which it is permitted should be very tightly defined. The proposed drafting by the SLC could be criticised as too wide. We would propose wording on something like these lines - there are of course various ways of expressing this:

"Where a person A freely consents to the infliction of pain or restraint upon himself, expecting this to lead to or result in sexual gratification, and such pain or restraint is inflicted with his free consent by another person B with a similar expectation, no offence shall have been committed."

Note that this restricts what is permissible to a situation where both parties expect sexual gratification (thus not legitimising, for instance, relationships based on purely mercenary considerations); that the infliction of humiliation, distress etc. is not legitimised as a purpose; and that third parties could not legally play a part. Note also that the provisions on the withdrawal of consent (Clause 11(3)) would continue to apply. Obviously the other requirements proposed by the SLC (over age 16), and that the treatment involved “is unlikely to result in serious injury”, should be included.

23. In this context we draw attention to the views and recommendations of the Spanner Trust, which represents those of all orientations interested in sado-masochistic sex. If the Committee has not sought these and taken them into account already, we recommend that they do so now, before finalising their proposals for legislation.

24. We would expect the provision which we suggest to strengthen their life together for those couples who believe such conduct is an essential part of their relationship, including within marriage or a civil partnership. We do not think it should encourage either rape or domestic violence, provided its terms are strictly observed and understood.

Conclusion
25. That brings us back to our first point, in paragraph 4 above, ie that when the law is enacted, a major campaign of public education should be carried out on all aspects of the revised law. This should lead to its greater observance, and hence to potential savings from the reduced commission of any of the revised offences which arise from ignorance of the law, and their prosecution.

J. L. F. Buist, C.B.

LGCM
Introduction

Sense Scotland is a leader in the field of communication and innovative support services for people who are marginalised because of challenging behaviour, health care issues and the complexity of their support needs. The organisation offers a range of services for children, young people and adults whose complex support needs are caused by deafblindness or sensory impairment, physical, learning or communication difficulties. Our services are designed to provide continuity across age groups and we work closely with families and colleagues from health, education, social work and housing. This breadth and depth of approach to service delivery helps us take a wider perspective on the direction and implementation of new policies.

General comments

We considered the proposed Bill with the interests of deafblind people with additional support needs in mind, in particular from a perspective of information giving and learning. Many people who are deafblind have some useful sight or hearing, some do not. It is not yet clear whether the provisions of the Bill will require changes to any arrangements we currently have. What is clear from the outset, is that it is almost impossible to give sexual health information to some of the people we support under current legislation. This is primarily because of the tactile nature of communication with them; a general lack of formal language; the impossibility of fully understanding new information or concepts without experiencing them and therefore difficulties with consent or free agreement.

In our current work on relationship and sexual health matters, we consult and plan with relevant external professional advisers, eg psychologists and care managers, our own senior managers, key support staff and, where possible, the person concerned. Family members may also be involved. In all respects, it involves ethical consideration of each individual circumstance.

We have not commented broadly on the Bill but have focused on those parts we feel may benefit from clarification or which we think may have a detrimental effect on providing information to the people we work with.

Specific comments

Section 2, paragraph 2(b). From this it is quite clear that any hands-on teaching is likely to be impossible, unless there is free agreement from the person involved.
Sections 5 and 6. These are potentially problematic. In teaching situations we might use line drawings of sexual activities, involving "imaginary persons". If the information is new, we cannot say for certain that the person freely agrees beforehand to looking at it though we can take a view on his or her willingness to participate in the session generally. We also cannot be certain beforehand that such an activity would or would not lead to distress or alarm. It is not clear if provisions would differentiate between deliberate and unintentional distress or alarm.

Sections 9 and 10. In general, we think that consent issues have been dealt with reasonably but we are concerned that our current practice of planning with others where the person is unable directly to consent may be outlawed.

Section 13. This is a difficult area for us and leads to a real Catch 22 situation, especially for congenitally deafblind people. It would be impossible to have their consent to being given information about their sexual health using tactile communication if the information is new to them. Congenitally deafblind people, or deafblind people with additional support needs may be covered by the definition of ‘mental disorder' because of learning disability.

Section 35. This may cover all of our support and, indeed, becomes helpful in relation to the exceptions noted in Section 39. What is not clear in this Bill is how ‘sexual activity’ is being defined. Rape, sexual assault and sexual coercion are all clearly defined.

Section 39. In many ways this is a helpful section because it provides exceptions for our teaching strategies. However, it only relates to Part 4 and 5 and seems to be aimed at allowing sexual health education to take place for teenagers. This is similar in the English Act and is referred to in the SLC report from December 2007.

Case Studies

These are heavily edited case studies giving a brief pen picture of how some people have been learning about sexual health matters.

1. 17 years old male; deaf; significant visual impairment (but can access visual material)
Two staff have supported this young man’s learning over the last year in the following topics: gender differences; body changes at puberty; behaviours appropriate in public and private (eg bathing and nudity); wet dreams.

The learning has been supported with line drawings, cartoons, PowerPoint presentations, Sign Supported English discussions and a latex model body part. There have been images of clothed and naked people of all ages, images of body parts, images showing the sequence of events leading to nocturnal emissions and this has been supported with discussions and demonstrations using a model.
The young man is also asked before, during and after each session what he is thinking, what questions he has, what topics he would like to explore next time.

**Potential difficulties with new legislation:**

Section 5, Section 13 and Section 35—when we show the young man images of naked people, we tell him beforehand that we will show a picture of a person with no clothes on; he appears to agree to this, but we cannot be absolutely certain that he is consenting to be shown this image, if he has never seen one before how does he know what he is consenting to? Section 39 could possibly allow us to act because we are clear that the purpose is educational, but may not help us get round the issues noted in Section 5 and 13.

2. **25 years old male; deaf; learning disability**

We supported this young man’s learning on: gender differences; puberty; relationships and sexual intercourse.

This learning has been supported with line drawings and BSL and gestural discussions. There have been images of clothed and naked people of all ages, images of male and female genitalia and discussions around sexual intercourse using sign language. (No images used to support learning about sexual intercourse.)

The same issues highlighted in the first case study arise.

3. **54 years old female; deafblind (no useful residual vision or hearing)**

This woman was potentially harming herself by rubbing her genital area on hard surfaces in her bedroom and bathroom and using various objects. A decision was taken to purchase her a vibrator. Staff were clear that they would only need to make this available to her, show her how to switch it on and she could decide how to use it herself with no more support from staff.

**Potential difficulties with new legislation**

Section 2, paragraph 2 (b) indicates that we could never engage in hands-on teaching support without the other person’s consent. This woman could not give free agreement to an activity of which she has no prior knowledge.

4. **Fully deafblind people**

We work with a number of fully deafblind people who do not understand much about their sexual autonomy. All of their communication is tactile, hand-on-hand or coactive signing. If we cannot be clear that someone is consenting to being touched in what may be construed under this Bill as a sexual way, some deafblind people who rely on tactile communication can never be given adequate information about sexual health. While that may not sit comfortably
with us, we could not contemplate the alternative – that we would be sanctioning potential sexual abuse. It does mean there is a world of sexual relationships that might be unavailable to some deafblind people. This is not a new situation nor does the Bill necessarily make things any worse than they are just now but while it clarifies very well the general situation it does nothing to clarify the safe provision of information to those who communicate by tactile means.

A lot also may also turn on the meaning of “sexual activity” and “sexually”. The Bill highlights in many places that a behaviour is sexual if any reasonable person would think it so. In our original submission to the consultation which preceded this Bill, we made the point that while we generally agree with this idea, not many members of the general public will have a good understanding of dual sensory impairment and thus may not appreciate the communication challenges involved in providing information. None of our teaching or support is considered “sexual” or as “sexual activity” but is information-giving about sexual matters.

Paul Hart
Principal Officer (Practice)
Justice Committee

Sexual Offences (Scotland) Bill

Written submission from the Lesbian, Gay, Bisexual and Transgender Domestic Abuse Project

About the LGBT Domestic Abuse Project

The LGBT Domestic Abuse Project is working to increase the visibility and awareness of lesbian, gay, bisexual and transgender (LGBT) people’s experience of domestic abuse. We are working with mainstream service providers to enable them to support LGBT people experiencing domestic abuse with the aim of ensuring that no matter what service they access they will receive a good response.

The LGBT Domestic Abuse Project works closely with a wide range of domestic abuse organisations, LGBT organisations and others, and is hosted by LGBT Youth Scotland.

Introduction

Rape and other sexual offences affect everyone in society and often have disastrous consequences for the health and wellbeing of the victim. At the same time, there are very significant problems with the law and our legal culture in this important area, resulting not least in the outrageously low conviction rate for rape.

Lesbian, gay, bisexual and transgender (LGBT) people’s experiences of rape and sexual offences have often been hidden and unrecognised due to the compound effect of underreporting of sexual offences and underreporting of crime by LGBT people generally; historical distrust in the police and the criminal justice system on the part of LGBT victims of crime has aggravated the problem in the past.

Over the last decade, police forces have worked with LGBT communities and LGBT organisations to change the face of policing and to address some of the perceptions that presented barriers to LGBT people’s reporting of crime and engaging with police and criminal justice agencies. At the same time, there has been momentous legislative change to remove discrimination from the statute book and key public services’ practice, and to promote equality for all.

We very much welcome the Sexual Offences (Scotland) Bill as an important step towards tackling the last remnants of discrimination on grounds of sexual orientation and gender identity in this important area of law, and we broadly support its provisions. The new legislation will acknowledge the reality of abuse, sexual assault and rape in same-sex relationships and offer increased protection to the victims of such crimes; critically, it will also give those victims a language to adequately describe what they suffered. It will further remove unjustified and unjustifiable gender differences in the treatment of children and young people who were subject to rape and sexual assault.
There are, however, some issues with the bill that we feel should be addressed by the committee to further improve the bill and increase its positive impact on Scotland’s LGBT population. We will address these issues in turn.

**The statutory definition of consent & mens rea**

We strongly support the statutory definition of consent; given the many damaging myths surrounding rape and sexual offences, it is essential that the law provides as clear a framework as possible as to what is meant by consent and the notion of free agreement is the right one for that statutory definition.

The inclusion of a list of situations where consent is not present on the face of the bill is to be welcomed; however, we believe that the reference to a notion of advance consent in section 10 (2) (b) of the bill fundamentally contradicts the new statutory definition of consent as free agreement. In order to truly constitute free agreement, it must be possible to withdraw consent at any time. The current wording of the section undermines the very concept of free agreement and blurs the bill’s otherwise clear and very important social message.

*In section 10 (2) (b), delete from ‘in circumstances’ to ‘that condition’*

We very much welcome that the bill replaces the unhelpful notion of ‘honest belief’ that consent is present with a requirement for the accused to prove a reasonable belief that this was the case. This change of approach towards establishing mens rea on the basis of more objective criteria may help chip away at the substantial damage that the use of so-called ‘sexual history evidence’ is currently inflicting on victims of rape and other sexual offences. If a reasonable belief that consent is present has to be established in Court, a defence relying on previous sexual activity of the accused with the complainant or anyone else will be more difficult to lead, and this may begin to address the very significant justice gap that the changes introduced by section 8 of the Sexual Offences (Procedure and Evidence) (Scotland) Act 2002 unexpectedly failed to close. However, this change of approach, although important, is not sufficient to resolve this legal and social crisis and the outcomes of the Scottish Law Commission’s recent commission regarding the law of evidence in sexual offences trials must be built into the new legislation as soon as the SLC’s findings are available.

**Removing discrimination on grounds of gender, gender identity, and sexual orientation**

The Scottish Government’s stated intention is to remove discrimination on grounds of gender, including gender identity, and sexual orientation from sexual offences law. We believe that it is a highly laudable intention to close the protection gap for LGBT people and we broadly agree with the Bill’s proposals to that end. It is also an intention that is backed up by human rights imperatives and indeed human rights law, although we shall not rehearse the
now well-known arguments here; suffice it to point out that the Scottish Government is under a duty to provide protection from crime to all of Scotland’s people on an equal footing and this Bill significantly improves the position of Scots Law in this regard.

However, there are two discrimination issues that need further attention:

Firstly, we feel very strongly that there needs to be an offence of ‘rape with an object of a person’s anus or vagina’ of equal weighting and severity to rape. Others have been very clear about the need for such an offence, not least Rape Crisis Scotland, whose evidence we commend to the Committee. There are a number of reasons why such an offence should be included in the new legislation. There should be a focus on the victim’s experience of what may have been a brutal and traumatising sexual assault, rather than on the question whether the non-consensual penetration was done with a penis or an object.

We consider that not introducing this offence will leave a protection gap in sexual offences law that disproportionately affects lesbian, bisexual and some transgender women. There is currently a lack of awareness of domestic abuse and rape in same-sex relationships, and this would appear to be particularly the case for lesbian relationships. Consider this quote from a participant in Stonewall’s recent lesbian and bisexual women’s health survey:\footnote{1}{Ruth Hunt & Dr Julie Fish 2008, Prescription for Change: Lesbian and Bisexual Women’s health Check 2008.}

\emph{I think same-sex rape between women needs a lot more attention – as a survivor of a woman-on-woman rape, I was terribly let down by both the lack of services and awareness and had to cope largely on my own - Hunt & Fish 2008, p12}

Stonewall’s survey suggest that about 1 in 15 LB women have been forced to have sex against their will. However, an academic study from 2003 put the figure at around 18\%.\footnote{2}{Laurie Henderson 2003, Prevalence of Domestic Violence among lesbians and gay men: p8.} Regardless of the exact figures, we believe that it is crucial that the victims of such offences are given a language to adequately describe what happened to them – an often painful, violent and degrading assault, often with dire consequences on the victim’s life. Where penetration is involved we believe that this would best be achieved by introducing an equivalent offence of ‘rape with an object of a person’s anus or vagina’ that will be heard in the High Court.

Add a separate offence of rape with an object of a person’s anus or vagina that is equivalent to section 1 (rape) in terms of procedure and sentencing.

Secondly, we believe that the language used to describe genitalia that have been created in the course of surgery, such as gender reassignment surgery, in section 1 (4) of the Bill is inappropriate. We understand that the term ‘artificial’ is not generally used to refer to surgically reconstructed parts of the body but usually refer to prosthetic parts made of plastic or other materials.
Section 79 (3) of the Sexual Offences Act 2003, which reformed sexual offences law in England and Wales omits such language and its clarity of meaning in this respect would appear to be untainted: ‘References to a part of the body include references to a part surgically constructed (in particular, through gender reassignment surgery).’

In section 1 (4), delete from ‘an artificial’ to ‘having’ and insert ‘a penis that has’ [been created in the course of surgical treatment]; further, in section 1 (4) (b), delete ‘an artificial’ to ‘having’ and insert ‘a vagina that has’ [been created in the course of such treatment] ‘together with a vulva that was so created’

We hope that the Committee finds our comments and suggestions useful. We will be delighted to discuss these and other related issues further with the Committee in the near future.
Justice Committee

Sexual Offences (Scotland) Bill

Written submission from the Sheriffs’ Association

The Sheriffs’ Association welcomes the opportunity to consider the terms of the Sexual Offences (Scotland) Bill.

The Bill reflects the Scottish Government’s policy objectives in this area and the Sheriffs’ Association would therefore not seek to comment in respect of such matters.

Four aspects of the proposed Bill may, however, have practical implications for the administration of justice and accordingly require comment.

Firstly, the language used in the drafting of the Bill is infelicitous and lacks clarity, simplicity and brevity. The presence of these features facilitate interpretation and use of legislation by practitioners, judges and interested parties. Their absence can only hamper easy access to the legislative intention and thus foster uncertainty and further court procedure.

Secondly, it is proposed in clause 27 to introduce a new offence criminalising both children between 13 to 15 taking part in consensual penetrative sexual conduct with each other.

Whilst the policy implications of such a proposal are outwith the scope of this response, it is to be noted that it remains unusual for children to be the subject of prosecution in the sheriff court. Those who do appear before a sheriff currently do so because it is alleged that they have committed an extremely serious crime.

Clause 27(4) will make both children guilty of an offence in respect of their consensual behaviour for the first time. Evidential difficulties are likely to result where both children are prosecuted for a consensual act. If both children face charges, warnings against self-incrimination will require to be given to them both. If one is prosecuted and the other gives evidence for the Crown, the child giving evidence for the prosecution will have immunity from prosecution.

The only defence available to a child under 16 ("child A") who sexually penetrates another child ("child B"), is that child A thought that child B was over 16. The only defence available to child B who is penetrated in a consensual act is that child B thought that he or she was being penetrated by a person over 16. It will therefore be a defence to a charge under clause 27(1) and (4) that rather than having consensual penetrative sex with another child, the child thought that he or she was having consensual sex with an adult.

Such children will be vulnerable witnesses and accordingly will bring into play the protective provisions contained within the Vulnerable Witnesses (Scotland) Act 2004. Section 271F of the Criminal Procedure (Scotland) Act 1995 as amended by the 2004 Act extends its protections to a child accused. Accordingly, child witness notices will require to be lodged by the prosecutor prior to trial specifying appropriate special
measures to be taken at trial. Thus, evidence of the accused or child witness (depending upon the stance taken by the Crown) could be taken by commissioner, or by live television link; screens could be used; supporters could be in court with them; prior statements could be used as a means of giving evidence. Courts are likely to require to be cleared of the public to allow evidence to be led in whole or part. Trials will be lengthy given that consideration may have to be given to breaks in evidence commensurate with the age and vulnerability of the accused and the effect of other special measures. Are both children to be co-accused or are they to be charged on separate complaints? If co-accused, how do the amendments brought in by the 2004 Act affect their presence in the dock together? The implications for court business may be substantial. The chance of a conviction may be slim.

Once convicted, sentencing options may be limited and in any event the sheriff may require advice from the Children's Hearing prior to sentence. It should be noted that such children on conviction will be subject to notification requirements in respect of the so-called Sex Offender's Register – see Schedule 3 to the Sexual Offences Act 2003. At present the sheriff would have no discretion as to whether or not to make the child subject to notification requirements. It is prescribed within the 2003 Act. Within three days of conviction of a listed offence the child, or his or her parents, are bound to notify police of the child's name, date of birth, address, passport details etc., and any change thereto and on sentence the length of notification period prescribed in the legislation is specified. Breach of the notification requirements is of itself an offence.

Thirdly, clause 29 of the draft Bill introduces a defence in relation to offences against older children but, in terms of subsection 29(2), provides that the defence will not be available if the accused "has previously been charged by the police with a relevant offence".

This, to an extent, mirrors the restrictions on defences to charge of intercourse with a girl under 16 currently contained within section 5(5) of the Criminal Law (Consolidation)(Scotland) Act 1995 which limits the defence to a man under 24 "who had not previously been charged with a like offence". This was the formulation suggested by the Scottish Law Commission in their report on Rape and Other Sexual Offences. The important difference between the two provisions is not, however, the use of "like" or "relevant", but is the lack of guidance given in the bill as to what constitutes a "relevant offence".

"Like offence" is specifically defined in section 5(6) of the 1995 Act and there is no provision for extending such offences by secondary legislation. However, the Bill contains no such specific qualifying offences, but rather provides in clause 29(5) that "...a "relevant offence" means such offence, or an offence of such description, as may be specified in an order made by the Scottish Ministers". It is proposed that any such order shall be made under the negative resolution procedure.

Accordingly, the current position is that there is no statutory definition of those offences which, if the subject of previous charge against the accused, would preclude the accused a defence in relation to the fresh charge. As the Bill stands an accused charged of a Part 4 offence would not know whether or not he or she could pray in aid
the statutory defence, as “relevant offence” has nowhere been defined. There is accordingly a lack of clarity in the proposed statutory framework.

It remains an issue for Parliament, and perhaps for future legal debate, as to whether or not the negative resolution procedure is appropriate in relation to the definition of criminal conduct and defences pertaining thereto.

Fourthly, clause 30(1) and (2) deems “B” to be 13 or over in relation to offences committed against B under clauses 21 to 26 and under clauses 14 to 19. Unusually, it is declared that a child will be deemed to have attained the age of 15 where there has been a failure at trial to establish beyond reasonable doubt that the child had in fact attained that age. It is not clear why this formulation has been used. Such a formulation means that the failure arises only after the judge or jury has made a decision on reasonable doubt about it; in which case it is too late.

28 August 2008
Sexual Assault

51-52 The inclusion of penile penetration in the charge of sexual assault.

PKDAF do have concerns that this inclusion may lead incidents of rape being charged as sexual assault. We feel that clear sentencing guidelines are required to ensure that the charge of sexual assault which emerges as rape is not treated leniently.

53-54 Sexual if considered sexual by a reasonable person.

We consider ‘sexual if considered sexual by a reasonable person’ to be rather ambiguous in the context of what constitutes a ‘reasonable person’. We feel that there is the risk that what is considered ‘reasonable’ will be another aspect of the legislation which will be open to individual interpretation and debate. This would be disappointing considering the lengthy process and obvious hard work which has been dedicated to clarifying the definition of consent. We therefore propose clear guidelines and examples for Judges and Jurors who have to consider whether or not an act is to be considered sexual.

Other Coercive Sexual Conduct

58-60 To recognise such with adults as well as children.

PKDAF welcome this addition to the legislation.

Sexual Exposure

61-64 To separate sexual exposure from public indecency.

PKDAF welcome this addition to the legislation.

Administering an intoxicating substance for sexual purposes

65-68 To criminalise the intoxication of A separately from the assault or planned assault of A.

PKDAF welcome this addition to the legislation.
Part 2 – Consent and Reasonable Belief

Policy Objectives

PKDAF feel positive about the Scottish Government following the SLC’s recommendations regarding the definition of consent. This is a long awaited change to policy and will hopefully impact upon the deliberation process faced by the judicial system.

Meaning of Consent

72-73 To define consent as ‘free agreement’

PKDAF welcome this recognition that consent given under threat or duress is not therefore ‘free agreement’. A much needed and long awaited clarification of what consent actually is.

Absence of Consent

80 Consent for intercourse whilst unconscious or asleep

‘Free agreement’ cannot be free agreement should A be asleep or unconscious whilst sexual conduct taking place. Idea of ‘free’ agreement is that it can be withdrawn at any time – this is not the case should A be asleep or unconscious.

“In such circumstances, the question of whether consent as free agreement was given is to be determined by reference to the general definition of consent”.

Even if it was given as free agreement at the time, A may have changed their mind about B carrying out the sexual conduct whilst in this condition. PKDAF are therefore concerned that the lack of any timeframe will open up a strong defence should the act have been consensually carried out prior to this specific incident. E.g.

1/ A consents to B having intercourse whilst A is asleep and this is regular practice throughout A and B’s relationship. There is one incident where A did not want B to have intercourse in this way. Is this then a crime?

2/ A consents to B having intercourse whilst A is asleep. They do this one time consensually; 6 months later B has intercourse with A in the same way. There has been no discussion about consenting to this prior to the original consent given 6 months previously. Would this be regarded as A giving consent?

PKDAF strongly felt that should the need for consent for intercourse whilst unconscious or asleep need to be included that it would need some kind of clear timeframe put in place as to when the consent was given. The bill does
state that consent would need to be given prior to the act taking place but that
could be 1 hour prior or 1 year prior. We feel that this need clarified.

**Scope of Consent and its Withdrawal**

**86-88 Right to withdraw consent before or during sexual conduct**

PKDAF welcome this addition to the legislation; however see above as to our
reservations with regards to intercourse whilst asleep or unconscious.

**Alternative Approaches**

**88–92 Not to define consent**

Welcome the government’s adoption of definition of consent and also the
adoption of the non-exhaustive circumstances in which consent is definitely
not given. Taking the experience of English law into consideration it would
appear that this ‘non-exhaustive’ list will hopefully provide clearer guidance.

**Part 4 – Children**

**Older Children**

**117–122 Lowering the age of consent**

PKDAF agree with the government’s decision to dismiss the SLC’s proposal
that sex intercourse between people aged 13-15 should be decriminalised. In
practice there is generally a reluctance for these matters to be investigated by
the Police where both parties are consenting. The Police will investigate
these cases and where there is sufficient evidence report the matter to the
relevant prosecuting authority unless there are exceptional circumstances to
the contrary. In these cases there will be full information exchange between
the relevant agencies and a record of any decision made maintained, together
with the rationale.

Maintaining the age limit at 16 for penetrative sexual intercourse retains the
threshold for this conduct and does not give out the message that our society
condones penetrative sex under this age.

**126 Age Proximity**

PKDAF queried why the discussion around age proximity narrowed
criminalised activity between 13-15 year olds to penetration via the anus or
vagina. Due to the generic context of the legislation which criminalised non-
consensual penetration through the anus, vagina or mouth we wondered why
oral penetration is not included under this heading? Additionally, the health
concerns related to oral sex are as high as those linked to anal and vaginal
penetration.
131 Defences – Mistakes to age

PKDAF welcome the government’s action to retain the defence of mistaken age only being viable if accused has not previously been charged with a like offence.

Part 7

170-171 Decriminalisation of Consensual Sexual Violence

In their final report, the SLC recommended that:

“It should not be the crime of assault for one person to attack another where: both parties are 16 or older; the purpose of the attack is to provide sexual gratification to one or other (or both) of the parties, and the parties agree to that purpose; the person receiving the attack consents to its being carried out; and the attack is unlikely to result in serious injury.” (para 5.27)

“In general, the SLC’s proposals focus on consent as the legitimising element of sexual activity and criminalise lack of consent. In that context, it makes sense that consensual sexual violence should be decriminalised. However, the vast majority of respondents to the Scottish Government’s consultation on the SLC’s final report were opposed to the inclusion of such a provision. In particular, many consultation respondents were concerned that such a provision could provide a loophole for defendants in rape and domestic violence cases. There was a real concern that defendants in such cases might try to argue that the victim consented to the attack and, as such, no crime was committed. It may not always be possible to prove beyond reasonable doubt that such consent was not given. At present, any such consent would be irrelevant as it is not possible to consent to be assaulted. There were also concerns expressed that the general thrust of the Bill is to put in place measures to protect people from sexual exploitation and that this provision runs contrary to that aim.”

PKDAF have concerns that the Government have not stated within this memorandum their decisions regarding the above issue. We fully agree with the concerns raised by the respondents previously and would like to see the Government taking on board these concerns when considering the charge.

Consultation Group for Perth & Kinross Domestic Abuse Forum
Steve Bissett (Tayside Police), Jen Stewart (WRASAC), Maggie McVean(WRASAC)
Justice Committee

Sexual Offences (Scotland) Bill

Written submission from Sandyford, NHS Greater Glasgow and Clyde

Sandyford is the sexual and reproductive health services provided by NHS Greater Glasgow and Clyde. These include services specifically for young people (The Place), those that have been raped and sexually assaulted (Archway Glasgow) and services for women involved in prostitution (Base 75). These comments have been compiled from responses from clinicians who work within these services and are happy to provide further information if required.

Overarching stated aims of the Bill

i. Updating the definition of rape is welcome as is the aim to use the same definitions of capacity to consent as in the Mental Health Act which brings both into line.

ii. Removal of the excuse that the accused believes the child is 13 is welcomed.

iii. However, there is disappointment that there is not more clarity regarding Section 27 (older children having sex with each other). There is comment that the Lord Advocate can issue instructions regarding reporting for prosecution that Chief Constables have to adhere to, and they must also ensure their junior colleagues adhere to these instructions.

iv. Although it is difficult to know how to improve on this and to safeguard more vulnerable children from young perpetrators, it still leaves avenues open for upset parents/guardians to prosecute other young people for having consensual relations with their children, which is not usually in anyone’s best interests. It would be helpful for a clause to state that where a consensual relationship is demonstrated, there will be no prosecution for young people engaging in sexual activity with each other.

v. It appears that penis / mouth contact is not considered an offence for young people over 13 but under 16, and we are unclear as to the reason for this.

vi. We feel it is important to reiterate our feeling that sexual offences trials should be held in specialised courts with specially trained staff/legal teams, and look forward to being updated of any planned action in this regard.
Rosie Ilett
Head of Planning and Partnerships
Justice Committee

Sexual Offences (Scotland) Bill

Written submission from the Family Planning Association

1. About fpa

1.1. **fpa** is the UK’s leading sexual health charity working to enable people to make informed choices about sex and to enjoy their sexual health free from exploitation, oppression or physical or emotional harm.

1.2 **fpa** has contact on a daily basis with professionals and members of the public through our information service, our training courses and our community-based sex and relationships education projects which work both with young people and with parents. We also produce and distribute around 10 million pieces of literature a year on sexually transmitted infections, contraception and pregnancy choices, including abortion.

1.3 **fpa** provides a national voice on sexual health, working with professionals and the public to ensure that high quality information and services are available to all who need them.

1.4 The following comments are restricted to our areas of knowledge and expertise.

2. General comments

2.1 **fpa** welcomes the introduction of the Sexual Offences (Scotland) Bill.

2.2 We welcome the attempts to make the law gender neutral. We agree with the move to make the offence of rape gender neutral by defining it as penile penetration of the mouth, vagina or anus without reference to the gender of the victim. We also agree that the law should make no distinction in terms of the gender of the perpetrator of sexual offences.

3. Part 3 – Mentally Disordered Persons

3.1 **fpa** welcomes the section of the Bill aimed at protecting people with a mental disorder. We would recommend that this clause is amended to incorporate the principle of people being unable to refuse sexual activity. We believe this would highlight the wider issues around people’s capacity to agree to something being done to them, rather than focusing on their ability to agree to engage actively in sexual conduct.
3.2 We also recommend that consideration is given to the inclusion of clauses relating to people with a mental disorder who are threatened, coerced or ‘groomed’ into sexual activity. In such cases, a person may have understood and communicated their decision, but this had been affected by coercion or exploitation.

3.3 Although part 2 of the Bill deals with situations in which consent can be deemed to be absent, it might be helpful to include specific clauses relating to coercing people with a mental disorder into sexual activity in part 3 of the Bill because of their additional vulnerability. This would highlight the coercive or exploitative activity rather than the fact that the person with the mental disorder did not have the capacity to consent.

3.4 fpa recommends that the Bill recognises that people ‘communicate’ in different ways and that a person is able to give consent through non-verbal communication. We agree that consent means free agreement, as set out in Part 2 of the Bill. However, we believe it is important to recognise that some people deemed to have a mental disorder for the purposes of this Bill, may give their consent through non-verbal communication.

4. Part 4 – Children: Young Children

4.1 fpa is committed to the principle that young people, including those under 13, are able to access confidential sexual health services without the knowledge or consent of their parents. We are concerned that the Bill as it is currently drafted will criminalise young people.

4.2 fpa agrees that it is vital that young people are protected from non-consensual sexual activity and we understand that the younger the young person is the greater will be the concern to ensure that sexual activity is not exploitative or abusive. However, we are concerned that the Bill could deter young people, under the age of 13, who are often the most vulnerable, from seeking help.

4.3 We are concerned that the Bill criminalises all sexual activity in young people under the age of 13 solely on the basis of their age and the belief that they are too young to give consent. At its most extreme, we believe that this will mean that two 12 year olds who engage in consensual sexual activity, which could include kissing, will be committing a serious criminal offence.

4.4 The Bill as it is currently drafted sends a message to young people that their sexual development is a negative thing. This risks having a detrimental effect on their wellbeing by making young people feel guilty about normal aspects of adolescent development and deterring them from accessing services.

4.5 Evidence has shown that young people’s concerns about the confidentiality of sexual health services can pose a significant obstacle to them seeking
professional help and guidance\(^1\). This could close off young people’s opportunity to discuss their sexual health and to gain advice from trained professionals, as well as making them more vulnerable to sexually transmitted infections and unwanted pregnancies. In addition, securing access to confidential services means that those who are at risk or who are being exploited or abused are able to start to disclose these issues to a trusted professional who can, with time, help them to tackle the situation.

4.6 \textit{fpa} is not proposing that sexual activity between two young people where there is no valid consent should be decriminalised. However, we strongly believe that legislation should not criminalise consensual sexual activity between young people of similar ages.

5. Part 4 – Children: Older Children

5.1 \textit{fpa} would welcome clarification of how the law will apply to the rape of older children. We have assumed that the rape of an older child would be prosecuted under the general offence of rape as set out in Part 1 of the Bill. However, because the specific offence relating to rape of a younger child has not been replicated in the section on offences against older children it could be interpreted that the offence of having intercourse with an older child is the only offence relevant to older children. This situation needs to be clarified.

5.2 As has been stated above, \textit{fpa} is extremely concerned that the Sexual Offences (Scotland) Bill criminalises consenting sexual activity between young people under the age of 16, which could have a detrimental effect on their sexual health and wellbeing.

5.3 We welcome the efforts the Scottish Government has made to avoid criminalising normal adolescent sexual behaviour. However, we do not believe the Bill as it is currently drafted achieves this. Young people’s sexual behaviour could still be subject to criminal investigation solely on the basis of their age.

5.4 We believe the creation of specific criminal offences of older children engaging in consensual penetrative sexual activity in clause 27 could be extremely damaging. These offences send a clear message to young people that their sexual development is a negative thing and something about which they should feel guilty. This could have a negative impact on their mental wellbeing.

5.5 We understand that the Scottish Government may prefer young people to delay having sexual intercourse until they are 16. However, we do not believe criminalising young people will achieve this.

5.6 We are concerned that clause 27 will deter young people from accessing sexual health services. As has been noted above, concerns about confidentiality

\(^1\) \textit{Wise Up!} survey of Brook clients, 2005
deter young people from seeking professional help. This clause could leave young people’s sexual behaviour open to investigation because of suspicion that they have engaged in consensual penetrative sex. For example, a young person might be investigated because they have bought or accessed condoms. This could encourage young people to avoid having protected sex because of a fear of investigation, leaving them at risk of sexually transmitted infections and unintended pregnancies, which is the opposite of the stated aim of the Scottish Government’s policy.

5.7 We are also concerned that the Bill as it is currently drafted appears to exclude oral sex from clause 27 and oral sex is therefore not criminalised. fpa does not believe criminalising consenting sexual activity between young people is appropriate. However, the exclusion of oral sex from this clause could serve to send a message to young people that as consensual oral sex is not illegal, it is risk-free, which is not necessarily the case. Although the risk of contracting an STI from unprotected oral sex is much lower than through unprotected vaginal or anal sex, there is still a small risk. It is possible that young people will not receive the information they need about the risks of oral sex, because it is seen as ‘okay’ due to its different treatment under the law. We are also concerned that young people could feel under some pressure to have oral sex, even if they do not want to, because it seen as being ‘okay’ or ‘allowed’ because it has been treated differently in the legislation. fpa does not wish to see any consensual sexual activity between young people of similar ages criminalised and would not wish the Bill to be amended to criminalise oral sex. However, we believe consideration needs to be given to the possible messages the exclusion of oral sex from clause 27 could send to young people.

5.8 fpa is concerned that the defences in relation to offences against older children provided in clause 29 still leave young people’s sexual behaviour open to criminal investigation. Where there is a suspicion that young people have been engaging in sexual behaviour they will have to prove whether they were engaged in vaginal or anal sex, which would be an offence, or oral sex, which would not be. Investigations could also be launched solely on the basis of the age of a young person’s partner where that person is over the age of 16. The fact that the law includes defences against offences which can be used in court does not necessarily prevent investigations taking place.

6. Clause 39 – Exceptions to inciting or being involved art and part in offences under Part 4 or 5

6.1 fpa welcomes the inclusion of a clause exempting those working to protect children and young people’s sexual health from committing an offence under this legislation. However, we are not clear how this exception relates to professionals’ duties to report a crime.
6.2 As we have noted above, concerns about confidentiality can deter young people from accessing sexual health services. If young people believe that professionals working in these services will report them to the police solely on the basis of their age, they will not seek the professional support and advice they need.

6.3 It must be made clear that professionals should not be required to report sexually active young people, no matter what their age, to the police unless they have significant concerns about the safety of the young person or someone else. Young people’s rights to confidential sexual health services must be protected.

7. Conclusion

7.1 **fpa** welcomes the attempt to update the legislation on sexual offences in Scotland. However, we are concerned that the legislation as it is currently drafted could have a detrimental impact on young people’s sexual health and wellbeing. The legislation also risks causing confusion amongst professionals and the public.

7.2 We hope that the Scottish Parliament will pass a law which protects children and young people from abuse and exploitation without undermining their rights and development.
Introduction
Engender is a membership organisation working on an anti-sexist agenda in Scotland and Europe to increase women’s power and influence and make visible the impact of sexism on women, men and society. We provide a wide range of information and support to individuals, organisations and institutions who seek to achieve equality and justice.

To its shame, Scotland has one of the lowest rape conviction rates in Europe, with figures suggesting that less than 3% of rapes recorded by the police result in a conviction.

Engender welcomes the Sexual Offences (Scotland) Bill and wholeheartedly supports the comments made by The Equality and Human Rights Commission (EHRC) in their written evidence.

Engender shares the concerns of the EHRC with regard to definitions, consent and reasonable belief, sexual history and character evidence, sexual offences and older children, the role of the Gender Equality Duty and the wider challenges around public attitudes to rape.

Conclusion
Engender welcomes the Sexual Offences (Scotland) Bill and believes that this is an important step in improving legal responses to sexual offences in Scotland. However, changes within legal responses to rape must be matched by a commitment to challenge attitudes within Scottish society to women’s behaviour and sexuality. Engender believes that it is absolutely essential to effect a fundamental shift in attitudes to women if we are to stand any chance of significantly improving the ability of our legal system to provide justice to women surviving rape and other sexual offences.

Niki Kandirikirira
Executive Director
In response to the call for written evidence on the general principles of this Bill, I wish simply to express support for these general principles, with three caveats:

(1) It should not be expected that the Bill, if enacted, will do much – if anything – to affect the fact that the conviction rate in rape cases (at least if it is expressed as a percentage of reports made to the police, rather than as a percentage of cases prosecuted). Pleas of not guilty in rape cases are likely not to be based on the boundaries laid down by the law, but on wholly different factual accounts of what actually happened being put forward by the prosecution and defence, one of which will fall well inside the criminal law and the other well outwith. Rationalising and reframing the law of sexual offences cannot, therefore, be expected to have more than a marginal effect.

(2) Regarding the Government’s decision to depart from the Scottish Law Commission’s proposals on sexual activity between older children, I recognise the strength of the arguments put forward in the Policy Memorandum. Nevertheless, it seems to me that it is inappropriate to pass criminal laws unless we are prepared to enforce them. The criminal law is too serious a tool to be used simply to “send a message”. When the Commission reviewed the law on the age of criminal responsibility at an earlier stage it found that, from 1994-1999, only 31 children were prosecuted for sexual offences (a figure which would encompass consensual and non-consensual activity, and activities involving both older and younger children). This low figure suggests that prosecutions are not brought for consensual sexual activity between older children, and the Policy Memorandum does not indicate any desire that this position should change. It seems to me strange that any Parliament would pass criminal laws which it wished prosecutors to refrain from enforcing.

(3) I have some concerns about the approach taken in the Bill to questions of “reasonable belief”. This seems to me to be an issue of general principle given the number of offences to which it applies, and my concerns are set out in more detail below.

Reasonable belief

Because most offences in Part I of the Bill are committed where A acts “without any reasonable belief” that B consents (or has certain knowledge), it is necessary to give some guidance on how “reasonableness” is to be assessed. The Scottish Law Commission considered that an approach of “having regard to all circumstances” could become too subjective, in that it
could require a jury to have regard to “the accused's attributes, including his belief systems” (Report on Rape and Other Sexual Offences, para 3.77). Instead, it has made a proposal, reflected in the Bill, that:

“In determining, for the purposes of Part 1, whether a person’s belief as to consent or knowledge was reasonable, regard is to be had to whether the person took any steps to ascertain whether there was consent or, as the case may be, knowledge; and if so, to what those steps were.” (section 12 of the Bill).

This is a particularly difficult issue but, on reflection, I doubt that the Bill addresses the problem. It merely gives the illusion of an answer. It is no use saying that regard is to be had to something unless it is the only thing that can be taken into account (and it is unlikely that that is what is meant), because it does not answer the more important question: what else can be taken into account?

To take an obvious example: suppose that A were extremely intoxicated at the relevant time. There is no question that this would affect his ability to form accurate beliefs as to whether or not B consented. But is that to be taken into account in deciding whether his belief was reasonable? It is easy not to have sympathy for A on the basis of his intoxication, but what if he was particularly young and immature, or had learning difficulties which affected his ability to assess whether B consented?

The Bill provides no answer. In due course, the High Court may have to decide the position. I am confident that the court would approach the question with great care, but this means that the eventual rule will not have been democratically scrutinised, and it may result in convictions being quashed on the basis that trial judges did not direct juries in accordance with the view eventually reached by the appeal court.

James Chalmers
Senior Lecturer in Law, University of Edinburgh
Introduction

Brook is the country’s leading sexual health organisation for young people, offering young women and men free and confidential sexual health services and advice from a network of Centres throughout the UK and Jersey and the Brook national office. Brook has over 40 years’ experience of providing services through specially trained doctors, nurses, counsellors, and outreach and education workers to over 200,000 young people each year.

This response is submitted by Highland Brook and the Brook national office on behalf of the Brook network.

We have concentrated our evidence primarily on the principles of Part 4 of the Bill concerning protective offences relating to children as these are of primary relevance and concern to our client group.

General Comments

We welcome the modernisation of the law around sexual offences and particularly the gender-neutral approach to offences as this provides a clear, simple and above all non-discriminatory approach to the law.

Part Two – Consent and Reasonable Belief

We support the introduction of a statutory definition of consent. We would however advocate a wider definition of consent which attempts to include ideas about the capacity to understand the nature and implications of the act as well as free agreement to it.

We also support the inclusion of the non-exhaustive list of examples where consent cannot be taken to exist. We believe this would provide much needed clarity to an area which is currently open to subjective judgement.

Part Four – Children

We support the principle of having separate provisions with regard to adults who engage in sexual activity with children under the age of 13. However, we do not believe it is appropriate to criminalise children and young people of a similar age engaged in genuinely consensual and non-exploitative activity, even under the age of 13, as we argue in more detail below.

We also have particular concerns about the impact that offences based on the principle that a child aged under 13 is deemed incapable of consenting to sexual activity have had in England where they have undermined young
people’s right to access services in confidence as well as the ability of people working with them to exercise their professional discretion to decide what is in the best interests of their clients. Research has consistently demonstrated that confidentiality is the single most important factor to young people using sexual health services and in a Brook survey 74% of respondents under the age of 16 said they would be deterred from visiting a clinic if they knew information had to be shared with professionals outwith the service.

This has occurred in part as a response to Sir Michael Bichard’s recommendation that the Government should re-emphasise guidance in Working Together to Safeguard Children so that the police are notified as soon as possible where a criminal offence has been committed against, or is suspected of having been committed, against a child - unless there are exceptional reasons not to do so. In some areas of England this led to the development of local protocols which required professionals to share information about any young person who was sexually active under the age of 13 on the basis that the Sexual Offences Act indicated that they were unable to consent to sexual activity rather than on an assessment of the degree of current or potential harm. We are aware that such an approach is being taken in the guidance that is currently being drafted by a short-life working group on disclosure of underage sexual activity.

We are concerned that such developments, by undermining young people’s faith in the confidentiality of services, will deter younger and more vulnerable people from seeking help to protect their sexual health and may actually lead to abusive or coercive relationships remaining hidden. This may include young people seeking information or counselling which could have an impact on their emotional well being as well as on their physical health.

Brook believes that it is inappropriate and unnecessary to criminalise young people who are genuinely capable of giving consent to sexual activity including sexual intercourse. We would advocate that all genuinely consensual sexual activity, between young people of a similar age and similar physical and emotional maturity should be decriminalised. This approach has been taken in other European countries such as Finland where young people who have sexual contact with others of a similar age and stage of development are exempted from sexual offences by the Finnish penal code.

From our work with young people, we know that exploratory touching is a normal and healthy part of sexual development. Research shows that almost 35% of girls and more than 55% of boys will have had some form of sexual experience short of intercourse before they reach the age of 16 while 23% of girls and 30% of boys in Scotland have had sexual intercourse by the age of 16.

We would therefore give only qualified support to the proposal that mutually consensual kissing and sexual touching should not be an offence between older young people, as we do not believe this goes far enough and would still criminalise substantial numbers of young people. We are also concerned that the offence will send confusing messages to young people and those
working with them about what is and is not legal. Brook supports the approach proposed by the Scottish Law Commission to completely decriminalise all sexual activity between young people under 16.

In other contexts, such as medical treatment, young people under the age of 16 are held to have the ability to consent if they understand the decision they are making; Brook would support the extension of this principle into the law on sexual behaviour which respects a child’s evolving capacities as enshrined in Article 5 of the UN Convention on the Rights of the Child.

There is no evidence to suggest that decriminalisation is likely to lead to more pressure on young people to begin having sexual activity earlier. Research has found that the strongest factors influencing the age at which young people begin sexual activity are their socio-economic status, educational achievement, age at first menarche and the source of their sex education (with young people who cite friends as their main source of information being more likely to have early sexual intercourse).

We strongly support the Scottish Government’s objectives of encouraging young people to delay sexual activity until they are ready and reducing rates of teenage pregnancy and sexually transmitted infections. However, the criminal law is not the best way to achieve those objectives. All the evidence suggests that open attitudes to young people’s sexuality, comprehensive sex and relationships education and easy access to confidential sexual health services will result in young people delaying first intercourse and being more likely to use contraception.

**Exceptions to inciting or being involved art-and-part in offences under Parts 4 and 5**

Brook welcomes Section 39 as it clarifies the position of professionals and others providing advice and services to young people under 16 and removes any remaining confusion about the provision of services to young people under the ‘age of consent’.
The Equality Network is a network of around one thousand lesbian, gay, bisexual and transgender (LGBT) individuals and organisations in Scotland, working for LGBT equality. The Equality Network’s policy work is based on consultation with LGBT communities across Scotland, and reflects the concerns that LGBT people have raised with us. We welcome the opportunity to provide evidence to the Justice Committee on the Sexual Offences (Scotland) Bill. Our evidence covers only those parts of the bill where we have identified an LGBT equality impact.

Overall, we very much welcome the bill, which removes most of the remaining discrimination on grounds of sexual orientation and transgender identity, from sexual offences law. However, there are a small number of areas where we feel the equality impact of the bill could be improved.

In their report which formed the basis for the bill, the Scottish Law Commission (SLC) noted that the European Convention on Human Rights prohibits sexual orientation discrimination in the enjoyment of Convention rights. Article 8 of the Convention can be engaged by sexual offences laws. The SLC concluded that “A further guiding principle is that the law on sexual offences should not involve distinctions based on sexual orientation.”

Although the SLC did not explicitly set out a principle for their draft bill of non-discrimination on grounds of transgender identity, it is well established that a failure to respect the gender identity of transsexual people can breach their Convention rights. The bill includes provisions intended to ensure that transsexual people are equally protected by the law.

We particularly welcome the following aspects of the bill, which remove significant inequalities from the current law.

**Definition of rape**

At present, male rape cannot be charged as rape, and is instead prosecuted as sodomy, a crime that is inappropriately defined and not widely understood. Section 1 of the bill widens the definition of rape to include vaginal, anal or oral penetration with the penis, regardless of the gender of the victim.

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1 E.g., L. & V. v. Austria, 2003; A.D.T. v. UK, 2000
2 Paragraph 1.29, Report on Rape and Other Sexual Offences, Scot Law Com no. 209
3 Goodwin v. UK, I. v. UK, 2002
4 The crime of sodomy currently covers a range of acts, including male rape, but also including, for example, consensual sex between men in the bushes of a park.
At present, it is unclear whether a rape of a transsexual woman, or a rape perpetrated by a transsexual man, could be prosecuted as rape. Section 1 of the bill is gender-neutral for both the victim and perpetrator, and subsection (4) ensures that the definitions of “vagina” and “penis” include surgically constructed parts. This means that transsexual people will be fully covered by the law, regardless of whether they have obtained a gender recognition certificate.

**Gender anomalies in penalties**

At present, some penalties for statutory sexual offences against older children are different according to the genders of the people involved. Where an adult man engages in sexual activity with a boy of 15, the maximum penalty in statute is two years\(^5\), while it is ten years where a man or woman engages in sexual activity with a girl of 15\(^6\). It may not be an offence at all at present for an adult woman to engage in sexual activity with a boy of 15. The bill removes these anomalies, by introducing a consistent set of gender neutral offences which protect young people equally.

**Outdated and discriminatory language**

The law still uses outdated and offensive language to describe sex between men: “gross indecency” (originally meaning any sexual activity between men) and “sodomy”.

The bill replaces what the law currently distinguishes as “homosexual offences”, that is, the common law crime of sodomy, and section 13 of the Criminal Law (Consolidation) (Scotland) Act 1995, with gender neutral offences. With one exception, discussed below, the bill does away with the out of date and discriminatory language.

**Remaining problems with the bill**

We welcome all these changes, but there are three areas, described below, where we believe that the bill does not completely fulfil its promise of eliminating sexual orientation and gender identity discrimination from sexual offences law.

**Surgically constructed body parts**

As noted above, section 1(4) of the bill extends the definitions of “penis” and “vagina”, for the purposes of the whole bill, to include surgically constructed parts. This ensures that transsexual people are fully covered by the law. However, the language chosen by the drafters – “artificial penis” and “artificial vagina” – is very unsatisfactory. A surgically constructed penis or vagina would not be referred to by a gender reassignment specialist, or by a transsexual person, as “artificial”.

\(^5\) S. 13 of the Criminal Law (Consolidation) (Scotland) Act 1995
\(^6\) S. 6 of the Criminal Law (Consolidation) (Scotland) Act 1995
For obvious reasons, transsexual people find the term “artificial” to be problematic – it is considered discriminatory and offensive to refer to their genitals as “artificial”. The same standards of language should be used here as when referring to any other surgically constructed body part.

An artificial leg is a prosthetic one, made of inanimate material such as plastic or metal. A living leg which has been surgically reconstructed after an accident would not be called “artificial”. A toe which has been re-implanted onto a hand to replace a missing thumb is not an artificial thumb – it is a surgically constructed, living thumb.

The term “artificial penis” would mean in standard usage an inanimate penis-shaped object, which is why section 1(4) as it stands requires to include the further qualification “if it forms part of A/B”.

These problems could be easily removed, by using language similar to that in the corresponding provision in English law (section 79(3) of the Sexual Offences Act 2003), which reads “References to a part of the body include references to a part surgically constructed (in particular, through gender reassignment surgery).”

We therefore recommend that section 1(4) of the bill be amended to read:

(4) In this Act –

“penis” includes a surgically constructed penis, and

“vagina” includes –

(a) the vulva, and
(b) a surgically constructed vagina (together with any surgically constructed vulva).

Retention of some “homosexual offences” legislation

Schedule 5 to the bill repeals most of section 13 (“homosexual offences”) of the Criminal Law (Consolidation) (Scotland) Act 1995. This reflects the replacement of offences in that section with gender neutral offences in the bill.

However, subsections (9) and (10) of section 13 of the 1995 Act cover offences dealing with male prostitution, and prostitution was specifically excluded from the scope of the Scottish Law Commission project which led to the development of this bill. Subsections (9) and (10) of section 13, along with subsection (4), which provides a definition, and part of subsection (11), which places a time bar on proceedings brought under subsection (9), are therefore not repealed by the bill.
Section 13 of the 1995 Act, as amended by the bill in its current form, would read as follows:

13 Homosexual offences

(4) In this section, “a homosexual act” means sodomy or an act of gross indecency or shameless indecency by one male person with another male person.

(9) A person who knowingly lives wholly or in part on the earnings of another from male prostitution or who solicits or importunes any male person for the purpose of procuring the commission of a homosexual act within the meaning of subsection (4) above shall be liable—
(a) on summary conviction to imprisonment for a term not exceeding six months; or
(b) on conviction on indictment to imprisonment for a term not exceeding two years.

(10) Premises shall be treated for the purposes of sections 11(1) and 12 of this Act as a brothel if people resort to it for the purposes of homosexual acts within the meaning of subsection (4) above in circumstances in which resort thereto for heterosexual practices would have led to its being treated as a brothel for the purposes of those sections.

(11) No proceedings for any offence under subsection (9) above which consists of soliciting or importuning any male person for the purpose of procuring the commission of a homosexual act shall be commenced after the expiration of twelve months from the date on which that offence was committed.

In our view this is highly unsatisfactory, for a number of reasons.

Firstly, the offence of “soliciting or importuning” in subsection (9) does not appear to be restricted to soliciting or importuning for the purposes of male prostitution. We are very concerned about the retention on the statute book of an (albeit not recently charged) offence that, on its face, potentially criminalises any man who proposes to another man that they engage in sexual activity. Subsection (9) should be amended to ensure that it only catches soliciting and importuning for purposes of prostitution.

Secondly, “homosexual act” is defined in subsection (4) by reference to three offences which are already or will become obsolete. The common law crime of shameless indecency was effectively abolished by a bench of five judges of the High Court in Webster v. Dominick in 2003. It was replaced by an offence of more limited scope under the name of public indecency. The bill itself abolishes the common law crime of sodomy, and repeals the statutory offence of gross indecency for all other purposes.
Thirdly, the retention of the terms “gross indecency” and “homosexual offences” is inconsistent with the principle of equality. It is absurdly outdated, and offensive that, in the age of civil partnerships, sexual acts between men should be described in statute as “gross indecency”. The small parts of section 13 that remain are not accurately described as “homosexual offences” – they are offences relating to male prostitution.

To provide complete equality, we believe that the remaining parts of section 13 of the 1995 Act – subsections (4) and (9) to (11) – should ideally be replaced by amendments to relevant parts of existing legislation relating to prostitution (for example on living on the earnings of prostitution and brothel-keeping), to ensure that it covers both female and male prostitution.

If it is felt that these amendments to prostitution law fall outwith the scope of the bill, then this bill should certainly make appropriate minor amendments to section 13 of the 1995 Act, consequential on the other provisions in the bill. Amendments to section 13 should be appended to paragraph 1 of schedule 4 to the bill, to:

- limit the scope of the soliciting and importuning offence in subsection (9) to ensure that it covers prostitution related behaviour only, since the rationale for retaining subsection (9) is that it deals with prostitution related offences;
- remove from subsection (4) the references to offences already obsolete or made obsolete by the bill, for example by redefining “homosexual act” simply as a sexual act between men; and
- replace the title of the section (“Homosexual offences”) with a title which is properly descriptive of the purpose of the remaining parts of the section, and less discriminatory, such as “Offences relating to male prostitution”.

Rape with an object

The bill classes sexual penetration, without consent, with something other than the penis, as a sexual assault. Sexual assault will be a very wide crime, ranging from rape with an object, through to the less serious kinds of touching through clothing. Sexual assault will inevitably be seen generally as a less serious crime than rape, just as indecent assault is now.

We believe that this does not deal seriously enough with non-penile rape.

In the case of a sexual assault by a woman on another woman, there may be forced penetration with the hand or with an object. This is experienced as a form of rape. We believe that, for example, where a woman is raped in this way by her female partner, this should be taken as seriously by the law as the rape of a woman by her male partner. To do otherwise could be said to be a form of indirect sexual orientation discrimination.

English law includes a specific offence of assault by penetration, but we feel that the word “rape” is an important one to use in this context.
We recommend that an offence of “rape with an object” should be introduced, to cover sexual penetration, without consent, of the vagina or anus with any part of the body or with anything else.

In effect, this would separate out part of section 2(2)(a) of the bill into a separate offence. A parallel change would be needed to the set of offences against young children.
Introduction
The Christian Institute is a non-denominational charity established for the promotion of the Christian faith. We have almost 3,000 supporters throughout Scotland, including 532 churches and church leaders from almost all the Christian denominations.

We hold traditional, mainstream Christian beliefs about marriage and sexual ethics. In our efforts to promote these beliefs, we have previously contributed to public debates on issues such as divorce law reform, parents’ rights, religious observance in schools, religious liberty and sex education.

We are responding primarily to part 4 of the Bill relating to children. The Scottish Law Commission proposed effectively endorsing teenage sex by permitting any sexual activity between children aged 13 to 15.

Whilst the Scottish Government has not gone along with this specific proposal, the Bill legalises a vast number of under-age sexual activities. The reality is that the Bill completely undermines the current age of consent. It allows a 13-year-old to consent to oral sex or any other form of sexual stimulation falling short of vaginal or anal intercourse. For example a 15-year-old boy could engage in oral sex with a 13-year-old boy or girl with impunity.

The Bill will inevitably create serious evidential difficulties for police and prosecutors seeking to enforce the remaining age of consent offences. It removes a critical legal protection from some of the most vulnerable in society.

Under the current law we believe it is extremely rare for there to be a prosecution of a 16-year-old for engaging in sexual activity with a 14-year-old. Such prosecutions are generally not viewed as being in the public interest, except where there are aggravating factors. In these most serious cases, inevitably linked to potential manipulation or abuse, the Bill will provide a substantial defence and so create a major loophole.

Most parents will see the provisions of the Bill as dismantling the age of consent protections. This causes us grave concern. The change also flies in the face of the stated public policy goal of reducing sexually transmitted infections amongst teenagers.
The existing law

It is a crime at common law to indulge in indecent practices towards children under the age of puberty (12 in the case of a girl, 14 in the case of a boy), with or without their consent. This offence is known as “lewd, indecent or libidinous practice or behaviour”. Section 6 of the Criminal Law (Consolidation) (Scotland) Act 1995 extends the common law offence of lewd, indecent or libidinous practice or behaviour to cover conduct with girls over 12 and under 16. The offence of lewd, indecent or libidinous practice or behaviour has been taken to include a perpetrator forcing a victim to handle his penis or touching a victim's hair with his penis. Oral sex would clearly seem to be within this offence.

Section 13 of the Criminal Law (Consolidation) (Scotland) Act 1995 covers homosexual offences. This section would criminalise homosexual acts, including oral sex, with a boy under the age of 16 (s 13(5)(c)).

Therefore activities such as oral sex are illegal if committed on a girl between 12 and 16 by any person. Similar homosexual acts are illegal where committed on a boy under 16. Oral sex on a boy up to 14 would fall within the common law offence. The only gap in the current law on these activities would therefore be offences against boys aged 14 and 15 committed by females.

The contrast between the current law and the proposals of the Scottish Government as contained in the Sexual Offences (Scotland) Bill, which would repeal the offences mentioned above, is stark.

Undermining the age of consent

1. Under-16s

The Bill only criminalises sexual activity between 13 to 15-year-olds where it involves penetration of the vagina or anus other than by the mouth.

Children aged 13 to 15 are defined under the Bill as being ‘older’ children. Sections 21 to 26 prohibit a range of sexual activities when they are committed against an older child, but only where the perpetrator is over the age of 16. Sections 27 and 28 deal with sexual activity between two older children, making penetration of the vagina or anus otherwise than by the mouth a criminal offence. However, no mention is made of other activities falling short of vaginal or anal penetration.

This omission clearly leaves it legal for two children aged 13 to 15 to engage in a whole range of sexual activities including oral sex and mutual masturbation without the criminal law being able to intervene. The activities would be entirely legal even if the 13-year-old had just turned 13.

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1 For a summary of the current law in this area, see Report on Rape and Other Sexual Offences, Scottish Law Commission, December 2007, pages 61 to 62
2 Report on Rape and Other Sexual Offences, Scottish Law Commission, December 2007, page 61, see especially footnote 9.
and the 15-year-old was about to turn 16, i.e. there was almost 3 years between them.

2. Proximity of age defence

In section 29(3) the Bill includes what the Scottish Law Commission described as a ‘proximity of age defence’. This is a defence to many of the offences as defined in sections 21 to 26. Such a defence would allow a young person aged 16 or over to engage in sexual activity with a child under 16, where there is no more than 2 years between them. The proviso included in the Bill is that this exception would not cover penile penetration of the vagina or anus. But, among other things, a 16-year-old would be able to engage in sexual activity with a 14-year-old where there is penile penetration of the mouth. As well as oral sex a 16-year-old could also engage in mutual masturbation with a 14-year-old.

Allowing 15 or 16-year-olds to engage in a range of sexual activities short of full intercourse with 13 or 14-year-olds respectively could be highly exploitative and abusive. The younger party is unlikely to fully comprehend the physical, emotional or moral implications of the activities, or the health risks, and is therefore in no position to be able to give genuine consent. Consequently, the criminal law has a clear duty to intervene by prohibiting this conduct.

The Government has a duty to guard children from exploitation and abuse. A considerable amount of child abuse is carried out by young people. According to Home Office research, adolescents commit up to a third of all sex offences and many of the victims are children. Children as young as 13 are not able to make sound judgments about the consequences of their actions and it is the role of the Government to put in place measures that will protect them. The emotional and physical differences between just 13-year-olds and almost 16-year-olds can be considerable and the current draft of the Bill suggests that the authors have failed to appreciate these differences. Manipulation of a child by an older adolescent or even an immediate peer may be subtle but nonetheless real. In some instances a victim does not realise until much later that exploitation has taken place. The result is that the child would not have properly consented, yet in the eyes of the criminal law would be deemed to have done so. This child protection concern is one reason that the law should prohibit any sexual activity below 16.

The age of consent offence can be used by prosecutors when there does not seem to be sufficient evidence to sustain a more serious charge. For example, where there is an accusation of a 16-year-old boy raping a 14-year-old girl but there does not appear to be enough evidence to secure a conviction, the prosecutors could currently use the age of consent provisions instead. Age of consent offences are therefore used in some of the most serious cases of under-age sexual activity, where the victims are particularly vulnerable. If the Sexual Offences (Scotland) Bill is passed in its current form,

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the scope for prosecutors to secure a degree of justice in such a scenario will be reduced. Cases will inevitably descend into disputes over whether penile penetration of the anus or vagina took place or not, which amounts to one person’s word against another’s. This will raise major evidential problems in an area that is already fraught with evidential difficulties. Whereas, with an absolute age of consent protection, evidence of, say, semen from the perpetrator on the victim’s clothes could be conclusive evidence of guilt, the new proposals will allow the perpetrator to argue that he did engage in some sexual acts with the victim, but not vaginal or anal penetration. It could be immensely difficult for the prosecution to prove otherwise.

The proposals in the Bill will lead to a severe weakening of the law. It will allow sexual activity to take place which is abusive whilst still being lawful. We urge that an absolute age of consent at 16 is maintained without exception. In maintaining this, a clear message is sent and the criminal law fulfils its protective role.

Peer Pressure
The dangers of peer pressure in this area must not be underestimated, and these pressures will increase massively if the Bill is introduced in its current form. As Lord Falconer, the former Lord Chancellor, said during a debate on the Sexual Offences Bill for England and Wales:

“The testimony of many children is that they welcome the protection that is offered by the age of consent, because it enables them to withstand peer pressure to engage in sexual activity before they are ready to do so. I am not sure that we would be right to remove that protection. I simply do not accept the proposition that we should leave children without any legal grounds to help them resist coercive sex. Legalising sexual activity between minors would send the message that sexual activity below the age of consent is acceptable and normal. In my opinion, that would encourage more children to engage in sexual activity before they are emotionally and physically ready to cope with the consequences.”

Many young people who have engaged in teenage sexual activity have admitted regretting this later in life. The largest and most academically robust study ever carried out of sexual activity was the National Survey of Sexual Attitudes and Lifestyles published in 1994. Analysis of this British survey found that 58.5% of girls whose first act of intercourse was under-age later regretted it as “too soon”. Although the Bill’s proposals do not legalise full intercourse under the age of 16, allowing other sexual activities underestimates the serious consequences of these behaviours and sends a message that they are not physically and emotionally dangerous for children. Once a child has engaged in some form of sexual activity they are more easily persuaded to progress to full sexual intercourse. Implementing the Bill can

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4 House of Lords, Hansard, 2 June 2003, col. 1107
5 Johnson A M, Wadsworth J, Wellings K et al, Sexual Attitudes and Lifestyles, Blackwell 1994, Table 4.13, page 96
only serve to increase the number of girls having sex before 16 and living to regret it.

It is also naïve to believe that all teenagers have the discipline, self control and courage in the heat of the moment to draw a line at full penetrative sexual activity when they have been engaging in many other forms of sexually stimulating behaviour up to that point. It stretches credulity to think teenagers would maintain a list of ‘legal’ and ‘non-legal’ activities, or that they would even know the difference, especially if they are being pressurised by an older teenager who simply asserts that ‘sex is legal for over-13s’. Introducing the Sexual Offences (Scotland) Bill will make it legal for teenagers to put themselves in situations where the temptation to engage in full sexual intercourse will be too great for them to resist.

Health Risks

There are serious health risks stemming from earlier sexual activity. In particular, medical opinion recognises that young women are biologically more susceptible to sexually transmitted infections (STIs) than older women. Key medical factors include physiological and immunological issues:

1. Physiological – The hormonal activity which causes the development of secondary sexual characteristics also causes the vaginal lining to thicken considerably from just a few cell layers to around an 80 cell layer thickness. The thinner the cell layer thickness at the time of first sexual intercourse, the greater the likelihood of trauma (coital injury) which may facilitate the spread of STI pathogens. Another key element of the vagina’s defence against infection, an antibacterial mucus, only develops up to two years after a girl has had her first period.

2. Immunological – A teenage girl is still immunologically immature. In particular, levels of a key antibody called IgA (or Immunoglobulin A) in blood have only reached 60% of the adult level by puberty, and this level increases slowly thereafter.

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6 Tracking the Hidden Epidemics: Trends in the STD Epidemics in the United States, Center for Disease Control and Prevention, US Department of Health and Human Services, 2000, page 3
Conflict with public policy

By allowing a broad range of sexual activity below the age of 16, the number of sexually transmitted infections and teenage pregnancies in Scotland will inevitably increase.

Sexually Transmitted Infections

Many sexually transmitted infections are transmitted by sexual activities other than full sexual intercourse, yet the Scottish Government is proposing to legalise such activities at a time when STIs are an increasing problem in Scotland. Rates of Acute STIs diagnosed at Scottish genitourinary clinics (GUM) have almost doubled since 1996. In particular, rates of chlamydia among young adults have increased by 400% since 1996. The largest increases in positive diagnoses between 2002 and 2006 were observed in both men and women aged 15-19. In allowing sexual activity below this age the Bill would pave the way for chlamydia and other STIs, which can end with ectopic pregnancies and infertility, to become more and more widespread amongst children. In Scotland, the number of diagnoses of gonorrhoea doubled in the ten year period, 1997-2006. Most diagnoses were in men and women aged 15-24. In 2006, 246 infectious syphilis cases were recorded at GUM clinics; this is the highest annual total recorded since 1952 and represents a 31% increase on that reported for 2005. Again, the largest increases were noted in those aged 15-19. Once again two thirds of new diagnoses of genital warts amongst women were in those aged 15-24 and the largest increase was observed in those aged 15-19. Scottish data from the National Survey of Sexual Attitudes and Lifestyles 2000 indicates that overall 9% of young men and 13% of young women have had an STI at some point. This is a shocking statistic and one that the Government should be fighting to bring down by discouraging early teenage sexual activity on health grounds in the same way as smoking is discouraged. In introducing the Sexual Offences (Scotland) Bill in its current form, the Government would thwart its own plans to improve sexual health in Scotland.

Teenage Pregnancy

Teenage conception rates in Scotland are amongst the highest in Western Europe. The rate in the under-16 age group has fluctuated since the early nineties, peaking in 1996 at 9.0 per 1,000. The lowest rate recorded is 6.6 per 1,000 in 2001. In more recent years the rate has been around 7.0 per 1,000

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9 Sexually Transmitted Infections and Other Sexual Health Information for Scotland, ISD Scotland, 2007, page 5

10 Sexually Transmitted Infections and Other Sexual Health Information for Scotland, ISD Scotland, 2007, page 8

11 Sexually Transmitted Infections and Other Sexual Health Information for Scotland, ISD Scotland, 2007, page 14

12 Sexually Transmitted Infections and Other Sexual Health Information for Scotland, ISD Scotland, 2007, page 17

and the latest figures show an increase to 8.1 per 1,000.\textsuperscript{14} Reducing unintended teenage pregnancy is a national target for the Scottish Government. The target is to reduce the pregnancy rate amongst those under-16 by 20\% from 8.5 in 1995 to 6.8 in 2010.\textsuperscript{15} Given that the most recent rate was 8.1 per 1,000 it seems highly unlikely the Government will reach its target. An analysis of factors associated with early motherhood showed that prevalence was higher among those who had first intercourse before age 16 years.\textsuperscript{16} As such, it seems the Government needs to be tightening the laws on sexual activity rather than relaxing them.

**Conclusion**

We are pleased that the Bill does not adopt the Scottish Law Commission’s proposals in their entirety. However, the failure to prohibit any under-age sexual activity except penetration of the vagina or anus otherwise than by the mouth, and the inclusion of the proximity of age defence, will dismantle key aspects of the age of consent law. These proposals are dangerous and wrong. Many vulnerable people that the criminal law currently protects will be exposed to exploitation by peers and potentially far more mature older teenagers. Sex is not an activity for children and it can carry great physical and emotional risks. Part 4 of the Bill must be revisited in order to properly protect children.

\textsuperscript{14} Sexual Health – Teenage Pregnancy Data see \url{http://www.isdscotland.org/isd/2071.html} as at 28 August 2008
\textsuperscript{15} Sexual Health – Teenage Pregnancy Data see \url{http://www.isdscotland.org/isd/2071.html} as at 28 August 2008
\textsuperscript{16} Sexually Transmitted Infections and Other Sexual Health Information for Scotland, ISD Scotland, 2007, page 33
Victim Support Scotland is the largest agency providing support and information services to victims of crime in Scotland. Established in 1985 the organisation currently employs around 180 staff and 1000 volunteers. In 2007/2008 our community based victim services and court based witness services supported around 175,000 people affected by crime. With the interest of victims and witness at heart, we are pleased to provide a response to this important consultation.

Overall, Victim Support Scotland welcomes the Sexual Offences (Scotland) Bill and look forward to seeing its effect on sexual offence cases across Scotland. We have certain comments to make regarding definition and scope of the proposals, which we have divided into their respective sections as portrayed in the Bill.

**Part 1 – Rape etc.**

**Section 1 – Rape**

Following some discussion, Victim Support Scotland believes that the term ‘rape’ should include any (intentional or reckless) sexual penetration of the vagina, anus or mouth without that person’s consent, regardless if this penetration is made by penis, other parts of the body or an object. While we accept that the penis is a sexual organ, we do not agree that that fact alone adds another dimension of severity to the attack. A victim will experience distress and physiological impact, regardless if the penetration is conducted by the penis or an object. Furthermore, penetration with an object has the potential to cause a higher level of physical, internal damage. Whereas physical proportions control the harm caused by penile penetration, penetration with an object can cause worse harm as longer and sharper items may be used. We acknowledge that the act of penetration of the mouth can include acts that are not necessarily seen as ‘sexual’. To avoid this, the definition of sexual penetration of the mouth should only include acts that due to its nature and other circumstances are severe enough to be seen as sexual assault according to section 2. We are hence not looking to create any new offence, but simply to place all proposed acts of non-consensual consensual sexual penetration within the same offence. The wide range of penalties available under section one will reflect the severity of the individual act.

The extension of rape to include penetration by any body part as well as objects makes the offence gender neutral, with the effect that both women and men can
be raped, by both women and men. In the current phrasing of the paragraph, only men can commit the crime of rape.

We accept the statement of the Policy Memorandum that the “proposed definition is a definite improvement on the current law and represents an accurate basis for the law in future”, however we feel that the Government should seize the opportunity and create the most appropriate legislation straight away. Our recommendation is therefore that any sexual penetration (reckless or intentional) by a person (Person A) of the vagina, anus or mouth of another person (person B) without that person’s (person B) consent should constitute the offence of rape. The nature of the penis as a sexual organ implies that all penile penetrations are to be seen as sexual, but penetration by objects or other body parts must be sexually motivated to be covered by the rape offence. To assess what should be seen as sexual, we agree with the assessment currently proposed under section 2; that the penetration should be seen as sexual if a reasonable person would consider it to be sexual. We recommend and will follow this assessment throughout the Bill.

We consent to the demand that there must be ‘reasonable belief’ that person B consented, which should require person A to take action to ensure there is consent before initiating/continuing a sexual act. If a dispute arises regarding the presence of consent, the accused should be able to declare what he/she did to ascertain that the other person consented to the sexual activity. This will not punish someone for his/her cultural background or ignorance, however puts the focus on the accused to show whether or not he/she was reckless or took steps to ensure that there was consent from the victim.

Finally, we agree that consent to any sexual act can be withdrawn at any time. It is a human right to make decisions regarding one’s own body, and it is fundamental that people have a right to change their mind, at any time, whether or not to engage in sexual activity. We agree that any continuation after a person indicates that he/she no longer consent to the sexual act, takes place without that person’s consent.

**Section 2 – Sexual assault**

The suggested offence ‘sexual assault’ includes a variety of sexual acts, for instance sexual touching, engagement in sexual activity and penetration by any means in a sexual way. Section 2(2)(a) creates an overlap with the previous section, with the result that an act of penile penetration without consent can be charged either as a rape or sexual assault. We find this unnecessary and even though the SLC envisages that “where the Crown has evidence that the complainer was subject to penile penetration by the accused”, a charge of sexual assault would not be brought, there is no guarantee that this will be the case. Also, the overlap may be somewhat confusing for all involved parties and lacks the transparency and clarity that new legislation should aim for.
Although we would not wish to imply a judgement that non-penetrative sexual assaults are automatically less serious or severe, we believe that the law should distinguish between penetrative and non-penetrative sexual offences. Legislation in England & Wales separates offences including penetration from other acts of sexual assaults; the Sexual Offences Act 2003 creates a separate offence called ‘assault by penetration’ for any penetration with a ‘part of his body or anything else’. However, we see it appropriate to include all non-consensual acts of penetration in the same offence. The act of penetration is easily definable, regardless of whether penetration is made by the penis or an object, and we believe that all penetration without consent should fall under the offence of rape. Other jurisdictions have taken this approach, in for instance Sweden rape is defined as penile penetration and any other sexual act that due to its nature and other circumstances provides corresponding violation, which is seen to include penetration with an object.

The inclusion of all acts of penetration in one offence would further diminish the need to overlap between the offences of sexual offence and rape, for instance when the victim does not know what was used to penetrate her/him. As stated under section 1 above, we therefore believe that any sexual penetration of the vagina, anus or mouth of person B without B’s consent should be seen as rape, regardless what is used to penetrate (penis, other body parts or an object).

We agree that the other acts stated in section 2 should constitute the crime of sexual assault.

**Section 8 – Administering a substance for sexual purposes**

Giving a person a substance to stupefy or overpower that person to enable sexual activity with him or her, aims to take away the victim’s sexual autonomy and right to engage in sexual activity. The Criminal Law (Consolidation) (Scotland) Act 1995 imposes liability on any person who “applies or administers to, or causes to be taken by, any woman or girl any drug, matter or thing, with intent to stupefy or overpower so as thereby to enable any person to have unlawful sexual intercourse with such woman or girl”. The new proposal makes the legislation gender neutral and is applicable to both female and male victims. We agree with the proposal and that it imposes criminal liability even where there is no resulting sexual contact. We are also content to see that the article includes sexual activities of any kind, and not solely intercourse.

**Part 2 – Consent and reasonable belief**

When trying to locate the wrong involved in certain forms of sexual conduct, the most fundamental principle is respect for a person’s sexual autonomy, which places emphasis on a person freely choosing to engage in sexual activities. The definition of consent must therefore indicate the free will of those involved,
including the dialogue – whether expressed or through actions – that must take place in order to verify the consent. The definition “free agreement” alone does not comprehensively indicate where consent may exist and therefore introduces some subjectivity into the definition. Problems may for instance arise to separate indifference with consent or if consent was given under threat. A statutorily defined consent may also have the effect that the focus of the trial becomes the actions of the victims rather than those of the accused, with which we disagree.

However, by providing further clarification of the concept, it may limit its scope. Therefore it is our view that “free agreement”, involving understanding and knowledge or the other person’s will (as oppose to indifference), expressed through dialogue or actions, would be the most suitable definition. Along with this wide definition, we find the non-exhaustive statutory list of situations when a person has not consented to sexual activity useful.

In addition to legislation, personal opinions and attitudes can also affect a person’s interpretation of consent. Research shows that the general public’s attitude to rape is still somewhat prejudiced towards the victim. As stated by the Policy Memorandum, 34% of people think that a woman is fully or partially responsible for being raped if she behaves in a “flirtations” manner, 30% if she is drunk; 26% if she is wearing “sexy or revealing” clothes and 22% she has had many sexual partners. We therefore believe that general information regarding the concept of rape and its impact should be given, along with information of what constitutes consent. However, rather than including it in the statutory information, we would encourage the introduction of jury directions regarding this general information.

Section 10 – circumstances in which conduct takes place without free agreement

Victim Support Scotland would like to stress the importance of the name of the ‘non-exhaustive statutory list’. It is most significant that this list is not viewed as a complete checklist of scenarios where consent is absent. The court should always be mindful that situations may arise in the future where consent did not exist that do not neatly fit into the list. Similarly, further indication that this list is not exhaustive would help prevent the accused or their defence agents from seeking loopholes between the scenarios on the list in order to avoid a conviction.

We agree with the view taken in the previous consultation that “the onus will remain on the Crown to establish lack of consent for all crimes where that is an element of the offence. When the Crown can establish the factual situation of one of the statutory situations, then they have successfully discharged that burden of proof. In other words proof of a statutory situation establishes the absence of free agreement”.
We are happy to see that the definition in section 10(2)(a) is not concerned with the cause of the victim’s intoxicated state. However, we acknowledge that it may be difficult to draw a line when a victim should be seen as too intoxicated to give consent. The effects of alcohol or any other substance vary; two individuals can have completely different reactions to the same amount of alcohol or drugs.

In our view, it is essential that the consent of all people engaged in the sexual activity is given at the time the act takes place. We therefore find section 10(2)(b) problematic, since it enables a person to give consent prior to the sexual act itself, without any reference to how long a previous consent is valid. If consent is valid until it is withdrawn, than a person must be given the ability to withdraw his/her consent. The Policy Memorandum states that “the definition makes clear that people who are asleep of unconscious lack capacity to give or express consent while in that state”. This also means that a person who previously consented to sexual activity is incapable of withdrawing that consent, which furthermore makes it impossible to verify whether or not the person is still interested in engaging in any sexual activity (which in our view would be highly questionable regarding people that are unconscious). The idea that a person’s previous consent validates sexual contact at a later point gravely contradicts the SLC’s recommendation, stating that “A person who has consented to a sexual act may at any time before or up until completion of that act indicate that he or she no longer consents, and if the act continues to take place it does so without that person’s consent”. It also contradicts section 11 of the Bill, which states that “consent to conduct may be withdrawn at any time before, or in case of continuing conduct, during, the conduct”. Victim Support Scotland agrees that each person has the right to change his/her mind about engaging in sexual activities at any time, but the suggested phrasing of section 10(2)(b) makes it impossible for a person to withdraw consent as they are in fact asleep or unconscious. Another problem is that the section enables a perpetrator to use previous consent as a defence, stating that the victim agreed to the act before he/she fell asleep or became unconscious. This would arguably imply that the burden of proof would focus on the victim’s possible previous consent, rather than highlighting whether or not consent was present at the time the sexual activity took place, which in our mind should be paramount. We would therefore recommend that the possibility of prior consent to engage in sexual activity is removed, since it is not possible to verify this consent at the time the act takes place and it does not give the chance for a person to change his/her mind about engaging in the said activity.

Section 10(2)(c) refers to ‘violence’ or ‘threats of violence’. We are glad to see it incorporates violence or threats of violence directed towards either the person with whom the activity is intended or any other person. However, we are concerned that this may not cover situations of historical violence between the accused and the victim. In our view, a definition based on legitimate fear, as opposed to actual threat, would be more suitable. This can relate more to
previous conduct which may clearly have been in the minds of both the accused and the victim, but where no actual threat was presented in that event.

We agree with and have no further comments on sections 10(2)(d) – 10(2)(g).

Finally, we would like to add a scenario to the non-exhaustive statutory list of factual situations which defines when a person has not consented to sexual activity. We believe that consent should be seen as lacking for anyone who has been trafficked to the UK for the purpose of prostitution and any sexual penetration in such circumstances should therefore constitute rape.

Part 4 – Children

Young children

Section 14 – Rape of a young child

For the same reasons as given above under section one in regard to rape, Victim Support Scotland believes that the term ‘rape of a young child’ should include any sexual (intentional or reckless) penetration of the vagina, anus or mouth of a child who has not attained the age of 13, regardless if penetration is made by penis, other parts of the body or an object. The bodies of young children are not fully developed and any penetration can have devastating effect, regardless what is used to penetrate. Furthermore, penetration with an object has the potential to cause a higher level of physical, internal damage. Whereas physical proportions control the harm caused by penile penetration, penetration with an object can cause worse harm as longer and sharper items may be used.

The extension to include penetration by any body part as well as objects makes the offence gender neutral, with the effect that both women and men can be found guilty of rape of a young child. In the current phrasing of this section, only men can commit this crime.

The inclusion of all forms of sexual penetration of a child under 13 in the offence rape of a young child takes away the need to overlap the offence rape of a young child with the offence sexual assault of a young child.

We are glad to see that there is no reference to consent, and that the child’s capacity to consent is seen as absent due to the age of the child.

Section 15 – Sexual assault of a young child

The suggested offence ‘sexual assault on a young child’ includes acts of sexual penetration by any means, section 15(4) specifically stating that it includes penile penetration. This creates an overlap with the previous section and an act of penile penetration of a child under 13 can be charged either as a rape of a young
child or as sexual assault of a young child. Victim Support Scotland finds this unnecessary and somewhat confusing to victims, that the same act can be charged under two different offences. Although we would not wish to imply a judgement that non-penetrative sexual assaults are automatically less serious or severe, we believe that the law should distinguish between penetrative and non-penetrative sexual offences. The act of penetration is easily definable, regardless if penetration is made by the penis or an object, and we believe that all sexual penetration of a child under 13 should fall under the offence of rape of a young child, regardless what is used to penetrate (penis, other body parts or an object). As stated under the previous section, this would diminish the need to overlap between the offences of sexual assault of a young child and rape of a young child, for instance when the victim does not know what was used to penetrate her/him.

We agree that the other acts stated in section 15 should constitute sexual assault of a young child.

**Older children**

**Section 21 – Having intercourse with an older child**

For the reason given under section one in regard to rape and section 14 in regard to rape of a young child, Victim Support Scotland believes that all sexual (intentional or reckless) penetration of the vagina, anus or mouth should be contained in the same offence, regardless if penetration is made by penis, other parts of the body or an object. The bodies of children are still not fully developed and any penetration can have devastating effect, regardless what is used to penetrate. Furthermore, penetration with an object has the potential to cause a higher level of physical, internal damage. Whereas physical proportions control the harm caused by penile penetration, penetration with an object can cause worse harm as longer and sharper items may be used.

The extension to include penetration by any body part as well as objects makes the offence gender neutral, as the effect will be that both women and men can commit the offence. In the current phrasing of this section, only men can commit the specified crime.

**Section 22 – Engaging in sexual activity with or towards an older child**

As explained under the previous section, Victim Support Scotland believes that all sexual (intentional or reckless) penetration of the vagina, anus or mouth should be contained in the same offence, regardless if penetration is made by penis, other parts of the body or an object. We therefore suggest that the activity specified in section 22(2)(a) is included in the crime 'having intercourse with an older child'. This makes a clear distinction between penetrative and non-penetrative offences, which reduces the need of overlap between the offences
‘having intercourse with an older child’ and ‘engaging in sexual activity with an older child’.

We agree and have no further comments on the rest of this section.

**Part 6 – Penalties**

Victim Support Scotland would like to address the disparities between the penalties for penile penetration, depending on the age of the victim. Cases regarding ‘rape’ and ‘rape of a young child’ can only be tried in the High Court of Justiciary with maximum penalty of life imprisonment or a fine (or both). However, if the victim has turned 13 but not 16, any charge of ‘having intercourse with an older child’ can be tried in a summary court where the maximum penalty is imprisonment for a term not exceeding 12 months or a fine not exceeding the statutory maximum (or both). If raised as a solemn case, the maximum penalty for the offence is imprisonment for a term not exceeding 10 years or a fine (or both). We believe that the offence ‘having intercourse with an older child’ should be heard in the same court (i.e. High Court of Justiciary) and given access to the same penalties as ‘rape of a young child’ and ‘rape’.

**Equal opportunities**

As the current phrasing of the Bill stands, the offence of rape; rape of a young child and having intercourse with an older child can only be committed by penile penetration. The effect of this definition is that only men can commit these offences and female perpetrators will be charged under the offence sexual assault, sexual assault of a young child and engaging in sexual activity with or towards an older child. We acknowledge that both offences of rape and sexual assault carries a maximum penalty of life imprisonment or a fine (or both), however the offence of rape can only be heard in the High Court of Judiciary, while a case of sexual assault can be raised in a lower court with a subsequent maximum summary conviction penalty of imprisonment not exceeding 12 months or a fine not exceeding the statutory minimum (or both). The result may be that penetration by an object (committed by male or female offenders) will be given a significantly lower penalty compared to the offence of penile penetration (committed by male offenders). Victims of female offenders are hence given a different legal setting within which to gain recognition and restoration compared to victims of male offenders, regardless of the circumstances in the case or the damages caused by the penetration. The same is applicable for victims who have turned 13 but not yet 16, since the offences ‘intercourse with an older child’ and ‘engaging in sexual activity with or towards an older child’ can be raised in a lower court with a significantly lower range of penalties.
Justice Committee

Sexual Offences (Scotland) Bill

Written submission from Stonewall Scotland

Thank you for your invitation to submit our views on the Bill. Stonewall Scotland has discussed this matter with the Equality Network and we concur with all of the points made in their submission. Therefore we would like it to be noted that we fully support the submission made to the Justice Committee by the Equality Network.

Gillian Miller
Policy Officer
Justice Committee

Sexual Offences (Scotland) Bill

Written submission from Zero Tolerance

About the Zero Tolerance Charitable Trust

The Zero Tolerance Charitable Trust is pleased to have the opportunity to comment on this Bill. We are a small national charity promoting innovative policy and practice to address the root causes of male violence against women and children. We pioneered the 3 P’s approach to tackling male violence – protection, provision and prevention. Of these, we believe that the prevention of violence through education is the key to changing the culture of endemic violence in which we live.

Since we began our work in 1992, we have run a number of campaigns to raise awareness about the prevalence of domestic abuse and child sexual abuse, the excuses people use for this violence, the failings of the criminal justice system in addressing these, and the need for people (and particularly young people) to develop respect as one way of eradicating this violence and preventing a new generation of abusers.

We continue to aspire to a world free of male violence against women and are working on a range of projects and initiatives towards that goal. Our ‘Respect’ programme teaches children how to develop healthy relationships, to understand concepts such as power, violence and control and to deconstruct gender stereotypes, through a teaching pack used in the majority of Scotland’s local authorities and many across the rest of the UK. We are also developing a new violence prevention network to enable people working in this field to work more effectively together and to develop new violence prevention campaigns. As such, we take a keen interest in any legislative changes which impact on violence against women and this Bill in particular is of great interest.

Our views on this Bill in summary

Whilst we welcome much of the content of this Bill, we are seriously concerned by the Bill’s introduction into law of the concept of ‘prior consent’ and we make detailed comment on this below. We also wish to see the scope of the Bill widened, to encompass the buying of sex through prostitution and trafficking, which we see as a sexual offence which is not currently dealt with by our legal system.

More generally, we have grave reservations about the ability of the Scottish criminal justice system to deliver justice for women who have been raped, whatever form the legislation takes.

The current rape conviction rate of 2.9% is a national disgrace. The continued use of irrelevant and deeply personal sexual history and character evidence to
damage the standing of rape complainants, despite moves to end this practice, is a stain on our justice system and proof of the deep-rooted prejudices it contains and reflects. The continued mythology about rape – men rape because they lose control, women who are raped were asking for it by dressing provocatively, most rapists are strangers in alleyways – is seldom challenged and often actively reinforced by the criminal justice system. Images that objectify and insult women are ubiquitous – at the supermarket checkout, in the stationery aisles of high-street shops, on billboards, on TV, in music videos and in advertising – and men’s magazines glorify in violence, whether on the football pitch or in the bedroom. These all add up to what we would call a ‘rape culture’ in Scotland.

In this kind of society, legislative changes can only go so far. What is needed to give this legislation any teeth is a root and branch change to the way in which women and men share power, wealth and opportunity. We need education programmes for everyone and a concerted effort to address stereotyping and mythology in the criminal justice system. Without those things, new legislation will make only the most marginal of changes.

Notwithstanding those comments, we wish to make the following remarks about the draft Bill.

Part 1 - Definition of rape

We support the definition contained in the Bill which conveys the nature of the offence of rape and its position as a specific and distinct crime, of a uniquely unacceptable nature, set apart from other sexual crimes. We also support the widening of the definition to include oral and anal penetration.

Part 2 – Consent and Reasonable Belief

Prior consent

We support the introduction of a statutory definition of consent as ‘free agreement’ and welcome the attempt to describe the circumstances in which free agreement is not present. One survey of young people conducted in 2006 for Amnesty International found that 11% of 16 – 20 year olds thought “it was acceptable for a boy to expect to have sex with a girl if she wants to stop halfway through the sexual activity, even though he is really turned on”\(^1\). This new law will send a clear message that consent must be given for all sexual activity at all stages.

However, we have extremely serious concerns about the use of the concept of ‘prior consent’ in clause 10, (2), (b). This clause is highly problematic. We want to emphasise that consent to sexual activity can be withdrawn at any time. The notion that a woman can consent to sex at one time and that this consent still stands hours later regardless of the circumstances is not one which should be introduced into law.

\(^1\) UK Poll of 16-20 year olds – ICM – Nov 2006.
We would like to see the onus being on the man to obtain full consent for all
sexual activity, which would be extremely difficult or impossible if the other
party was ‘asleep or unconscious’. Furthermore, the idea that anyone would
give prior consent to sex which would occur while s/he was asleep or
otherwise unconscious is not only highly unlikely but creates an obvious
complexity in terms of the law, particularly in establishing how close to the
event the consent had to be given for it to be legitimate, and what consent
itself, in these circumstances was. This provision has the potential to
undermine the provisions at Section 8 (Administering a substance for Sexual
Purposes).

It is also questionable what kind of individual would want to have sex with
someone who was ‘asleep or unconscious’ on the basis that they had offered
some kind of consent earlier in the day, and to legislate with such a person in
mind seems to go against all ‘reasonable people’ tests usually associated with
Scots law.

As a result, the addition of this concept of ‘prior consent’ into the Sexual
Offences Bill is deeply troubling to Zero Tolerance. It seems to weaken
protection given to rape complainants rather than strengthen the law to
ensure justice for victims.

Consent and violence

We feel that the provision at clause 10, (2), (c) is insufficient and would
welcome a more broad clarification and understanding of the term ‘violence’ to
encompass but not be limited to coercion, force and threat of
violence/coercion and force. It is also notable that violence and threatening
behaviour are often part of a continuum, building an environment and
relationship of fear and power which leave victims acutely aware of their
position as subordinated and at risk of harm. Therefore, violence need not
explicitly be defined only as an actual violent act or event.

It is important that judges and juries are empowered through the law to move
away from the stereotype of a rapist as a strange man in an alleyway wielding
a knife. In reality, most women who are raped know their attacker and
‘violence’ as juries might understand it is not always present – someone does
not have to be wielding a weapon or using physical force to be using violence.
Often in domestic abuse cases the violence is more insidious and some rapes
in the domestic sphere or in existing relationships can use similar kinds of
threat and fear without necessarily using force. The wording of this clause
needs to reflect these subtleties.

Reasonable belief

The reasonable belief provision in section 12 states that “regard is to be had
to whether the person took any steps to ascertain whether there was consent
or, as the case may be, knowledge; and if so, to what those steps were”. This
seems to be an ill-fit with the Scottish system of criminal justice as it essentially asks the accused to prove something.

This also raises the question of how the court is to determine if any such steps were taken if the defendant refuses to provide evidence. It is not clear whether an inference may be drawn from a defendant's refusal to outline the steps taken to determine consent, or whether this would prejudice their right to be considered innocent until proven guilty. Perhaps the addition of a clause 12 (b) stating that an inference may be drawn if no evidence is led would be helpful. Whilst we understand the thinking behind this provision, that essentially asks an accused person to explain why they understood they had consent from the complainant, we are not sure that it will add anything in practice and we ask the Committee to clarify how regard can be had to the steps taken in a range of circumstances including those where no comment is made.

Children and mentally disordered persons

We welcome the provisions which protect children and mentally disordered persons from rape and sexual offences including sexual abuse of trust, but have no detailed comment to make on these aspects.

Penalties

We find it disturbing that the penalty for the crimes of rape and rape of a young child as listed in schedule 1 can be a fine. No financial penalty can properly compensate for the violation that such crimes represent, and we would argue that custodial sentences are the only appropriate disposal in such cases.

Other comments

Sexual offences as violent offences

We understand that as sexual offences, by law, are judged to be categorically different to violent offences, significant and relevant evidence is being passed over in court because it falls into a different category of assault, when we believe it should be considered to be an ‘analogous conviction’. This includes a case where a woman’s husband who had previously attacked her, to her permanent disfigurement, did not have this crime taken into account when being tried for her rape, as the crime was not considered to be related to a sexual crime and so it was not ‘analogous’.

We would hope that legal loopholes and bureaucracy would not get in the way of the presentation of intrinsically relevant evidence in the case against someone accused of rape or sexual assault. We believe that rape and sexual assault are part of a continuum of abuse and violence and in themselves are violent acts, even where extreme force has not been judged to have been used. Therefore, we would recommend that any previous convictions, evidence of, or reports of violence by the accused towards the complainant or
towards other women, should be seen as highly relevant, important and significant evidence in their trial for a sexual offence.

**Evidence used in the defence of the accused**

Despite the laws that are in place to discourage the use of character references, sexual history evidence and mental and physical health records of complainants in rape trials, all the evidence points to the fact that this still happens. We would like to see stronger recommendations to emphasise that exceptions to this law are only to be used in very strict and pertinent circumstances. Currently the list of exceptions to the law forbidding the use of character references, sexual history and medical records of the complainant in rape trials allow nearly all prosecutors to find an excuse for raising this information. At present, 70% of women in rape trials are questioned on their sexual history and character, which is intrusive, humiliating and ultimately a violation of their human rights. This can also be a deterrent to reporting and prosecuting a rape and contributes to the culture of woman-blaming which seeks to shift responsibility for rape from male perpetrators to the women complainants, whose personal lives are scrutinised and criticised as though they were the accused.

A woman’s previous sexual history bears no relevance to her ability to give consent to sex. In terms of the use of psychological and mental health records, we are concerned that there could be reason to object to this not only as irrelevant to a woman’s ability to give consent to sex, but also in terms of a disability discrimination issue. We feel that the legislation needs to be strengthened in order to reinforce the message that use of this type of information as evidence is highly unjust.

**Rape as a ‘gender neutral’ crime**

Despite the recognition that the bill gives to male rape, which we support, we do not agree that rape or sexual assault are gender-neutral crimes. Women are disproportionately the victims of such crimes and we believe in line with significant evidence, that rape and sexual assaults are gender motivated and the extreme expression of male abuse and display of power and control over women.

Gaining more recognition of the gendered patterns of violence, and their part in a patriarchal society in which males hold most of the power and control over women, including within the justice system, represents a step towards transforming the systems and structures which have been intrinsically and historically male-centric and which perpetuate inequality and injustice.

**Prostitution and Trafficking**

We would like to note that men caught gaining profit from the illegal commercial sexual exploitation of women are currently only charged with a public order offence that emphasises the undesirability or illegality of their business, rather than with a sexual offence, as we believe it to be.
Furthermore, men that prostitute (traffick) women against their free will (consent) are clearly facilitating rape, despite not necessarily physically raping the women themselves. We would like to see the Bill address these issues.

**Buying prostitution as a sexual offence**

We believe that buying sex should be considered a sexual offence. We believe that only by tackling the demand for the commercial sexual exploitation of women can a society begin to shift the stigma of prostitution from the women engaged in the system to the men who create and profit from it. We see prostitution as representing the violation and inequality of women – not a free exchange between adults - and believe that all women prostituted are participating in a system which is itself unequal. We wish to challenge the normalisation of this so-called ‘industry’ and we aspire to a world without these forms of exploitation. We reject the notion that we have to tolerate prostitution and live with its effects. We would like to see demand criminalised as has been the case in Sweden, and this Bill presents an opportunity to do so.

**Conclusion**

Despite our reservations about various aspects of the Bill, and particularly the concept of prior consent, we welcome this important and long-overdue reform of this area of Scots law. We would be happy to work with the Scottish Parliament and other key agencies working to advance equality and human rights in Scotland to secure the best possible legislation but also to address the wider concerns we have expressed in this response about the culture and attitudes in Scotland which currently perpetuate violence and inequality. Without wider work to achieve change, we fear that this legislation will have minimal impact.

**Jenny Kemp**

*Prevention Network Officer*
Introduction

Scottish Women’s Aid (SWA) is a national organisation working for change on issues of domestic abuse, and an umbrella body to a membership of 39 autonomous Women’s Aid groups throughout Scotland which provide temporary accommodation (refuge), information and support to women, children and young people who experience domestic abuse.

We welcome the opportunity to comment on this draft Bill, which is an important and timely opportunity for the Scottish Government to update and improve the Scottish legal approach to rape and sexual assault.

We do have some concerns in relation to the introduction of the concept of “advance consent” which we discuss below. Further, there are issues with proposals covering:

- Offences in the Bill not having the capacity to deal with reckless as well as intentional behaviour
- Inconsistencies in sentencing
- The option for serious offences to be tried summarily

However, the Bill represents the culmination of the most significant review of Scots law on sexual offences in recent decades and we look forward to contributing to the discussions and debates which will continue to shape it over the coming months.

PART 1 - Rape, etc (Sections 1-8)

Section 1 - Rape

Scottish Women’s Aid supports support the new, broader definition of rape outlined in the Bill which will include anal and oral penile penetration. We welcome this move forward from the current very narrow definition of rape.

We are in agreement with Rape Crisis Scotland that there should be a separate offence of sexual assault by penetration which is equivalent in seriousness and maximum sentence to rape, rather than this being subsumed within the new offence category of sexual assault.
Section 6 - Communicating indecently

The issue of the perpetration of reckless, in addition to intentional, behaviour has not been addressed in these sections of the Bill, which SWA, Rape Crisis Scotland and the Women’s Support Project all recommended be done.

Our recommendation was that, in addition to the existing provision covering intentional behaviour, section 6 should be extended to include circumstances where the accused was reckless as to whether their behaviour has the impact of humiliating, distressing or alarming someone.

The rationale for this request is because as the wording of the section currently stands, the offence would only apply where the Crown Office could prove that the accused set out solely to obtain sexual gratification, or behaved with the direct purpose of humiliating, distressing or alarming someone. Thus reckless behaviour would not be an offence. We believe that that the Bill should, therefore, address reckless behaviour in these circumstances.

This applies equally to the following sections which appear in later parts of the Bill:

Section 16- Causing a young child to participate in a sexual activity
Section 17- Causing a young child to be present during a sexual activity
Section 18- Causing a young child to look at an image of sexual activity
Section 19-Communicating indecently with a young child, etc
Section 23- Causing an older child to participate in a sexual activity
Section 24- Causing an older child to be present during a sexual activity
Section 25- Causing a young child to look at an image of a sexual activity
Section 26--Communicating indecently with an older child, etc

PART 2 – Consent and reasonable belief (Sections 9-12)

Section 10- Circumstances in which conduct takes place without free agreement

The Bill should state that the list of circumstances in section 10 indicating lack of free agreement is non-exhaustive. This is made explicit in the wording of the Explanatory Notes at Paragraph 35 which makes clear that the list of circumstances set out in Section 10 “… is a non-exhaustive list and therefore does not imply that in situations which are not listed in subsection (2), there is free agreement”. It is important that, for the avoidance of doubt, this is made explicit in the body of the Bill itself.
We agree with Rape Crisis Scotland’s proposal that there are several other issues appropriate for inclusion in section 10 as a factual situation showing that consent was not present, namely:

- The inclusion of a provision to allow a pre-existing relationship of violence or sexual exploitation to form the basis for showing that there was either no free agreement or that any belief that the complainer was consenting was not a reasonable one. This presumption of “no consent” should apply in circumstances in which the complainer had been the victim of sexual or physical abuse at the hands of the accused on previous occasions.
- Behaviour consistent with grooming for the purposes of sexual exploitation
- The particular position of women involved in prostitution and trafficked women should be considered in circumstances where it can be shown that the accused knew or was reckless to the fact that the complainer was being held against her will by a third party.

SWA completely rejects the move to introduce any concept of “advance consent” into law. The Bill sets out that consent will be considered to be absent when a person is sleeping, incapable through alcohol or unconscious as long as prior consent had not been given to having sex in these circumstances. These proposals are a regressive step and undermine the intent of the Bill to improve the law.

Currently, the Crown has to prove that the complainer was asleep or unconscious at the time of the alleged rape. We do not wish to see any change in the law that will potentially result in the Crown also having to prove that the complainer did not previously give consent to having sex in these circumstances. This approach contradicts the notions of sexual autonomy which are seen as underpin this Bill, namely the understanding that a woman, or a man, can say ‘no’, or withdraw their consent to sex, at any time.

Further, for the sake of clarity in the matter of the victim having taken either drugs or alcohol, Paragraph 36 of the Explanatory Notes should acknowledge that it does not matter whether the victim has voluntarily or knowingly taken drugs or alcohol, to put the emphasis on the fact that their consent, or lack of, is the issue, and the fact that they voluntarily took an intoxicant is irrelevant in terms of this section. This was included in the first version of the Explanatory Notes in the earlier consultation paper and we think that this is a helpful clarification.

**PART 4 – CHILDREN (Sections 14-30)**

**Section 22 - Engaging in sexual activity with or towards an older child**

We are unsure why, in Schedule 2, there is no provision for prescribing an alternative offence, if sexual activity with or towards an older child is not proved by the Crown. Consequently, we would welcome clarification of this point.
PART 5 - ABUSE OF POSITIONS OF TRUST: CHILDREN AND MENTALLY DISORDERED PERSONS (Sections 31-36)

Section 31 - Sexual Abuse of Position of Trust - Children

Section 31 creates a new offence of “sexual abuse of trust” whereby a person aged 18 years or older intentionally engages in a sexual activity with, or directed at, a person who is under 18 and in respect of whom the perpetrator is in a position of trust.

According to Schedule 1, the maximum custodial sentence applicable is five years. There is an issue here that this custodial penalty does not reflect the severity of the offence and is inconsistent in terms of the custodial penalty applied for other offences.

This is demonstrated by the anomaly in sentencing between sections 27 and 31. In section 27, a 15 year old engaging in penetrative sexual conduct with another 15 year old could find themselves potentially facing a prison sentence of 10 years; in section 31, if an adult in a position of trust towards a person under 18 sexually abuses that person, the maximum prison sentence available to the court is only five years. This situation is unacceptable as the lesser sentence applicable in section 31 does not reflect the severity of the offence inherent in such a breach of trust.

Further, the argument for the increase in the maximum penalty to 10 years is supported by the current law. Under the existing provisions which govern this crime, namely, sections 3 and 4 of the Criminal Law (Consolidation) (Scotland) Act 1995, anyone found guilty of sexual intercourse with a child under the age of 16 years who is a member of the same household as that child and is in a position of trust or authority in relation to that child, is liable, on conviction on indictment, to imprisonment for any term of imprisonment up to and including life imprisonment. The Bill intends to repeal these existing sections, leaving the maximum penalty at five years, which diminishes the seriousness of the offence and endangers the safety of children.

We would also comment that there is no provision for prescribing an alternative offence if engaging in sexual abuse as abuse of a position of trust, as defined under the statute, is not proved.

We would also seek clarification of Paragraph 113 of the Explanatory Notes which outlines the test that will be use in determining whether the activity engaged in by the accused is sexual. Instead of saying “activity”, the subsection talks about “penetration”, which appears to be incorrect—“Subsection (2) provides a test for whether penetration is sexual. The test is effectively the same as the test used in section 2 (see paragraph 13 above).”
Section 35- Sexual Abuse of Position of Trust - mentally disordered person

There is concern here, which we voiced in our response to the SLC’s 2007 consultation, as to possible incorrect assumptions on the extent of a person’s capacity to consent and the assumptions that the section makes in relation to “existing sexual relationships.”

The section suggests that the fact that the parties are married, in a civil partnership or in a sexual relationship should be a prima facie outright defence to a charge of the sexual abuse of a person with a mental disorder. However, it is perfectly possible for the spouse, civil partner or sexual partner to exploit and abuse the other person, which can happen in relationships where the person does not have a mental disorder, as highlighted in Recommendation 6 of the 2007 consultation which states, “The giving of consent to one sexual act does not by itself constitute consent to a different sexual act “.

This is particularly relevant where a person who becomes someone in a position of trust has been sexually abusing the mentally disordered person before the position of trust was established, as any pre-existing sexual relationship would count as a defence.

These concerns notwithstanding, Scottish Women’s Aid welcomes this Bill, which has much to commend it, and we look forward to working with the Scottish Government and Scottish Parliament to put in place definitive legislation protecting women, children and young people. Further, we look forward to engaging with them and our colleagues in the statutory and voluntary sectors to address the wider changes to policy and attitudes which must underpin the success of law reform on sexual offending.
Thank you for providing the opportunity to comment on the Sexual Offences (Scotland) Bill that is currently being considered by the Justice Committee following its introduction to the Parliament earlier this year.

NHS Tayside welcomes the clear statutory definition contained in the Bill on consent as well as on equal status and equal protection. We believe that the clarity on consent will help reinforce the efforts of schools and others to explain and encourage responsible behaviour and is in keeping with the aims set out in the national sexual health strategy *Respect and Responsibility*.

However, clinical staff felt that the Bill should have taken the opportunity to decriminalise consensual sex between 13 to 15 year olds, where concerns over possible coercion and child protection considerations have been excluded, and that its continued criminal status presents a barrier to some young people accessing support and services that are ultimately aimed at safeguarding their wellbeing.

Overall, we believe that the Bill will result in greater clarity and offers the potential to improve conviction rates for sexual offences.

*Sandy Watson*  
*Chairman*
Justice Committee

Sexual Offences (Scotland) Bill

Written submission from North Lanarkshire Council

North Lanarkshire Council broadly welcomes this Bill and recognises it as an improvement to the current legislation in respect of sexual offences.

The Council specifically welcomes the following recommendations within the Bill:

- the abolition of outdated and confusing offences such as Lewd and Libidinous Practices and Behaviours, Clandestine Injury, etc.
- the creation and definition of a statutory offence of Rape and the widened definitions of what constitutes Rape as a crime
- the creation of an over-arching offence of Sexual Assault
- the defining of the term ‘consent’ as being “free agreement”
- the creation of a range of ‘protective’ provisions

In response to the letter from the Justice Committee (via ADSW dated 26 June 2008) asking for comment, there are a few points that, as a Council, we would wish to highlight.

Requirement to register

Currently, those convicted of specific offences (of a sexual nature) are required to register with the Police. The range of these offences is specified in the Sexual Offences Act 2003 – Part II (which applies in Scotland).

The deletion of crimes such as Rape (common law), Clandestine Injury, Lewd and Libidinous practices and behaviours, etc., mean that offenders will no longer be convicted of such crimes and will be replaced by Rape (statutory), Sexual Assault, etc. under the proposals contained in the Bill.

If the intention is to continue the practice of requiring convicted sex offenders to register with the Police, it means that either Part II - as outlined above - needs to be amended or, indeed, new registration arrangements need to be addended to this proposed Bill. To do neither would suggest that those convicted of the new offences outlined in the Bill would not be legally mandated to register as their crimes would not come under the ambit of Part II.

Free Agreement

If a pattern of subjugation is evidenced (e.g. domestic violence), then it should be highlighted that the person who has been the recipient of this cannot give what would generally be considered as ‘free agreement’. This is particularly the case when Rape occurs within the context of a marriage / other significant relationship.
In a similar vein, victims who have been subject to the process of ‘grooming’ by offenders (particularly sexual offenders) cannot be viewed as being able to fully give free agreement. Although the Bill outlines issues of age and mental health as barriers to free agreement, it is necessary to give consideration about whether truly free agreement can be given by those who have been affected by insidious and damaging behaviours such as grooming and / or relationship-based violence.

**Section 1 - Rape**
Given the welcome change to the re-defining of Rape within the Bill, this might be an opportunity to re-visit the issue of how Rape is prosecuted in Court. The Bill could move one step further and offer victims of Rape more protection by making a legislative change to prohibit the victim’s sexual history being introduced into Court proceedings and outline action against those who would seek to raise this as evidence during a trial.

**Section 2 - Sexual assault - (2) (c)**
Whilst the general principle of this clause appears to cover a number of probable behaviours, it would be helpful if consideration could be given to a specific charge of “Sexual Assault by an object” (or similar wording). This would allow not only a clearer appreciation that penetration actually occurred, but also highlight that such offences are beyond abusive sexualised behaviours, i.e. they have an element of deliberate sexual violence suggesting a potentially more dangerous activity by the perpetrator. In looking at such a specific offence, the issue of mens rea (as with many other proposed new offences in the Bill) would require to be applied.

**Section 10 - Circumstances in which conduct takes place without free agreement - (2) (a) + (b)**
The implied notion of ‘advance consent’ appears contrary to the general use of free agreement in other sections of the Bill. In these paragraphs it would appear to suggest that consent is some form of contract between the two parties and creates other questions such as “how long is consent valid for?”: a situation that would not be helpful when trying to prosecute in crimes of Rape for example. Consent is a fluid issue that, whilst situational, cannot be assumed or inferred (from previous events or behaviours) and must remain the exclusive right of the person, irrespective of ensuing events (e.g. the person becoming unconscious).

Mary Fegan  
*Head of Social Work Services / Chief Social Work Officer*
1. Introduction

1.1 The Equality and Human Rights Commission was established by the Equality Act 2006 and came into being on 1 October 2007. We are the independent advocate for equality and human rights across the three nations of Great Britain, and we work to reduce inequality, eliminate discrimination, strengthen good relations between people, and promote and protect human rights. We enforce equality legislation on age, disability, gender, gender reassignment, race, religion or belief, and sexual orientation and encourage compliance with the Human Rights Act. In Scotland, we co-locate and work in partnership with the Scottish Commission for Human Rights.

1.2 The Commission welcomes the opportunity to comment on this timely and important piece of legislation. Our submission covers the areas which we believe have an equalities dimension, specifically gender, age and sexual orientation. The Commission has previously submitted evidence to the Scottish Law Commission’s proposals for the reform of the law on rape and sexual offences.

1.3 We welcome the Sexual Offences (Scotland) Bill. We have a number of specific comments to make, regarding definitions, consent and reasonable belief, sexual history and character evidence, sexual offences and older children, the role of the Gender Equality Duty (GED) and the wider challenges around changes public attitudes to rape. This last point is fundamental to the debate around changes to the law on rape and sexual offences in Scotland.

1.4 Legislative change, however welcome, will not on its own lead to improved conviction rates for rape, nor will women have greater protection from crimes of sexual violence without a sustained challenge to widely-held public attitudes to rape, in particular the still-prevalent myth that a woman can in some way be responsible for being raped, depending on how she was dressed, or how much she had had to drink, or because of her sexual history. As the Lord Advocate stated in March 2008, “for as long as society is prepared to blame the victim, we cannot begin to hope that it will blame the perpetrators, no matter what the law might say.”

2. Definition of Rape

2.1 The Commission supports the introduction of a statutory definition of rape (Section 1). This definition conveys in specific terms the nature of the offence, while its separation from other sexual crimes denotes it as a specific and uniquely unacceptable crime. We also support the widening of the definition of rape to include oral and anal penetration, and the recognition inherent within this definition that any penetration without consent represents a fundamental violation of an individual’s autonomy.
2.2 This move away from a common law definition of rape, which only covers penetration of the vagina, is also welcome in giving legal recognition that men can be victims of rape. This, along with the removal of the outmoded offence of sodomy, means that the law on rape will apply largely without distinction to gender, gender identity or sexual orientation.

2.3 One area of remaining concern is that of rape with an object, particularly in relation to lesbian and bisexual women’s experiences of same-sex rape. The Commission supports the concerns of the Equality Network and LGBT Youth that further consideration is needed of the potential protection gap for victims of woman-on-woman rape.

3. Consent and Reasonable Belief

3.1 The Commission also welcomes the statutory definition of consent as free agreement. However, the proposal to introduce the concept of “prior consent” to sex (Section 10, (2) (b)) raises serious concerns. It is very difficult to see under what circumstances an individual would wish consent to sexual activity at some point in the future when s/he is asleep or unconscious. This provision also has the potential to undermine the provisions at Section 8 (Administering a Substance for Sexual Purposes).

3.2 In addition, the provision at 10, (2) (c) is insufficient since it does not adequately capture the effect of historical abuse on a person’s ability freely to agree to sexual activity. It is not clear how distant in time previous instances (or threats) of violence must be to be considered irrelevant. It does not address the impact that living in a relationship built on threats of violence and sexual coercion has on an individual’s capacity to agree freely to sexual activity. The Bill must seek to address the more insidious forms of violence and coercion that can accompany rape and sexual offences.

3.3 The reasonable belief provision in section 12 – “regard is to be had to whether the person took any steps to ascertain whether there was consent or, as the case may be, knowledge; and if so, what those steps were” – raises the question of how the court is to determine if such steps were taken if the defendant refuses to provide evidence. How, without prejudicing a defendant’s right to silence, will section 12 achieve its aim? Will it be made explicit that an inference may be drawn from a defendant’s refusal to outline the steps taken to determine consent? The Commission considers that without such a provision section 12 runs the risk of being meaningless.

4. Children

4.1 The Commission welcomes the provisions which protect children from rape and sexual offences, including the definition of rape for children under 13.

4.2 The Commission recognises the need to take a different approach to consensual activity between older children aged 13 to 15 (section 27). We recognise the need to retain a criminal justice response to sexual offences committed by older children on other older children, but believe that care must be taken to determine where a criminal justice
response should take precedence over other interventions better able
to reflect the needs and circumstances of individual children. A child
protection and emotional/sexual wellbeing approach to older children
who are, or may be, engaging in sexual activity would, we believe, be
the more appropriate response in most instances.

5. Sexual History and Character evidence
5.1 Although the Bill does not contain provisions for the reform of the law
on sexual history and character evidence this remains a crucial issue.
At present 70 per cent of women in rape trials are asked questions
about their sexual history and character. This questioning is intrusive
and humiliating, and the prospect of enduring such questioning in court
acts as a deterrent for some women reporting a rape to the police.
Seeking to disclose a woman’s sexual history in court can also
entrench some of the commonly held myths about women being in
some sense responsible for being raped.
5.2 Related to this is the increased frequency of cases where a
complainant’s medical records are used in court. Again, the admission
of irrelevant details about a person’s mental and sexual health feeds
into ingrained attitudes about a complainant’s character and the validity
of her evidence.
5.3 At the same time, there are currently restrictions on the admissibility in
courts of “analogous convictions” – a defendant is obliged to reveal
these if an application is made to question a complainant on her sexual
history. However, the current definition of analogous conviction is very
narrow. Currently, for example, a defendant may not have to disclose
previous convictions for non-sexual crimes of violence against a
complainant. This failure to recognise the commonality of crimes of
violence and sexual violence against women must be addressed.

6. Challenging Public Attitudes
6.1 The Commission welcomes the changes will offer further legal
protection for victims of rape and other sexual offences and particularly
improved protection for transgender people. However, it is important to
be realistic about the impact that legislation can bring for women
victims of rape and sexual offences.
6.2 Scotland has an alarmingly low conviction rate for rape; in 2006/07
convictions fell to a record low of 27 in 2006/2007. In the same year
922 rapes were reported to the police. This means that the conviction
rate for rape has dropped to under 3% for the first time, with only 2.9%
of rapes reported to the police leading to a conviction. Just 7% of
reported rapes led to a prosecution, with the vast majority of cases not
reaching court.
6.3 Sexist attitudes towards women victims of rape are well documented;
more than a quarter of people in Scotland believe that victims of rape
are partially or totally responsible for the crime if they were drunk at the
time with similar numbers blaming the victim where she behaved
flirtatiously or wore revealing clothing.
6.4 If conviction rates for rape are to be improved the Commission strongly
believes that there needs to be a fundamental shift in attitudes which
blame women for sexual violence. These issues should be addressed 
across Scotland but with particular attention on the criminal justice 
system to ensure that women victims have full access to justice.

7. The Gender Equality Duty
7.1 The Gender Equality Duty has an important role to play in requiring 
police, prosecutors and the courts to assess the impact of policy and 
practice in the conduct of rape and sexual offences cases. The 
Commission recognises that work is ongoing in this area, with the 
Crown Office currently implementing the fifty recommendations made 
in a review of the investigation and prosecution of rape and sexual 
offences in Scotland viii. The Commission hopes to contribute to this 
debate with a research project later in 2008 looking at the role the 
Gender Equality Duty can assist public authorities in addressing 
violence against women, including rape and sexual violence.

Conclusion
The Sexual Offences (Scotland) Bill heralds an important and much needed 
reform of Scots criminal law in this area, and the Equality and the Human 
Rights Commission welcomes its publication. We look forward to continuing 
to work with the Scottish Parliament, Scottish Government, as well as all the 
key actors in the criminal justice system and our partners in women’s and 
equality organisations, as together, we look to address the wider policy and 
attitudinal changes which must accompany reform of the law.

Euan Page
Parliamentary Affairs Manager

References/Notes

i
www.equalityhumanrights.com/Documents/Scotland/ScotRapeandSexualOffences.doc

ii Rt Hon Elish Angiolini QC, speech to Rape Crisis Scotland Conference, 
“Legal Responses to Rape: Redressing the Balance”, Tuesday 4 March 2008, 
www.copfs.gov.uk/Resource/Doc/6/0000375.pdf [Link no longer operates]

iii A lack of awareness appears to be hampering effective support and 
protection for lesbian and bisexual victims of same-sex rape. See: 
Stonewall/Ruth Hunt & Dr Julie Fish, Prescription for Change: Lesbian and 
Bisexual Women’s Health Check, 2008

iv See: Scottish Government, Impact of Aspects of the Law of Evidence in 

v All figures from Scottish Government, cited by Rape Crisis Scotland. June 
I write on behalf of the Association of Scottish Police Superintendents (ASPS) in response to the Justice Committees’ invitation to submit views on the above Bill and the likely impact of its proposed measures.

Having consulted our members the following response reflects the broad views of the Association.

1. Consent (free agreement)

We feel that the statutory definition of consent as being ‘free agreement’ and the statutory list of situations whereby an individual can be considered to have ‘consented’ to sexual activity is simplistic and provides little guidance to a Jury. We consider that an alternative definition should include the following: “that the persons acted freely, voluntarily and with knowledge of the nature of the act.”

2. Rape

Our members welcome the move away from the gender specific aspect of rape and the broader inclusion of males.

3. Sexual Offences

We welcome the introduction of new statutory offences relating to sexual conduct, including rape, sexual assault, sexual coercion, etc.

4. Protective Offences

4.1 Relating to Children

We welcome the removal of the distinction between the gender of either the child or perpetrator of such offences. Further we are content that the Bill does not decriminalise consensual sexual intercourse between under age teenagers as this would in effect, reduce the age of consent and encourage sexual intercourse in this age group.

4.2 Sexual Abuse of Trust

We are concerned that only those under the age of 18 years are likely to be protected and would point out that this could lead to cases where vulnerable adults, particularly those who have not been
clinically confirmed as having a mental disorder, may be open to abuse.

We also note that there is an inference that those in ‘positions of trust’ within education are considered only to be those individuals who have a direct responsibility for a pupil and not any teacher within the educational establishment. This should be reconsidered as it may lead to anomalous situations arising.

5. Conclusions

The Association welcomes this opportunity to provide our views on this Bill and generally welcome the positive changes within the Bill which clarify how the law defines and deals with Sexual Offences.

We anticipate that these changes will play a significant part in protecting the young and vulnerable as well as clarifying the law in a non-gender specific way in particular where it relates to male victims including Gay men.

Whilst women remain the majority of victims of these crimes we acknowledge that these changes should therefore have a significant and we hope positive impact in achieving successful prosecution of such crimes.

We hope the Justice Committee finds these views of assistance.

Carol Forfar
General Secretary
Written submission from the Community Planning Partners in Highland

The Justice Committee have requested views on the Sexual Offences (Scotland) Bill. The Community Planning Partners in Highland, including the Highland Child Protection Committee and Sexual Health Strategy Group, are content to support this Bill with one exception. That exception relates to clause 27, “Older children engaging in penetrative sexual conduct with each other”. We continue to agree with the Scottish Law Commission’s recommendations that consensual sexual intercourse between similarly aged 13, 14 and 15 year olds should cease to be a criminal offence.

We suggest that there are a number of pressing reasons why clause 27 should be removed from the Bill and these reasons are set out below.

In effect, it will potentially criminalise both boys and girls aged 13, 14 and 15 who engage in consensual sexual activity. The current law criminalises boys only, regardless of whether the activity is with a girl or a boy and regardless of who initiated the sexual activity. This means that currently, boys engaging in sex with girls or with other boys are liable to prosecution, but that girls engaging in sex with boys or with other girls are not. This may contribute to the reluctance of boys to seek sexual health advice and support. It also has the potential to impact disproportionately on boys already in touch with services (for example police or social work), because the sexual behaviour of those not in contact with these services is far less likely to come to the attention of authorities. We do not believe that the concern about consensual sexual activity amongst young people under 16 should mean a simple change to criminalising both boys and girls, for the reasons set out below. We would expect cases of non-consensual or coercive sex between older children to be fully investigated and prosecution sought and we believe the remainder of the Bill fully addresses this.

In relation to clause 27 we are specifically concerned about the potential impact on:

- Access to sexual health services
- The prosecution of rape
- Criminalisation of young people – both short and long term impacts

We detail our concerns below:

Access to Sexual Health Services
Teenage pregnancy and the spread of sexually transmitted infection in young people are significant public health concerns. Girls currently vastly outnumber boys in attendance at Sexual Health Services for STI testing and contraception. There is no current threat of criminal proceedings for young women under 16 engaging in consensual sexual activity, but this will change under clause 27. We are concerned that, should clause 27 be retained, the
perceived threat of reporting to police will deter girls from accessing sexual health services and thus have a direct impact on teenage pregnancy rates and the spread of sexually transmitted infection in young people.

**Impact on Prosecuting Rape**

The retention of clause 27 is potentially extremely damaging to rape trials – those alleging rape should never be seen as gaining personal advantage from such an allegation. There is no advantage for young women who have engaged in consensual sex to allege rape at the moment as they are not prosecuted for having consensual sex. However, clause 27, by opening the possibility of prosecution for engaging in consensual sexual intercourse, brings with it the potential to escape prosecution by claiming that the consensual sexual intercourse was in fact non-consensual. If the receptive partner alleges that sex was not consensual, s/he will not be subject to potential prosecution, but the charge against the insertive partner will become far more serious – rape. Pressure for young receptive partners to avoid prosecution is likely to be intense and will come from peers, parents and Defence Counsel. In genuine rape cases Defence Counsel is likely to raise this possibility (i.e. that it was consensual activity), further feeding the attitude that women lie about rape and creating further difficulties in achieving convictions for people aged under 16 and for adults.

There may also be a further impact on young people who have been raped if the prosecution results in a Not Guilty verdict - if the accused is found not guilty, the victim could be charged with/convicted of engaging in consensual sexual activity. The likelihood of this being the case is extremely high and we are concerned about these cases in particular. As many rape cases hinge on the word of the accuser against that of the accused on the specific issue of consent, a Not Guilty verdict would indicate that the jury believed the young person had consented. The logical conclusion is that the young person could, therefore, be prosecuted for “engaging while an older child in consensual penetrative sexual conduct with another older child” – this would have the horrendous effect of criminalising young people who are rape victims.

This creates a further anomaly between people over and under the age of 16. Where someone over the age of sixteen has been raped but her accused is found not guilty, the accuser faces no further inquiry and is unlikely to be subject to criminal prosecution. This would not be the case for young people under 16 under the terms of the proposed Bill.

We believe, if passed in its current form, that this legislation will act as the strongest of deterrents to young people under the age of sixteen to report rape but conversely and perversely may act as an inducement to claim rape when the sex was in fact consensual.

**Criminalisation**

As proposed, clause 27 brings in two new offences for any young person aged 13-15 years. Those of:
• ‘Engaging while an older child in penetrative sexual conduct with or towards another older child’ for anyone who penetrates the vagina or anus of another person aged 13, 14 or 15
• ‘Engaging while an older child in consensual penetrative sexual conduct with another older child’ for anyone who consents to (and receives) penetrative sexual activity.

We note that oral sex is exempt from these proposed offences.

A large number of young people are engaging in sexual activity between their 13th and 16th birthdays and this is not unique to Scotland – similar rates are seen across the developed world.

• A recent lifestyle survey, the HBSC study, highlighted that 30% of young men and 34% of young women aged 15 years are or have been sexually active
• Strict enforcement of the proposed law would result in the prosecution of a third of young people under 16

We believe these new offences of ‘engaging while an older child in penetrative sexual conduct with or towards another older child’ and ‘engaging while an older child in consensual penetrative sexual conduct with another older child’ raise significant issues of inequity in relation to sexual orientation and those already vulnerable or living in deprived circumstances:

• Sexual orientation - heterosexual and male homosexual relationships are more likely to involve non-oral penetration of the vagina or anus than lesbian relationships. Thus both girls and boys engaging in heterosexual consensual sexual intercourse, and boys engaging in penetrative sexual intercourse with other boys are open to prosecution whilst sexual activity between two women is far less likely to be subject to prosecution under this clause
• Information about sexual activity on the part of young people already “known” to police/social services is more likely to come to light and prosecution is, therefore, more likely to follow. Young people known to police/social services come disproportionately from vulnerable and deprived backgrounds. This would have the effect of further compounding the inequalities such young people already experience
• In light of the recent lifestyle survey referred to above, we are concerned about the long term impacts that being investigated for consensual sexual activities will have on both boys and girls – in reality it would mean that these young people will have details about consensual sexual behaviour while under 16 years of age disclosed during Disclosure Scotland checks. Where prosecution is successful, the consequences are life-changing and entirely disproportionate to any harm caused. Where charges are not brought (but it’s clear an offence has been committed) this is also likely to be revealed through the Disclosure Scotland process. This brings with it the most severe penalties in terms of being barred from a range of future occupations

Conclusion
Whilst it may seem that we are suggesting removing protective barriers for young people engaging in sexual activity, there is no evidence to suggest that the law acts as a significant deterrent to early sexual behaviour, and we believe that the impact on health-seeking behaviour, the potential damage a conviction or Disclosure Scotland record for a young person involved in consensual sexual activity will have in terms of lifelong career and financial matters, and the further complication of rape trials and hardening of attitudes towards women who are raped, outweighs any small deterrent effect that may be postulated. We believe that there are adequate protective measures that should be used where young people have been raped and coerced into sexual activity and these are robustly outlined in other parts of the Bill. We also agree with the Scottish Law Commission’s proposal that the Children’s Hearing system could be utilised as an alternative to criminalising young people.

We urge the Justice Committee to remove clause 27, “Older children engaging in penetrative sexual conduct with each other” (and any related sub-clauses consequent to the substantive point of Clause 27), and to consider other, evidence-based ways of raising the age of first consensual sexual activity.

Gillian Gunn  
Violence Against Women Development & Training Officer  
Highland Wellbeing Alliance

Lorraine Mann  
Public Health Specialist (Sexual Health)  
NHS Highland
Introduction to CARE

1 CARE is a charity representing over 100,000 Christian supporters from all denominations throughout the UK. CARE’s Public Affairs Department acts as a think tank on ethical issues in biology and medicine, as well as in education and social issues. CARE also briefs supporters and Parliamentarians as relevant issues are considered in Westminster, Brussels and the devolved Parliaments and Assemblies. CARE also has a network over 150 Crisis Pregnancy Centres throughout the UK which provide advice and assistance to women who are pregnant and/or suffering from post-abortion trauma. We are actively campaigning for measures to address the issue of human trafficking into the sex industry and are members of the Stop the Traffic coalition.

2 CARE for Scotland has an office in Glasgow. CARE for Scotland has approximately 3,000 registered supporters drawn from across the main Christian denominations in Scotland and 10 Crisis Pregnancy Centres throughout Scotland. Since 1999 CARE for Scotland has maintained a significant public policy presence with a parliamentary officer liaising with the Scottish Executive/Government and the Scottish Parliament. We have responded to many consultations and given evidence to parliamentary committees. The issues upon which we have had an input include measures to tackle trafficking in the Criminal Justice Act 2002, the Prostitution Public Places (Scotland) Act 2006 and the National Sexual Health Strategy.

General Approach of the Bill

CARE is supportive of the general approach adopted in the Bill. We agree that action should be taken to increase the number of rape convictions and are content for the definition of consent to be changed along the lines outlined in the Bill. However, we think it would be helpful for Government and/or the Lord Advocate to give examples of the criteria which might be taken into consideration when determining if a ‘reasonable belief’ that consent is given exists. Situations of particular difficulty in determining if such a ‘reasonable belief’ is present are likely to arise in where the individuals concerned are not in an ongoing relationship, there is reluctance (and subsequent regret) by one party to participate in sexual intercourse and perhaps there has been the consumption of alcohol. Guidance for police, prosecutors and courts in such situations would be helpful.

CARE is pleased that the Scottish Government has decided not to accept the Scottish Law Commission proposals regarding the age of proximity. We consider that there proposals would have sent an unhelpful signal to young
people at a time when society is facing record levels of teenage pregnancy and sexually transmitted infections. We are pleased also to note that the Scottish Government has chosen not to implement the recommendations of the Scottish Law Commission relating to consensual sexual violence.

CARE is supportive of the Scottish Government’s proposal that rather than following a route of prosecution, in most cases children and young people found engaging in sexual activity will be referred to a Children’s Panel on welfare grounds. We consider that this strikes the right balance between upholding the law, acting with compassion and seeking to address potentially harmful behaviour patterns. However, we are conscious of the small number of cases currently referred to Children’s Panels and consider that more resources need to be put into the system to effectively respond to the challenge posed by sexual activity among young people in a way which encourages more responsible behaviour. On that point we would argue that abstinence-based SRE programmes and youth work initiatives (e.g. the Romance Academy approach) have a role to play and should be resourced by national and local government and that projects based on this approach be accessed by young people via the Children’s Hearing System.

The Case for a Demand-side Prostitution Amendment

CARE is aware that the scope of the Bill includes prostitution. With that in mind, we encourage the Committee to consider introducing measures at Stage 2 to tackle the demand for prostitution. In particular, we ask the Committee to introduce an amendment which would outlaw the purchase of sex. Such legislation has proven effective in Sweden in tackling abuse of women through prostitution and human trafficking. The UK Government is currently considering whether or not to introduce such a legislative change in England and Wales. We would encourage the Scottish Parliament and the Scottish Government to seize this opportunity to set an example to the rest of the UK on this issue by taking action to address the issue of human trafficking in Scotland. A recent report by Amnesty International\(^1\) pointed to the scale of the problem of human trafficking in Scotland. It stated that:

- Since March 2003, 25 women found in Glasgow have been referred to the TARA Project, most of whom were from Eastern Europe and West Africa.
- Glasgow has the highest number of sex workers in the UK outside London and at least 50% of whom are from overseas.
- During Operation Pentameter 1 Scottish police forces visited 25 premises, made 12 arrests and uncovered 10 women, 5 of whom were trafficking victims.
- During Operation Pentameter 2 over 50 premises were visited and 59 victims of trafficking were identified in Scotland.
- No-one has been convicted of trafficking in Scotland despite the fact that ACPOS estimate that Scotland has a disproportionately large share (13%) of the human trafficking trade.

\(^1\) See “Scotland’s Slaves: An Amnesty International briefing on trafficking in Scotland”, pp 5-6.
CARE believes that Scotland can learn from the experience of Sweden. The Swedish Government has long given priority to combating prostitution and human trafficking for the purposes of sexual exploitation as well as other forms of trafficking in human beings. In 1999 legislation was brought in prohibiting the purchase of sexual services, with the penalty of a fine or imprisonment. In 2005 this was extended to include cases where the payment had been promised or made by someone else. Since the Act came into force, there has been a significant drop in the number of women in street prostitution. Criminalisation has also resulted in a significant drop in the number of men who buy sexual services, as has the recruitment of women into prostitution. A further result of this legislative change has been a dramatic reduction in the number of women trafficked into prostitution. CARE largely agrees with the Swedish approach to tackling prostitution and we would like to see the Scottish Government implementing similar laws in Scotland.

Dr Gordon Macdonald
Parliamentary Officer
A quick note of interest into the coming proposed bill. I would say that the concept of calling sex with a child 13-16 with an adult ‘intercourse with an older child’ ‘unacceptable.

I would have liked to have seen this still seen as rape foremost. I do not understand how we can say that would not be rape just because the child is 13 or over. That child is still a child under the age of sixteen and if penile intercourse occurs it should still be seen as rape as I would say that a child of 13 does not understand the full implications of this with an adult.

I am disheartened to see that we are throwing away children’s rights to be fully protected under the UN convention on the rights of the child. In view of this I would have liked to see this changed to rape and not classified as ‘Intercourse with an older child.

We are eroding childhood as it is in our culture to day and wondering what is happening to our children and young adolescents. If this goes ahead we are further eroding the age of saying what is acceptable and not. We need to keep and cherish childhood regardless or whether they are young old they are still children.
Justice Committee

Sexual Offences (Scotland) Bill

Written submission from the Catholic Parliamentary Office

Comments on Some Aspects of the Bill

Consent
We broadly agree with the provisions as laid out in the bill in relation to consent and agree that consent be defined as “free agreement”. We support the aim of giving clarity and consistency to the law in this area.

Rape
The Catechism of the Catholic Church states that:

"Rape is the forcible violation of the sexual intimacy of another person. It does injury to justice and charity. Rape deeply wounds the respect, freedom, and physical and moral integrity to which every person has a right. It causes grave damage that can mark the victim for life. It is always an intrinsically evil act. Graver still is the rape of children committed by parents (incest) or those responsible for the education of the children entrusted to them."

We are supportive of the view stated by the Scottish Law Commission:

“…as the penis is a sexual organ, penetration with a penis represents a quite different wrong from other forms of penetration. There is an added dimension to the sexual nature of an attack when it involves penetration with the sexual organ of another person, which for practical purposes means the penis.”

In regard to the bill implementing the view stated by the Scottish Law Commission:

“We see no reason why rape should continue to be defined so narrowly. Penile violation of a person’s anus or mouth is as severe an infringement of sexual autonomy as violation of a vagina. Furthermore the present definition means that while penile penetration of a man is criminal (either as sodomy or indecent assault), it is not regarded as rape... we can identify no reason why men and women victims of penile assault should be treated in different ways.”

We note that penile penetration of the anus is intrinsically disordered and carries graver physical and psychological risk to the victim. Whilst both of these types of assault are exceedingly grave it is incorrect to assert that there is “no reason” for distinguishing between the acts. It would surely be more reprehensible for a victim of rape to also be sodomised.

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1 Scottish Law Commission, Discussion Paper on Rape and Other Sexual Offences, discussion paper no. 131, Para 3.12

2 Ibid, Para 3.23
**Protective Principle**

There is a difference in gravity in the wrongs of sexual activity involving children under 16 years of age and it is therefore legitimate and just to reflect this in the law. There is a need however to recognise the educational effect of the law. There must be clarity that sex below the age of consent is wrong and that there is liability for those who breach this principle. Sex between consenting children under the age of consent cannot be seen as being condoned and a legal prohibition must remain. Proposals should not obscure this reality or give the impression that the age of consent is lowered or can be ignored. We are re-assured that the government has taken note of the concern around this area giving strong reasons for not decriminalising under age sex in their policy memorandum and therefore have provided ‘protective offences’ to cover sex with young and older children.

The immunity for counselling where children are under 16 and supported in illegal sexual activity is inappropriate. Counsellors in such a situation should act in the best interests of the child and work to ensure that the sexual activity ends. The granting of immunity to counsellors in this area seriously undermines the protection due to children and may contribute to increased laxity in the provision of contraceptives and abortifacients to children.

**Consensual Assault**

We are supportive of the government’s decision to delete the provisions of the draft bill to decriminalise consensual sexual violence. The distortion of acceptable sexual activity has wider social repercussions than those for the particular participants. Sadomasochistic activity is intrinsically disordered and introduces violence to an aspect of intimate personal life. The law must protect wider society from the danger of violence being accepted as a legitimate part of sexual relationships. Women in particular will be placed most at risk and proposals to permit attacks, even when injury is not serious, gravely undermine the common good.

**John Deighan**

*Parliamentary Officer*
Justice Committee

Sexual Offences (Scotland) Bill

Written submission from the National Development Group: Working with Children and Young People with Sexually Harmful Behaviour

The National Development Group: Working with Children and Young People with Sexually Harmful Behaviour (‘the Group’) is hosted by the Criminal Justice Social Work Development Centre for Scotland (‘the Centre’). The Centre hosts a number of these Groups, each with a remit to promote best practice within their particular area. The Group for those working with children and young people with sexually harmful behaviour has a core membership representing local authorities, the secure estate, forensic mental health teams and the voluntary sector across Scotland, with additional membership from other relevant partner agencies including Polmont YOI and ACPOS. The Group has been instrumental in organising a series of ongoing Practitioner Networks across Scotland as well as a national conference related to the client group. They have also developed a data collection tool that has facilitated the only systematic process of data collection related to these children and young people across Scotland; the sample collected using this tool is currently the largest of its type known in Europe and one of the largest in the world, with a number of publications having been produced from this data.

Based on the range of experience held within the Group in the context of working directly with children and young people displaying sexually harmful behaviours, and their knowledge of relevant research, the following response to the proposed Sexual Offences (Scotland) Bill is submitted with regard to Part 4 of that Bill.

‘Young’ and ‘Older’ Children

While the premise behind making the distinction between ‘Young’ and ‘Older’ children is understood, it is nevertheless felt that this distinction is an arbitrary one as children develop both physically and mentally at very different rates. Although assessing developmental level (and, by association in this context, culpability) is not a straightforward process, the assignation of what is a comparatively meaningless distinction based on age is not an appropriate one for making decisions in a criminal context.

In addition the context, persistence and seriousness of the sexually harmful behaviour should be considered when determining consequences and interventions for a child, with this premise being supported in the literature as well as in practice. These factors have little relationship to the age of a child.

Section 14: Rape of a Young Child

The explanatory notes that accompany the Bill state that, in connection with Section 14, ‘An offence will be committed irrespective of whether a young child
apparently ‘consented’ to the penetration”. This would seem to imply that if two 12 year-olds engaged in a consensual penetrative act, the penetrator could be charged with the rape of a young child while, if the two children were aged 13 years, the consequence would be different. Both the research and practice experience show that mutual sexual acts between young children do occur, often as a form of comfort between two children who have been abused themselves, and in this circumstance the criminalisation of one or both of these children would be fundamentally wrong. Therefore, if the age distinction made in the Bill is to be maintained then clarification of this point is required.

**Older Children**

The explanatory notes that accompany the Bill state that the ‘Older children’ offences provide that “the offence may be committed only by a person aged 16 or over”. If that premise is adhered to, then if a 12 year-old child should commit a sexual offence against an older child (i.e. aged 13 or over) the Bill does not appear to cover such a scenario. While it is understood that, for example, if a 12 year-old child should commit a sexual offence against an older child then this would be covered by Part 1 of the Bill, there is a concern that in such a case a 13 year-old victim could be required to give evidence as lack of consent would have to be proven in court, whereas if the offender were over 16 it would not. As with the point made above regarding Section 14, therefore, if the age distinction made in the Bill is to be maintained then clarification is required.

**Section 21: Having Intercourse with an Older Child**

Given the language used at Section 14 (‘Rape of a young child’), the classification at Section 21 appears anomalous. In the Policy Memorandum that accompanies the Bill, at paragraph 108 it states that:

“There is an overlap to some extent between the coverage of the older children offences and the offences in Part One of the Bill, as any non-consensual activity against an older child could be prosecuted as an older child offence or using the offences of non-consensual conduct provided for in Part One of the Bill”

If paragraph 108 is indeed correct, then it is suggested that the same language used at Section 14 be used at Section 21, as the language used currently suggests that rape of an older child is a lesser offence. Please note that the premise behind using the language at Section 21 is understood as being intended to cover the concept of ‘outward consent’ (e.g. a 17 year-old and someone under the age of 16 having a sexual encounter in a nightclub), and there is no issue with this concept. However, if the language is to be maintained then it is suggested it is incorporated into a new Section in order to make a distinction between a possibly alcohol-fuelled and misguided sexual encounter and actual rape.
Section 22: Engaging in Sexual Activity with or towards an Older Child
The point made above regarding Section 21 applies here also, as the language used at Section 15 (‘Sexual assault of a young child’) again suggests that this is a more serious offence than can be committed against an older child. It is therefore suggested that the language used at Section 15 also be used at Section 22.

Section 27: Older Children Engaging in Penetrative Sexual Conduct with Each Other
Sub-sections 3 and 4 of Section 27 specifically exclude penetration of the mouth. There is no rational reason for making this exclusion, particularly as forced oral penetration of the mouth can be even more psychologically damaging to the victim than either vaginal or anal penetration. As with the point made regarding ‘Older Children’ above it is understood that forced oral penetration would be covered by Part 1 of the Bill; however, once again consent would have to be proved in such a case. It is therefore suggested that oral penetration be included in Section 27.

Section 29: Defences in Relation to Offences Against Older Children
Sub-sections 3 and 4 of Section 29 imply that, providing there is a less than 2-year age gap between perpetrator and victim, there is some defence against forced oral penetration. It is understood that part of the rationale behind these sub-sections is to cover a situation where a 14 and 15 year-old in a relationship, taking part in consensual acts of oral sex, will not be criminalised should the older child become 16 years old while the younger child remains 14 years of age. However, in line with the points made above regarding Section 27 the overall premise of sub-sections 3 and 4 is considered unreasonable and it is suggested that this be amended.

Background information

Criminal Justice Social Work Development Centre for Scotland - April 2008 Children and Young People with Harmful, Abusive or Offending Sexual Behaviours: a Review of the Literature. Available at: http://www.cjsw.ac.uk/cjsw/publications/Harmful%20sexual%20behaviours%20Lit%20review.pdf [Link no longer operates]
Justice Committee

Sexual Offences (Scotland) Bill

Written submission from Scotland’s Commissioner for Children and Young People

Scope of Evidence
The Bill deals with many complex matters. I will confine my written evidence to Part 4 of the Bill, specifically those relating to sexual activity with younger children under 13, and sexual activity between consenting older children aged 13-15.

Young Children - Under-13
I agree with the approach taken by sections 14 – 20, which proceed on the presumption that a child under the age of 13 cannot consent to sexual activity. It is important to have clear age limits that allow of no excuse by those who seek to abuse or exploit children.

However, I am concerned at the potential for criminalisation of children under 13 for what might be defined as “sexual activity” with each other. The definition of “sexual activity” is very broad and could include normal, childish exploration and activities such as kissing. Given the very low age of criminal responsibility in Scotland, this allows for the possibility of children aged 8 to 12 being prosecuted for sexual offences or referred to the children’s hearing on the grounds that they have committed such an offence. It seems strange that children might be charged with offences relating to activities that they are otherwise presumed to be incapable of consenting to. At the very least, this should be mitigated by a provision analogous to that in section 27(7) of the Bill concerning instructions from the Lord Advocate.

It is true that, in terms of Crown Office guidance, children under 13 may be prosecuted only on the specific instructions of the Lord Advocate. They are more likely to be referred to the children’s hearing. However, even though proof or acceptance of an offence ground of referral to a children’s hearing is not regarded as a conviction for most purposes, it still falls within the scope of the Rehabilitation of Offenders Act 1974 as regards “spent” and “unspent” convictions and might still appear on criminal record checks later in the child’s life. I am sure no-one would wish this consequence and I would ask the Committee to make enquiries about it.

Older Children, aged 13 - 15
When the Scottish Government consulted on the recommendations of the Scottish Law Commission on the question of consensual sexual activity between older children aged 13 – 15, the media presented this as a polarised debate. However, I would suggest that most people share a common aim: to help young people make the right choices; to encourage them to avoid early sexual activity that research shows is often a source of later regret; to protect

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them from sexually transmitted infections and unwanted pregnancies; and to protect them from exploitation or peer pressure to engage in early sexual activity. The question is how to achieve that aim.

The Scottish Law Commission recommended that the age of consent should remain at 16, but that consensual sexual activity between older children, aged 13 – 15, should not attract a criminal consequence but a welfare one, involving a possible referral to the children’s hearing. The media and public response showed that they were not persuaded by arguments that this was not a lowering of the age of consent. They felt that it would be interpreted as such and that this would remove an important disincentive to young people. It was feared that underage sex would become normalised and young people would be under greater peer pressure to engage in it. I have some sympathy with those fears. My response to the Scottish Government consultation on these proposals cautiously welcomed them as a more principled approach, but identified this possible normalisation and peer pressure as a possible negative impact and recommended that any such change in the law be accompanied by a high profile education campaign to counter any impression that the age of consent had been lowered and to encourage young people to have the confidence to resist any pressure to engage in sexual activity. I added that discussion on this matter would be immeasurably enriched by sensitive consultation with children and young people and, indeed, that this was required by article 12 of the United Nations Convention on the Rights of the Child.

The Scottish Law Commission’s proposals represent a principled approach, but some commentators felt these would not effectively achieve the common aim identified above. The tension seems to be between a principled approach and an effective one. Can we have both? Or are we faced with a choice between a principled approach that is not effective, and an effective approach that is not principled? And what unintended consequences might each option attract? The following paragraphs explore these questions of: principle; effectiveness; and unintended consequences.

**Principle**

The Scottish Law Commission’s recommendations regarding consensual sexual activity between older children are set within a broader exploration of the meaning of “consent” and of the principles that underpin our law. Their report acknowledges the legitimacy of using the criminal law in order to protect vulnerable people, including children. Their recommendations aim to make the law clearer, less discriminatory in terms of gender, and more consistent with the European Convention on Human Rights.

While not referred to by the Commission, the UN Convention on the Rights of the Child is also relevant. It aims to protect children from sexual exploitation and abuse, but also from the unnecessary application of the criminal law, preferring welfare-based alternatives.

On this basis, the Commission’s recommendation of decriminalisation represents a principled approach. Paragraph 4.55 of the report says:
"We are not impressed by the argument that such criminal liability would be theoretical only and in the vast majority of cases there would be no criminal prosecutions. Such an approach fails to take account of the possibility that older children might still be subject to investigation by the police, even if prosecution in the criminal courts is unlikely. More fundamentally, there is an important point of principle involved. If consenting sexual activity between young people is not to attract criminal liability, then the activity should not be criminal."

This is an argument against a purely symbolic use of the law. But it is this very symbolic use that is supported by many respondents to the government consultation and that is reflected in the Bill. The argument is that a symbolic law will be an effective disincentive for older children and will support them to resist peer pressure. The symbolic nature of the law is underpinned by section 27(7) of the Bill which aims to counter the disadvantages of a heavy-handed criminal response. It empowers the Lord Advocate to issue binding instructions to Chief Constables in relation to the prosecution of these offences, presumably to the effect that they are not to be prosecuted. This gives out a clear message that the criminal sanction is, and is intended to be, an empty threat.

The Bill does seek to be principled in opposing discrimination on the basis of gender. Under the current law, if two older children have sexual intercourse, only the boy is guilty of the offence. This is clearly unacceptable. I welcomed the Scottish Law Commission’s recommendation on decriminalisation to the extent that it removed this discrimination against boys. However, the fact that the Bill removes the discrimination while retaining the criminal character of the activity means that even more young people will become vulnerable to characterisation as criminals with all the attendant negative consequences. The Bill thus “compounds the felony” by taking a principled approach to non-discrimination while rejecting the principled approach to decriminalisation thus creating a situation in which more young people may be criminalised. This contradicts the philosophy of the Convention on the Rights of the Child and the intention of the proposed legislation which is to protect children rather than to punish them.

What we do not know is whether this empty threat of criminalisation (extended to girls as well as boys) will be effective in encouraging and supporting older children to avoid early sexual activity. It is to the question of effectiveness that I will now turn.

2 By “purely symbolic”, I mean that it has no real practical consequences. At paras. 4.6 – 4.8 of their report, the Scottish Law Commission acknowledged the important “symbolic” function of retaining the protective principle and not relying solely on the concept of consent.

3 It is interesting to compare the stance taken by protagonists in this debate and the debate on the physical punishment of children. Those in favour of making physical punishment illegal argue in favour of a symbolic use of the law on the basis that a clear ban would send out a strong message that such behaviour is not acceptable, even though minor assaults would not be prosecuted. Those against such a ban consider this symbolic use of the law to be illegitimate and unworkable. Yet there is a distinct crossover between those who argue for a symbolic use of the law in the debate on underage sex and those who argue against it in the debate on physical punishment (and vice-versa).
Effectiveness
The Bill proceeds on an untested and unproven assumption that a purely symbolic use of the law will discourage underage sex. No-one has asked the young people whose motivations are central to this debate. This is acknowledged in the Policy Memorandum attached to the Bill, which says (para. 119):

“While we cannot be certain about the extent to which the fact that sexual intercourse with a girl under 16 is a criminal offence shapes or moderates behaviour, there is a risk that action perceived as lowering the age of consent could change the sexual behaviour of some young people and run contrary to the Government’s policy of encouraging young people to delay sexual activity.”

If young people are sensitively informed about the issues and consulted on them, and if they tell us that the retention of the criminal character is something that they welcome and that it helps them avoid pressure and make sensible choices, then I will not have the same objections to using the law symbolically in the way proposed by the Bill. It is, however, important that such consultation also explores the possible unintended consequences of different courses of action which I will now address.

Unintended Consequences
In a sense, this whole debate is about unintended consequences. I suspect that many of those in favour of retaining the criminal character of underage sex would not want the law to be applied in practice, but are concerned that an unintended consequence of decriminalisation would be removal of a disincentive and an increase in underage sex. I have suggested above that this concern needs to be tested with young people.

I list below some possible unintended consequences of the Bill: firstly of the application of criminal sanctions; secondly of the fear of criminal sanctions; and thirdly of the empty threat approach. I present these merely as a stimulus to discussion. These would also need to be tested out through consultation with young people.

Possible Unintended Consequences of Criminal Sanctions – if applied
1. Young people would get a criminal record for behaviour that hurt no-one but themselves
2. This conviction for a sexual offence would follow them for the rest of their lives and restrict career choices, especially in the context of the current Disclosure system
3. Even if the child was referred to the children’s hearing instead of the criminal court, admission or proof of commission of the offence would count as a conviction for the purpose of the Rehabilitation of Offenders Act and could also show up in a Disclosure check

Indeed, I am one of those advocating what might be understood as a symbolic use in the context of physical punishment.
4. The fact that this was known would undermine the credibility of the Disclosure system
5. The possibility of underage, pregnant girls being subject to police investigation and prosecution and the consequent added distress to them and their parents

Possible Unintended Consequences of the Fear of Criminal Sanctions
6. Young people might not approach health and other supportive services
7. Young girls might be more inclined to have abortions to avoid being found out

Possible Unintended Consequences of the Empty Threat Approach
8. Young people learn that it is an empty threat and it fails to act as a disincentive
9. Young people learn that there are criminal laws that do not need to be taken seriously
10. The Lord Advocate’s binding instructions to the police leave them uncertain as to their role in investigating cases where there may be a suspicion that the activity was not consensual
11. The discretion left to the police in order to counteract unintended consequence 10 makes the threat more real than empty and reintroduces the possible unintended consequences of a fear of criminal sanctions

Conclusion
My conclusion refers back to my starting point: that most people who have contributed to this debate share a common aim to help and support young people. The controversy is about how this might best be achieved. It is perhaps unfortunate that the focus has been so much upon the legal framework in abstraction from the broader context of the reality of young people’s lives. We will not be able to address this issue effectively unless we engage with our young people.

Given the concerns that I have set out above about the potential impact on both younger and older children, I recommend to the Committee that:
1. The Bill be amended to exclude younger children from criminal consequences in relation to the “strict liability” offences;
2. The provisions relating to consensual sexual activity between older children be withdrawn; and
3. They seek a commitment from the Scottish Government to engage with children and young people in order to formulate law, policy and practice on underage sexual activity in way that effectively achieves our common aim and avoids unintended consequences.
1. Introduction
1.1 I write this in my capacity as an academic criminologist with longstanding teaching and research interests in the criminal justice response to sexual violence, and the co-author of research papers on rape reform and the use of sexual history and character evidence in Scottish sexual offence trials.

1.2 I very much welcome the Sexual Offences (Scotland) Bill which seeks to place existing common law and statutory sexual offences into a single Act; makes important changes to the current definition of rape, and; sets out a statutory definition of consent. Together these mark quite radical and wide-ranging changes to the Scottish legal framework for rape and other sexual offences and, I believe, reflect a genuine and serious attempt to modernise and improve the legal response to such crimes.

1.3 In recent years, we have seen several significant reforms, legislative interventions and important judicial decisions affecting both the law of rape and the criminal justice response to it in Scotland. But we still struggle with the challenges posed by very high levels of under-reporting of sexual crime, the dismal fact that we have one of Europe’s lowest conviction rates for rape, and the prevalence of unenlightened social attitudes about rape and, in particular, about those who experience it. Legislative change, whilst much needed, can not on its own lead to improvements in this regard. Extensive reforms to policy, procedure, evidence, statute, and agency guidelines in relation to sexual crime have been undertaken in many jurisdictions around the world over the past 20 years, all with broadly similar intent. Many governments have made sexual violence against women a policy priority. Yet all jurisdictions have encountered difficulties with implementation and interpretation of reforming legislation, and have seen little change in willingness to report or conviction rates. Public confidence in the ability of law and the legal system to respond effectively to rape remains low. Sexual crimes still occur with relative impunity and this fact has to be acknowledged. Along with the widening of legal debate and the strengthening of the legal framework, we need, perhaps even more so, a sustained challenge to the culture of permissiveness towards sexual violence which lies beneath public attitudes to rape in Scotland. In particular, we need to confront the basis and the prevalence of widely held views that rape can be excused or explained away by reference to a particular lifestyle, character or sexual history, and that women are responsible for being raped.

1.4 My specific comments on the Bill, in relation to the definition of rape and sexual assault, the definition of consent and reasonable belief, and the use of sexual history and character evidence, are set out below.
2. **Definition of Rape**

2.1 I support both the Bill’s decision to retain the term ‘rape’ and the broadening out of the conceptual definition of the crime (Section 1). ‘Rape’ is a powerful and weighty word which taps into complex social and historical meanings. It conveys in specific terms the nature of the offence, while its separation from other sexual crimes denotes it as a specific type of wrong, with characteristics that are quite distinct. ‘Rape’ signals a unique indignity, conveying the serious nature of what is considered to be the most personal and private of crimes.

2.2 Scotland’s current gender-specific common law definition of rape as penile penetration of the vagina is too restrictive not only in that it represents a very narrow and specific form of criminal conduct. The current definition also emphasizes a traditional, male, phallo-centric perspective. By defining rape in this way, the sexual violence experienced by the victim may be disregarded as the definition is restricted to penile penetration of the vagina, thereby excluding other forms of violent sexual contact that might be equally devastating to victims. The broader definition proposed in the Bill is not limited to conventional notions of rape, but includes penetration of the anus and mouth, as well as the vagina, in circumstances where the victim does not consent. This, along with the removal of the outmoded offence of sodomy, also gives legal recognition that men can be victims of rape. These changes mean that the law on rape will no longer be gender-specific, but will apply without distinction to gender identity or sexual orientation. It will also bring Scotland more into line with other western jurisdictions, which use a wider definition and recognize male rape.

3. **Sexual Assault**

3.1 I support the introduction of a new statutory offence of ‘sexual assault’ which denotes specific sexual acts, which take place in the absence of consent, and which are distinct from the crime of rape.

3.2 However, the insertion of implements into the anus, vagina and other parts of the body is a very brutal sexual violation which can be just as devastating for the victim as penile penetration, and is no less serious a crime than rape. For this reason I would support the creation of a separate offence ‘sexual assault by penetration’ which is distinct from ‘sexual assault’ and which is equivalent in seriousness and maximum sentence to rape, rather than this being subsumed within the new offence category. The seriousness of this offence must be recognised as such at every stage of the judicial process, up to and including sentencing.

4. **Consent (section 9 and 10)**

4.1 I fully support the move to create a statutory definition of consent to provide much needed clarity in this area. I also support the statutory definition of consent as ‘free agreement’, and the principle of expanding on this definition by setting out a (non-exhaustive) list of circumstances where consent is deemed to be absent. This is a significant change from the current position, which is that a defence of consent requires an ‘honest belief’ by the accused regardless of how reasonable or otherwise that belief is. The concept
of ‘honest belief’ enables a subjective interpretation to be applied to consent, and has allowed the accused to maintain that the victim’s behaviour amounted to what he believed to be consent - even if that belief is not reasonable. I support the move away from the subjective approach currently taken to establish mens rea, in the belief that a far greater degree of objectivity is required to test to belief in consent. The current position means that trial proceedings are far more likely to focus on the actions of the complainer than on those of the accused, who is under no obligation to give evidence himself, while she may be forced to undergo a secondary ordeal in the court room in the form of intrusive and detailed cross-examination of a highly personal nature on aspects of her sexual life. The focus on the victim’s actions has led to situations where evidence of her clothing, lifestyle, behaviour, character, reputation as well as past sexual activity has been brought to bear in order to demonstrate consent.

4.2 The Bill provides for a greater focus on the responsibility of the accused to demonstrate what steps they took to establish that there was consent and, whilst I remain doubtful that this will significantly reduce the focus on the victim’s actions, even less prevent prejudicial value judgements being made about the victim as a result, this is nonetheless to be welcomed.

4.3 The Sexual Offences (Criminal Procedure) (Scotland) Act 2002 s149A requires the accused to give advance intimation if his defence is to include a plea of consent on the part of the victim, and recent research found that this occurs in the vast majority of rape trials (Burman et al., 2007). It is important that the current requirement for the defence to lodge a prior notice of consent is continued under any new legislation. This prior notice, in principle, allows the complainer to be informed that it will be argued that she consented and, to some extent, prepare for it.

4.4 A key strength of the term “free agreement” is said to be its simplicity and succinctness. It is considered a phrase that the public and, in particular, juries can readily understand. In rape and sexual assault cases it is crucial that the law is clear. Yet there is a real concern that “free agreement” as a concept remains open to subjective interpretation and therefore might mean different things to different people. It is essential therefore that if the Bill becomes law, it provides as clear a framework as possible, in order to allow the court to accurately convey the meaning of this term to juries (and victims and accused persons) in clear and straightforward terms.

4.5 The Bill puts forward an important set of statutory indicators of situations in which consent will not apply. The relationship between the definition of consent and the statutory indicators which outline when consent is not present reflects the idea that the interactive nature of sexual behaviour means that the focus should be on the circumstances surrounding the act in question, and in particular on the interaction of the parties involved and the role played by each in ascertaining that consent was given.

4.6 The proposal to introduce the concept of “prior consent” to sex (Section 10, (2) (a) and (b) gives some cause for concern. At present, the Crown has to prove that someone is asleep or unconscious at the time of the alleged
rape. If these provisions become law, there is a strong possibility that they will also have to prove that the complainer didn’t previously give consent to having sex in these circumstances. It is very difficult to see under what circumstances an individual would wish to consent to sexual activity at some point in the future when they would be asleep or unconscious. The very idea that someone can give their advance consent to sex one afternoon and that this consent would still apply at 1am the next day when they are incapable of giving consent is quite ridiculous, and subverts the very important concept of ‘sexual autonomy’ which underlies the Bill. This provision also has the potential to undermine the provisions at Section 8 (Administering a substance for Sexual Purposes).

4.7 In addition, the provision at 10, (2) (c) also gives cause for concern. It is vital that the statutory indicators make explicit that any fear or force to which the complainer was subject may have a historical basis (e.g. been part on an ongoing situation in her relationship with the accused) and need not necessarily have arisen in explicit terms at or around the time of the incident in question. This is not sufficiently clearing the provision, which does not adequately capture the effect of past abuse on a person’s ability to freely agree to sexual activity. How distant (or proximate) in time do previous instances of violence/threats have to be to be irrelevant? Importantly, it does not address the impact that living in a relationship characterised by threats of violence and sexual coercion has on someone’s capacity to freely agree to sexual activity. If the Bill becomes law, it must seek to address the more subtle forms of violence, coercion and intimidation which so often form the wider context in which rape and sexual offences take place.

5. Reasonable Belief (section 12)

5.1 Whilst the insertion of the reasonable belief provision (Section 12 is welcome, it raises an important question about how this provision might be met without prejudicing the accused’s right to silence. The provision that “regard is to be had to whether the person took any steps to ascertain whether there was consent or, as the case may be, knowledge; and if so, what those steps were” begs the question of exactly how the court is to determine if any such steps were taken if the accused refuses to provide evidence. It is rare in sexual offence trials for an accused person to take the witness stand. It is difficult to see how juries can properly examine whether the accused reasonably believed the complainer consented – or consider what steps he took – if he doesn’t give evidence. If there can not be a requirement that the accused take the witness stand in such cases and be cross-examined on the basis of his/her belief in consent, then can the Bill make it more explicit that an inference may be drawn from an accused’s refusal to outline the steps taken to determine consent?

6. Sexual History and Character Evidence

6.1 Although unaddressed by the Bill, sexual history and character evidence are crucial issues in relation to any consideration of the legal response to sexual offences. Despite two (well-intentioned) legislative attempts to restrict the use of sexual history and character evidence of the complainer in sexual offence trials in Scotland, such questioning and evidence
is in fact introduced in the vast majority of sexual offence trials heard in the High Court (Brown, et al, 1992, 1993; Burman et al, 2007). Currently seven out of ten complainers in High Court sexual offence trials are questioned on their sexual history and character, usually in order to ‘show’ consent and challenge the credibility of the complainer. Questioning on sexual history and character is sought by both the Crown and (routinely) by the Defence, applications to the court to introduce such evidence are rarely disallowed and the resultant questioning is almost always highly detailed and intrusive. This type of questioning adds significantly to the distress experienced by complainers, and has the potential to mislead juries. The introduction of such evidence also paves the way for the deployment, in the court room, of sexist stereotypes and clichés about female sexuality and sexual character, and feeds into myths about women being responsible for being raped. The awful prospect of facing a secondary ordeal in the courtroom is a clear disincentive for reporting a sexual crime. Research in other jurisdictions has revealed the potential that the introduction of sexual history evidence has for affecting jury perceptions of the victim, and ultimately trial outcome.

7. Challenging Cultural and Social Attitudes

7.1 The steep increase in the use of sexual history and character evidence introduced in Scottish sexual offence trials runs counter to the policy aims of the ‘rape shield’ legislation (the Sexual Offences (Procedure and Evidence) (Scotland) Act 2002) which were to prevent complainers being subjected to unnecessary and irrelevant questioning. It seems clear that this legislation has not improved the position, and indeed has had the opposite effect. This is a sober reminder of the limited effectiveness of legislative change in the area of rape.

7.2 The Rape and Sexual Offences (Scotland) Bill heralds an important and much needed reform of Scots criminal law of rape. The Bill has attempted to provide greater clarity about the law of rape and about sexual autonomy, and sharpen the definition of consent. Without doubt, changes to the substantive law of rape both update and bring Scotland more in line with other jurisdictions, offer more clarity of definition, and provide further legal protection for victims. For these reasons, the changes are very welcome and to be supported. Yet it is important to be realistic about the impact that such legislation can bring to those who seek justice in cases of rape and sexual offences. Having appropriate legislation, statutes and procedures in place are just one, albeit important element. Crucially, those who implement such laws and procedures must be fully (and demonstrably) committed to the spirit of any reforms.

7.3 On the basis of a reading of a body of feminist scholarship and international research evidence on the reach and effectiveness of rape law reform, I am seriously doubtful that these changes to the substantive law, whilst welcome, will lead to an increase in the reporting of sexual crimes, a decrease in case attrition, an increase in conviction rates, or a decrease in unjustified acquittals in Scotland. There are wider cultural and attitudinal shifts required before any such changes will occur. Real rape reform will be signalled by a willingness to seriously investigate, prosecute and convict
sexual crimes that take place in ‘risky’ contexts where, for example, a woman accepts a drink from a man, dances with him, kisses him, accepts a lift from him, and goes back to his flat for more drinks. When such a scenario will not invoke scepticism, disbelief, and cries of false allegation. When defence counsel do not invoke outmoded sexist stereotypes about female sexuality and paint pictures of 'bad' sexual character in attempts to discredit complainers and undermine their credibility. When prosecutors present an account of events in which they assert the rights of women who do not fulfil conventional expectations of femininity, and when juries are prepared to convict despite a women’s sexual history.

8. Monitoring the impact of the legislation

8.1 In order to fully determine and assess the impact of any new legislation in this area of law, it is important that the Scottish Government and Scottish Parliament consider the adoption of appropriate mechanisms. For monitoring and evaluation which will facilitate a review of the operation of the new legislation. A primary consideration is to ensure that criminal justice data in relation to rape and sexual offences can be disaggregated by both gender and age; this will be particularly important should the provisions in the Bill relating to the changes to the definition of rape and the new offence of sexual assault be enacted. Not only is this likely to be a requirement of the Gender Equality Duty, but our available criminal justice data on sexual violence is extremely limited. A more robust system of data collection and monitoring will not only allow a detailed assessment of the impact of new legislation, but would also inform policy development and practice.

8.2 Relatedly, there should be a commitment to commission independent research to evaluate the operation of any new legislation in this very important, and complex area of law.

Bibliography


Professor Michele Burman

Professor of Criminology and Co-Director of the Scottish Centre for Crime and Justice Research, University of Glasgow
Introduction

The Scottish Children’s Reporter Administration (SCRA) welcomes the opportunity to provide written evidence to the Justice Committee at Stage One of its consideration of the Sexual Offences (Scotland) Bill.

SCRA responded both to the Scottish Law Commission’s (SLC) consultation and to the subsequent Scottish Government consultation on the SLC’s recommendations and draft Bill.

SCRA Submission

At this stage in the consideration of the Bill, the Committee has asked for comments on the general principles of the legislation, including the stated purposes of the Bill and on the extent to which improvements can be expected from the proposed measures. SCRA’s comments are largely focused on Part 4 of the Bill, which deals with offences committed against, and in some circumstances by, children and young people.

Stated purposes of the Bill

The Policy Memorandum attached to the Bill states that, in relation to Part 4, the policy objective is to create protective offences which prohibit sexual contact with children recognising that children are particularly vulnerable to sexual exploitation.

SCRA is supportive of these principles and recognises the benefit of reforming and clarifying the law in this area.

SCRA’s view is that it is important that there should be an ability to respond to concerns regarding the sexual behaviour of children of any age. SCRA suggests that such concerns would be most effectively and appropriately addressed as an issue of welfare, care and protection. A mechanism for this response would be by way of a new ground for referral to the Reporter.

However, SCRA supports the position that any sexual activity involving coercive behaviour by an older child remains an offence.

SCRA agrees with the Scottish Government’s statement in paragraph 110 of the Policy Memorandum, that “…the law should continue to make clear that society does not encourage under age sexual intercourse as it can be a cause for concern for the welfare of a child, even where it is consensual”.

Proposed measures: specific comment

With regards to the extent to which improvements can be expected from the proposed measures, SCRA does have comments and concerns in relation to some aspects of the Bill, which are detailed below. The comments below relate to the legislation as presently drafted.

Parts 1 to 3

SCRA agrees with the provisions of Parts 1 to 3 of the Bill.

Part 4 – Children

The Bill distinguishes between “young children” under 13 years of age, who are considered to have no capacity to consent, and those between the ages of 13 and 15, who are considered to have a limited capacity to consent to sexual activity.

Young children (under 13 years old)

SCRA agrees with the protective principle that underpins the policy objective of sections 17 to 20, and with the principle that young children have no capacity to consent to sexual activity.

It is important that there is an ability to respond to concerns regarding the sexual behaviour of young children. SCRA considers that such concerns would be most effectively and appropriately addressed as an issue of welfare, care and protection. A mechanism for this response would be by way of a new ground for referral to the Reporter.

SCRA notes that the definition of sexual activity and behaviour set out in the draft Bill is so broadly set that there is a potential to include behaviours which currently would not be considered an offence and which would not, reasonably, be deemed concerning.

While SCRA understands that the intention of this section is to provide necessary protection to children under 13 who might be engaging in concerning sexual behaviour with an older person, the legislation as currently drafted also sets up the potential for sexual behaviour between two younger children to be regarded as a criminal offence. This is at odds with SCRA’s position that such concerns would be most effectively and appropriately addressed as an issue of welfare, care and protection. As stated, a mechanism for this response would be by way of a new ground for referral to the Reporter.

Furthermore, as currently drafted, the legislation creates a contradiction where in relation to situations where both person (A) and person (B) are young children, they are considered incapable of consenting to any sexual activity but are considered capable, if over the age of criminal responsibility, of committing an offence by being involved in that sexual activity.
Older children (13-15 years of age)

SCRA agrees with the provisions in sections 21 to 26.

SCRA agrees with the Scottish Government’s statement in paragraph 110 of the Policy Memorandum, that “...the law should continue to make clear that society does not encourage underage sexual intercourse as it can be cause for concern for the welfare of a child, even where it is consensual”.

Section 27

In relation to Section 27, it remains SCRA’s position that concerns regarding the sexual behaviour of children of any age would be most effectively and appropriately addressed as an issue of welfare, care and protection. SCRA notes that the law presently responds to other concerns about the welfare of children that arise out of their behaviour (for example; misusing alcohol or drugs, misusing a volatile substance, being beyond the control of a parent, falling into bad associations or being exposed to moral danger) by way of a ground for referral to the Reporter on non-offence grounds.

SCRA notes an anomaly in the proposals that by criminalising girls for having sexual intercourse with boys (where both are “older children”) the proposed law creates what may be an unintended consequence. If a 15 year old girl has sexual intercourse with a 15 year old boy, she commits an offence, as does the boy; if she has sexual intercourse with an 18 year old boy she does not, while the boy does. However, it must be recognised that the current law contains a similar anomaly for boys i.e. a 15 year old boy does not commit an offence if he has intercourse with a 17 year old girl; he does commit an offence if the girl is 15 years.

It is often difficult to establish issues of consent in such relationships and if for example a girl who is an “older child” has penetrative sexual intercourse with a boy who is an “older child”, the creation of an offence in section 27 makes the girl’s legal position one of two contrasting possibilities:

- If she did not consent to the intercourse, she is the victim of the serious offence of rape;
- If she did consent to the intercourse, she is the victim of the offence in section 27(1) and has committed the offence in section 27(4).

As a result, this may lead to uncertainty or inconsistency with regard to how the concerns for the welfare of the girl are reported by the police and responded to by COPFS or SCRA.

Sections 29 & 30

SCRA agrees with the “age proximity defence” in section 29(3), which simplifies the calculation by making it a gap of two calendar years.

SCRA agrees in principle with the provisions of section 30 (Special provision as regards failure to establish whether child has or has not attained age of 13 years)
However, it is possible that the accused will be a “child” (i.e. aged 16 or 17 years and subject to a Supervision Requirement) and will be dealt with in the Children’s Hearings System in relation to offences under sections 21 to 26. Therefore SCRA recommends that section 29 be amended to make it clear that it applies to Children’s Hearings court proceedings.

**Offences against younger and older children**

Although SCRA agrees with the abolition of the common law offence of lewd, indecent and libidinous practice, we have concerns that sections 17 to 19 and 24 to 26 of the Bill may not extend to some behaviours that would currently come within this common law offence.

Although SCRA welcomes the protective nature of sections 17 to 19 (in relation to young children) and 24 to 26 (in relation to older children), the protection offered may be restricted by the need to establish that the purpose of the conduct in question is for sexual gratification or for humiliating, distressing or alarming the child.

Causing a child to be present during sexual activity, or to look at an image of sexual activity or sending an indecent communication to a child may be done intentionally, but proof of these purposes may not be easily achievable especially where it is carried out as part of a plan to groom a child, or where it is carried out with disregard for the potential harm to a child.

SCRA suggests that removing the need to prove a purpose in the offences in these sections would provide better protection for the child. However, it is recognised that it would be necessary to exempt the showing of images to a child for educational purposes.

**Part 5 – Abuse of Position of Trust**

SCRA agrees with the general principle that there should be offences prohibiting sexual activity between persons one of whom holds a position of trust and authority over the other. However, the categories of ‘positions of trust’ in section 32 may exclude some ‘positions of trust’ such as family friends. Rather than being prescriptive in terms of defining positions of trust it may offer greater protection to children if this section began with text such as that suggested by the SLC i.e. “Position of trust should be defined as including, but not restricted to cases, where…”

**Part 7 – Miscellaneous and general**

**Power to convict for offence other than that charged**

SCRA agrees with there being a power for a court to convict for an alternative offence. However, it is essential that this power is also available to Sheriffs in Children’s Hearings proof proceedings where the offence can be committed by a child (including a 16 or 17 year old subject to a Supervision Requirement made by a Children’s Hearing).
Schedule 4

SCRA notes that, despite the proposed abolition of the offence of lewd, indecent or libidinous practice and behaviour towards children, the “catch-all” category in Schedule 1 (4) of the Criminal Procedure (Scotland) Act 1995 “any offence involving the use of lewd, indecent or libidinous practice or behaviour towards a child under the age of 17 years” has not been amended.

Although this uses similar language to the common law offence, its terms are wider as they include any offence that involves such behaviour. SCRA strongly recommends that such a “catch-all” category relating to sexual behaviour towards a child is retained. However, as the common law offence is to be abolished SCRA suggests that it would be appropriate to revise the wording of this paragraph of Schedule 1 of the Criminal Procedure (Scotland) Act 1995.
Supplementary written submission

At the oral evidence session on 4th November 2008, the Justice Committee requested data from SCRA on “unlawful sexual activity between under 16s”. This data is held on individual case files, but is not extractable from our Referrals Administration Database. We record data on children referred to the Reporter for committing sexual offences, as well as children referred as victims of sexual offences. This data is presented in tables 1 and 2 below.

Children referred for committing sexual offences

This section of the report relates to children referred to the Reporter on offence grounds [Section 52(2)(i) of the Children (Scotland) Act 1995].

Lord Advocate’s Guidelines

The Lord Advocate’s Guidelines direct the police when cases involving children need to be reported both to the Procurator Fiscal and to the Reporter. Where a case is jointly reported, the Procurator Fiscal and the Reporter will discuss the case (in some serious cases Crown Office will be involved) and a decision will be made on the most appropriate forum for dealing with the offence.

Various factors will be taken into account in reaching this decision - the seriousness of the offence, the current situation for the child (including their involvement with services) and an assessment of evidence required to support the alleged offence. It is not unusual for a case to be passed to the Reporter where there is insufficient evidence for the Procurator Fiscal to proceed in the criminal justice system. There may however be sufficient evidence for the Reporter to proceed with a lesser offence. An example of this would be a charge of rape, where there is insufficient evidence of rape, but prima facie sufficient evidence of a lesser sexual offence, such as lewd and libidinous behaviour.

Recording offences and Reporter decisions

It should be noted that the offence which is registered by the Reporter will always be the one for which the child has been charged by the police. This is the case, whether or not the case is jointly reported to the Procurator Fiscal. So whatever the reason for the Procurator Fiscal passing the case to the Reporter, even where there is considered by the Procurator Fiscal to be insufficient evidence of the charged offence, that is the specified offence which is recorded in SCRA’s database (RAD).

The Reporter will require to make their own assessment of the evidence, as part of their investigations. It is not uncommon for that assessment to find an insufficiency of evidence for the offence for which the child was charged. There may, or may not be, a prima facie sufficiency of evidence of another offence, usually a lesser one. When the Reporter records a final reason for their decision on the referral for the child in RAD, this will be done against the originally recorded offence. However, the Reporter may well record aspects of the evidence separately and will record against the child’s case file the
details of the offence proceeded with. SCRA is currently working with our partners to ensure that the outcomes notified to the criminal history system are consistent with the charges as proceeded with.

This information is critical to understanding the data on serious offences dealt with by the Reporter. For example, the rape charges which were passed to the Reporter to deal with after discussion with the Procurator Fiscal will almost certainly be cases where rape cannot be proven.

**SCRA Data**

SCRA’s Referrals Administration Database specifically records four sexual offences:

- Assault with intent to ravish
- Indecent assault
- Lewd and libidinous conduct
- Rape

The Committee requested data on unlawful sexual activity between under 16s. SCRA does not centrally record the age of the victim of each offence, so it would be inaccurate to assume that all these offences were committed against other children. Additionally, children who are 16/17 years old and subject to Supervision Requirements when they allegedly commit an offence may be dealt with in the Children’s Hearings System so it cannot be assumed that all the alleged offenders are under 16 years.

It is important to note that table 1 shows the number of children with a final outcome in 2007/08, not the number referred in that year. In other words, some referrals will be ongoing and are not included here.

**Table 1: Number of children by offence type**

<table>
<thead>
<tr>
<th>Offence type</th>
<th>Number of children with a final outcome in 2007/08</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Total</td>
</tr>
<tr>
<td>Assault with intent to ravish</td>
<td>2</td>
</tr>
<tr>
<td>Indecent assault</td>
<td>49</td>
</tr>
<tr>
<td>Lewd and libidinous conduct</td>
<td>178</td>
</tr>
<tr>
<td>Rape</td>
<td>28</td>
</tr>
<tr>
<td>Total Children</td>
<td>247*</td>
</tr>
</tbody>
</table>
Notes:
1. Please note that children may be counted against more than one offence types. Therefore the totals for the year do not equal the sum of the offence types.

Children referred on non-offence grounds

This section of the report relates to children referred on non-offence grounds as victims of sexual offences. This data has been extracted from the children referred under s.52(2)(d) of the Children (Scotland) Act 1995 “…is a child in respect of whom any of the offences mentioned in Schedule One of the Criminal Procedure (Scotland) Act 1995 has been committed”.

It is important to note that (d) grounds as a whole are broader than just sexual offences and include cruelty, abandonment and neglect as well. Only the relevant sections have been presented below.

Some children may be referred on other grounds where wider concerns exist, including over their sexual activity, or such concerns may emerge during the Reporter’s investigations. For instance referrals may be made under ground (b) “…is falling into bad associations or is exposed to moral danger”. It is not possible to extract these referrals from the broader data set.

The Committee requested data on unlawful sexual activity between under 16s. SCRA does not centrally record the ages of the perpetrators of these offences and it would therefore be inaccurate to assume that they are all committed by children.

The standard of proof required to establish non-offence grounds is “on the balance of probabilities”. It should not therefore be assumed that a prosecution has been, or could be, undertaken against the alleged offender in all of these cases.

It is important to note that the table shows the number of children with a final outcome in 2007/08, not the number referred in that year. In other words, some referrals will be ongoing and are not included here.

Table 2: Number of children referred as victims of sexual offences

<table>
<thead>
<tr>
<th>Ground for referral s.52(2)(d)</th>
<th>Number of children with a final outcome in 2007/08</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Total</td>
</tr>
<tr>
<td>Child victim – incest, sexual or homosexual offences</td>
<td>415</td>
</tr>
<tr>
<td>Child victim of lewd, indecent or licidinous practice or behaviour</td>
<td>620</td>
</tr>
<tr>
<td>Total Children</td>
<td>1016¹</td>
</tr>
</tbody>
</table>
Notes:

1. Please note that some children may have been referred more than once under (d) grounds for different reasons. Therefore the total does not equal the sum of the two subsets.
2. There are 4 children whose gender was unrecorded centrally.

14 November 2008
ENABLE Scotland is the largest voluntary organisation in Scotland of and for people with learning disabilities. We have a strong voluntary network with around 4000 members in local branches across Scotland as well as 500 national members. Around a third of our members have a learning disability.

ENABLE Scotland campaigns to improve the lives of people with learning disabilities and their families and carers. We provide a range of services for children, young people and adults including a number of supported living, employment and training initiatives. Altogether we employ around 1700 staff across Scotland.

We are pleased to have the opportunity to comment on the Sexual Offences (Scotland) Bill. We have been following developments since the Scottish Law Commission Review and have consulted our members, including those with learning disabilities, on the provisions in the Bill. As a result of this consultation process, and following a close examination of both the Bill and our own principles, we have departed in some respects from our initial views. In particular, we are now questioning whether or not the protective measures in sections 35 and 36 are proportionate and justified. We explain this further in the body of our response.

We have also tried to restrict our comments to the provisions relating specifically to people with learning disabilities. While we think further discussion is necessary on some provisions we believe that the move towards a law based on “free agreement” is a positive and progressive step.

Summary of ENABLE Scotland’s position

- The concept of “free agreement” is the right basis on which to regulate sexual relationships.

- Section 10 should recognise that threats other than those involving violence can eliminate free agreement.

- The provisions in Sections 35 and 36 should be reconsidered. We have serious concerns about using the criminal law to regulate the consenting sexual behaviour of capable adults. These sections also imply that people with learning disabilities are inherently vulnerable.

- We should consider different ways to regulate care relationships and what happens in other sectors

- We need to research how effective the law has been and address the wider barriers in the criminal justice system.
Detailed position

The concept of “free agreement”

We think that the concept of “free agreement” is the correct basis for a modern law regulating sexual activity. Our position is that people with learning disabilities should be able to form the sexual relationships they choose just like everyone else.

However, for some individuals the severity of their learning disability leaves them unable to understand, and freely agree to, sexual activity. We fully agree that engaging in sexual activity with such individuals should constitute a criminal offence. The test of capacity to consent in Section 13 seems to be the correct one.

Section 10(2)(c)

This section details circumstances in which free agreement cannot be said to exist. One of these circumstances is where an individual has only consented as a result of violence, or the threat of violence, against them or a third party.

However, we know that people agree to sexual activity as a result of other types of threat. For example, we have dealt with cases where individuals have been threatened with consequences such as going to prison, being moved or not being allowed to see family. We have also come across distressing cases where threats have been made to kill or harm family pets.

We think that threats other than those of violence can in some cases be sufficient to remove free agreement. We would like to see this section changed so that an offence is committed as a result of any threat that causes someone to consent when they would not otherwise have done so.

Sections 35 and 36

We start from the principle that people with learning disabilities should be subject to the same laws as everyone else unless different treatment is justified and proportionate. At the moment there are extra rules about sexual relationships. In particular, a care worker who has a sexual relationship with a person with a learning disability commits a criminal offence. This was thought to send the message that certain relationships are inappropriate and should not continue. However, we have reviewed our position and think we need to reconsider this approach.

The legislation criminalises sexual behaviour between care staff and those they support because the individual receiving support has a learning disability. Where the care worker supports someone whose needs are due to physical disability, age or ill health the position is different. In such circumstances the care worker does not commit a crime. Given we are talking about consenting
relationships, we are not sure why the absence or presence of a learning disability justifies such different treatment. We think this needs further consideration. If the case is made for certain relationships to be crimes we wonder why it is not applied to everyone receiving personal care services.

Our members raised concerns that the current and proposed legal position is unduly punitive and will discourage disclosure because of a fear of criminal investigation. It could also lead to fear among staff about developing acceptable friendships. Overall, we prefer an approach that encourages people to be open about feelings or relationships so that appropriate action can be taken at an early stage. For example, we think that the care relationship should not continue if a personal relationship develops but it might be possible for the care worker to be employed elsewhere.

While we understand the intention is to prevent abuse we do not think that the criminal law is an appropriate way to regulate consenting sexual relationships between capable adults.

The message to society

Our previous support for additional provisions was based on the idea we should send a message that certain relationships are abusive and wrong. Therefore, the argument follows that not reproducing the current offences will send a message that these relationships are acceptable. However, we do not think the position is quite so straightforward.

Retaining the offences sends out the message that people with learning disabilities are inherently vulnerable. They cannot make the same decisions as other capable adults and need to be protected. Our view is that a learning disability in itself does not make someone automatically vulnerable.

We would also like to make it very clear that that we are not in any way promoting or encouraging sexual relationships between care staff and those they support. On the contrary we recognise that such relationship are not desirable or appropriate. Instead, we are questioning whether or not the criminal law is the correct response to the consenting sexual behaviour of capable adults. We think a clear distinction must always be made between those who can consent and those who cannot. Where a person with a learning disability does not or cannot consent we are in no doubt that sexual activity is a criminal offence.

Definition of “care service”

If the offence is retained then we suggest further thought be given to the categories of worker to whom the legislation applies. A reference to existing definition in other legislation may appear straightforward. However, there are many other categories of individuals who could be in positions of trust. For example, this might include social workers, advocates, employers and employment support workers. We wonder whether or not there has been any research about the circumstances in which relationships are likely to arise.
The move towards self directed support also creates challenges. When self-directed support models are used the person receiving the service is often the employer. This could mean it is difficult to regulate the relationship and a different form of regulation might be necessary.

Making the law effective

We understand that as of January this year there had been no convictions under the relevant sections of the Mental Health (Care and Treatment) (Scotland) Act 2003. In fact, only 4 people had been charged under the legislation. We are not sure if any work has been done to look at the reasons for this. It might be the law is working as a deterrent. On the other hand, it may be that the legislation is just not widely recognised or that people are hiding relationships. Either way we do not think we can assume the law is working effectively and we would like to see research on this.

Other measures

We have been thinking about other ways to regulate relationships of trust as well as what happens in other fields. For example, our understanding is that sexual relationships between doctors and patients are inappropriate and can result in professional sanctions. However, the doctor would not risk being convicted of a criminal sexual offence. Therefore, we wonder if there are alternative approaches involving the general regulation of care workers and employment relationships.

We also think that good education and training for staff and people with learning disabilities is crucial. People must have the opportunities to develop natural friendships, relationships and support networks.

Wider issues in the criminal justice system

There are much wider issues for people with learning disabilities who are victims of sexual offences. We know that the Scottish Government has introduced some important provisions to support victims, including the Vulnerable Witnesses (Scotland) Act 2004.

However, we also know that people with learning disabilities face specific barriers when they experience abuse. Unfavourable assumptions are often made about their ability to give evidence and they are not seen as credible witnesses. We think there is a degree of institutionalised discrimination. The Mental Welfare Commission highlighted some of these issues in their recent report “Justice denied”. We hope that all relevant bodies will implement the recommendations in that report.
Justice Committee

Sexual Offences (Scotland) Bill

Written submission from Rape Crisis Scotland

1. Introduction

1.1 Rape Crisis Scotland welcomes the opportunity to provide written evidence on the Sexual Offences (Scotland) Bill. This is a crucial opportunity for Scotland to update and improve the legislative framework on this issue. Scottish Government figures suggest that less than 3% of rapes recorded by the police in Scotland result in a conviction. Complainers of sexual offences do not speak highly of their experience of the Scottish justice system: many women describe their experience of giving evidence in particular as akin to re-traumatisation, or being raped again. It is clear that there is a significant need for reform.

1.2 While Rape Crisis Scotland welcomes the modernisation of offences relating to sexual crimes which this bill represents, we need to be very clear that much remains to be done. Very important issues relating to evidence, such as Moorov, have been referred to a new SLC review, and it is crucial that reform to this area of law is prioritised. As well as specific comments on the bill itself, we have also made some comment in this paper about a number of important issues which have not been dealt with in the bill.

1.3 Legal reform is important, as is the reform of policy and practice within the Crown Office in relation to the prosecution of rape and sexual offences which is currently underway. Changes within legal responses to rape must, however, be matched by a commitment to challenge attitudes within Scottish society to women’s behaviour and sexuality. Studies into societal attitudes to rape consistently demonstrate that a significant minority of the population blame women for rape where they are wearing revealing clothing, flirting, drunk or had many sexual partners. Only by affecting a fundamental shift in attitudes to women are we likely to improve significantly the ability of our legal system to provide justice to women surviving rape.

2. Definition of Rape

2.1 Rape Crisis Scotland supports the broadening of the definition of rape to include anal and oral penile penetration. Scotland currently has an

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1 See for example research published in 2007 by the Scottish Executive which found that 27% of people surveyed believed women were at least in part responsible for rape if they had been drinking, and 26% blamed women if they were wearing revealing clothing.
excessively narrow definition of rape which does not reflect women – and men’s – experience. We support the definition of rape outlined in the bill.

2.2 RCS is of the view that there should be a separate offence of sexual assault by penetration which is equivalent in seriousness and maximum sentence to rape, rather than this being subsumed within the new offence category of sexual assault.

3. Communicating indecently etc
3.1 At the moment, the provisions in section 6 of the bill would only apply where the Crown Office could prove that the accused’s purpose was to obtain sexual gratification, or was for the purpose of humiliating, distressing or alarming someone. We therefore recommend that these provisions be extended to include circumstances where the accused is reckless as to whether his behaviour has this impact.

4. Consent and reasonable belief
4.1 Rape Crisis Scotland is in full support of the move to define consent in law for the first time in Scotland. Rape Crisis Scotland strongly supports the development of a statutory definition of consent: given the myths and prejudices which surround female sexuality and rape, it is essential that the law provides as clear a framework as possible as to what is meant by consent.

4.2 We agree with the definition of ‘free agreement’, and support the principle of expanding on this definition by setting out a non-exhaustive list of circumstances where consent is deemed to be absent. However, we have serious concerns about the introduction within 10.2 (a) & (b) of the concept of prior or advance consent. At the moment, the Crown has to prove that someone is asleep or unconscious at the time of the alleged rape. If these provisions become law, there is a strong possibility that they will also have to prove that the complainer didn’t previously give consent to having sex in these circumstances. The notion that someone can give advance consent to sex at 6pm and that this consent should still apply at 1am when they are incapable of giving meaningful consent is absurd. It completely contradicts the notions of sexual autonomy which are supposed to underpin this bill: that a woman – or man - can say ‘no’, or withdraw their consent to sex, at any time. We are seriously concerned that these provisions it might make it easier for men to get away with rape.

4.3 One of the particular definitions set out in 10.2(c) relates to someone submitting because of violence or threats of violence. In their report, the Scottish Law Commission (in para 2.68) state that an important feature of this definition is that it does not require that the violence occurred or the threat was made at the time of the sexual act. They are clear in their intention that this covers historical abuse. However, we are not convinced that this intent is clear from the wording of the actual legislation.

4.4 A further issue which the Scottish Law Commission considered in their review was whether it would be helpful to set out a separate related list of factors which do not in an of themselves indicate consent. This issue is to
be considered in the context of problematic social norms in relation to women’s sexuality. The SLC rejected setting these out in a statutory list and suggests instead that this function could be dealt with through jury directions. RCS views this as a very helpful way forward. We have significant concerns about the impact of stereotypes and prejudices that jury members might bring to bear on their interpretation of evidence in rape trials, and clear jury directions in relation to this would be welcome.

4.5 Rape Crisis Scotland is keen to ensure that the current requirement for the defence to lodge a prior notice of consent is continued under the new legislation. Although consent is the most common defence in rape trials, it still might be that complainers are unaware in advance of the trial as to whether the defence will be consent or for example mistaken identity. Being informed that the defence will be consent might at least prepare the complainer to some extent for the trial.

4.6 Currently in Scotland there is no requirement that any belief in consent held by the accused in rape or sexual offence trials is reasonable. This has been described as a ‘rapist’s charter’ in that it allows the accused to claim an ‘honest belief’ in consent even when it is not reasonable to hold such a belief. Rape Crisis Scotland strongly supports the move away from the subjective approach currently taken to establish mens rea. We believe that a far greater degree of objectivity is required in examining the degree to which mens rea was present than the law currently provides. We also wholeheartedly support the decision of the Scottish Law Commission to reject the inclusion of the phrase “having regard to all circumstances” in any definition of reasonable belief, as we believe such a move would mean retaining a significant subjective element. We are concerned that it would further open the door to irrelevant and prejudicial sexual history and character evidence i.e. an accused could claim that this belief in consent was reasonable due his knowledge of the complainer’s sexual behaviour with other people.

We are therefore of the firm view that the only test to belief in consent which would go any way to protecting a woman’s sexual autonomy and right to bodily integrity is an objective test.

4.7 Rape Crisis Scotland also supports consideration being given to what steps (if any) were taken by the accused to ensure that consent was given. However, it is difficult to see how juries can properly examine whether the accused reasonably believed the complainer consented – or consider what steps he took – if he doesn’t give evidence. In this context, the approach of the police interview with the accused in relation to questions of consent will be absolutely crucial, as this may be the only opportunity the jury will have to hear the accused’s account of this. Further police guidance and training in this area may be helpful prior to the implementation of any legislation. Consideration should also be given to what inferences can be drawn if an accused refuses to outline why he believed a complainer consented, and/or what steps he took to determine whether the complainer was consenting.
5. Older children
5.1 We support the move by the Scottish Government to continue to criminalise sex between older children, as long as this is supported by a policy of non-prosecution in cases which are genuinely consensual.

6. Sexual history & character evidence
6.1 One issue not dealt with within the draft bill is that of sexual history and character evidence. A recent evaluation commissioned by the Scottish Government of legislation designed to protect complainers from this type questioning found that 7 out of 10 women in rape trials will be asked about their sexual history or character. It is completely unacceptable that women in Scotland continue to be treated in this way. Rape Crisis Scotland accepts that the Scottish Government has already legislated twice in this area, but there can be no doubt that the provisions to which these efforts have led have failed to protect women in Scotland. We cannot overstate the importance of this issue: this type of questioning significantly adds to the distress experienced by complainers, it is potentially highly prejudicial for juries and it acts as a deterrent to women coming forward to report rape in the first place. Often one of the reasons that women give us at rape crisis for not reporting their experience to the police is the prospect of giving evidence in court and their past history being under scrutiny. We believe that it represents a breach of women’s human rights to be subjected to this type of treatment.

6.2 Rape Crisis Scotland urges the Scottish Government to broaden out the definition of “analogous convictions” (to include other forms of violence against women) which the Crown is obliged to inform the court of in cases where the accused has successfully applied to introduce aspects of the complainers’ sexual history or character. This is in light of the findings that revealed, for example, that a man who had a previous conviction for assault to severe injury against his ex-partner was not obliged to disclose that in the course of his trial for her rape, as it was not considered to be an analogous conviction².

7. Medical records
7.1 A further concern for RCS is the increase in the frequency with which complainers’ medical records are accessed in the course of criminal trials. This is another matter worth legislating on in the context of this Bill. The introduction of such records is a serious breach of women’s privacy and can significantly exacerbate the extent to which they are exposed to spurious and idle speculation on many irrelevant (and highly private) aspects of their health, including sexual history and mental health.

8. Necrophilia

8.1 The Scottish Law Commission identified that it is not clear what offence is committed where a person has sexual contact with a dead body. They recommended that a general offence of unlawful interference with human remains be created, which would be broader than sexual interference. We are surprised that there is no clarity currently on what offence is being committed when someone ‘sexually penetrates’ a dead body. Our view is that this is an extremely serious offence and also that crucially it is a sexual offence and therefore should be included in this bill, rather than as a more general offence of interference with human remains. There have been a number of cases where women are raped directly after – rather than before – being murdered. We view this as rape, and believe that it is important that someone who commits this very serious offence is recognised as a sexual offender.

9. Monitoring the impact of the legislation
9.1 It is important that the Scottish Government and Parliament consider what mechanisms may be helpful to put in place to review the operation and impact of any new legislation in this difficult area of law.
It will be essential to ensure that criminal justice data in relation to rape and sexual offences is gender disaggregated. Due to the narrowness of our current definition of rape, this is less of an issue now but will be if a broader definition of rape is adopted. This is likely to be required in relation to the gender equality duty. There is a broader need to improve data in relation to rape and sexual offences and the justice system more generally, as the data currently available is very limited and not entirely reliable. If systems are to be put in place to measure the impact of any new legislation, data collation in relation to attrition in particular will need to be improved.

Conclusion
With the provisos set out above, Rape Crisis Scotland welcomes the Sexual Offences (Scotland) Bill. However, we do not anticipate that these changes will make a significant difference to the prospects of rape complainers of obtaining convictions against those who have assaulted them, nor do we expect that on their own they will make the experience of rape complainers in court significantly any less painful or distressing than it is at present. Indeed, unless the provisions relating to prior consent are removed from the bill, it has the potential to make rape even harder to prove that it is currently.

It is essential that the Bill is not seen in isolation from wider changes which are required. This includes issues relating to the laws of evidence which will be considered as part of a further, broader, Scottish Law Commission review. The focus on the specific issues and challenges relating to sexual offences must not be lost within any broader review. Finally, we must make a sustained and serious commitment to changing public attitudes to rape.
Sandy Brindley
National Co-ordinator
Justice Committee

Sexual Offences (Scotland) Bill

Written submission from Lifeline Pregnancy Counselling ((Scotland)

Having tried to understand the proposed law, we at Lifeline believe that it is a huge step in the right direction and once again we wish to express our gratitude and our satisfaction at the justice committee's proposals.

Our Observations:
As an organization our concerns at the present moment revolve around older children at a developmental stage where sexual awareness and its ensuing exploration take place. We believe that these children require particular care and are not always receiving it.

1. We believe that the recognition of coercion as a form of abuse is very important, especially where older children are concerned. Related to coercion is grooming; it is very difficult to deal with because it often carried out by someone other than the abuser(s). However, its effect is to leave older children in a very vulnerable position where their personal defenses have been subverted. They are left open to abuse and at times do not realize that they are being abused. Is there any way the relationship between grooming and coercion could be clarified in the proposed bill?

2. We believe that special provision for older children recognizes the place of developmentally appropriate exploration and experimentation while protecting them from exploitation, coercion and abuse at the hand of adults. We hope it will make the situation clearer for judges to identify ebophilia. To date the patchy application of the law as it stands appears to reflect society’s confusion and obsession over youth. Still, older children do not have the psychological sophistication required to discern the inappropriateness of the subtle approaches of predatory adults. Because of the older child’s limited ability to enter into free and fully informed agreement, it is supremely important that the law acts very firmly to provide older children the protection they require.

Please convey our observations to the Justice Committee. It is our hope that our few comments will be of use and that the new law will provide increased protection to Scotland population, both young and old.

Tim McConville
Manager
Introduction

Barnardo’s Scotland previously commented on the Scottish Law Commission’s report on Rape and Other Sexual Offences and welcomes the opportunity to provide evidence to the Justice Committee on the Sexual Offences (Scotland) Bill.

Barnardo’s Scotland manages more than 60 children’s services in Scotland, and the safeguarding of children and young people is a central issue. We currently run 3 services in Scotland that work with children and young people who exhibit harmful or problematic sexual behaviour, as well as other services that support children who have been sexually abused. Barnardo’s Scotland response has been informed by this practice experience.

Barnardo’s Scotland comments are restricted to Part 4 of the Bill which contains proposals relevant to children and young people.

Young Children

Barnardo’s Scotland supports the policy objectives of the Bill through the introduction of protective offences where children under the age of 13 years are deemed to not have the capacity to consent by reason of their age.

However, we remain concerned that the recommendations as framed could lead to criminalisation of some children under 13 years on account of their sexual behaviour.

Our services dealing with young people with sexually harmful behaviour are aware of the potential for instances where there has been an admission of sexual activity involving two children under 13 years and where there has been no evidence of coercion. Barnardos Scotland understanding of the proposals in the Bill is that this would be treated as rape on the part of the boy and the principle of strict liability would mean that there would be no defence possible, with the matter being dealt with by the Procurator Fiscal. Barnardos Scotland understands that this is not the policy intention of the Bill and suggests that in this instance there would be merit in jointly remitting the case to both Procurator Fiscal and the Reporter to ascertain where the case should best be heard. This would allow a balancing of the interest of the children and the principle of public interest.
Older Children

**Protective measures**
Barnardo’s Scotland supports the policy objectives and the measures in the Bill where there are protective offences against children aged between 13 and 16, where committed by a person aged 16 years or over and we believe this will continue to safeguard vulnerable young people in this age group from sexual exploitation.

**Decriminalising consensual penetrative sex between 13-15 year olds**
Barnardo’s Scotland supported the Scottish Law Commission recommendation which effectively decriminalised consensual sexual intercourse between 13 – 15 year olds. In our view this was a pragmatic response to the reality that, at present, many young people choose to engage in sexual activity at an early age. For instance:

> “the median age of first intercourse has fallen to 16 for both females and males with one in three young people being sexually active before age 16.”
> (NHS Scotland, 2005)

In terms of the health of young people there are serious consequences for this early onset of sexual activity. For instance, Scotland has consistently had one of the highest rates of teenage pregnancy in Europe with the rate staying reasonably stable, but high:

> “In 2006 there were 57.9 pregnancies per 1000 females aged below 20 (denominator is females aged 15-19) and 8.1 pregnancies per 1000 females aged below 16 (denominator is females aged 13-15)”
> (NHS, ISD, 2008)

There is a strong link with the rate of teenage pregnancy and relative levels of deprivation and vulnerability:

> “There is a strong deprivation gradient. The most deprived groups have approximately ten times the rate of delivery as the least deprived, and twice the rate of abortion. These proportions have not varied much over the most recently available seven years, and do not vary much with age.”
> (NHS, ISD, 2008)

It is known that the groups most vulnerable in terms of sexual health are:

> “young people living in deprived areas, those with low aspirations, looked after young people, young people who are lesbian, gay or bisexual, youth offenders, those from black and minority communities and those with learning disabilities.”
An example of this effect is the alarming rise in the incidence of chlamydia, where:

“between 1993 and 2003 there has been a 40% increase in chlamydia diagnoses in females less than 15 years old.”

These worrying statistics are against a backdrop of the current position where consensual sexual intercourse between 13-15 year olds is regarded as a criminal offence. Yet young people continue to engage in under-age sex with serious consequences to their health. Barnardo’s Scotland believes that having their behaviour regarded as a criminal offence actually lessens the chances of them seeking out quality advice and information, where this is available. In practice the level and quality of sexual health education/information which young people receive is patchy. In Scotland, the curriculum is non-statutory and responsibility for what is taught rests with local authorities and schools, taking into account national guidelines and advice – resulting in an inconsistent approach to sexual and relationship education.

Barnardo’s Scotland intention in supporting a move to decriminalise consensual sexual intercourse between those aged 13-15 years is to maximise the opportunity for them to access appropriate health services. Healthcare personnel are generally clear about their role in providing sexual health services & advice for young people aged 13-16. The problem is reaching the most vulnerable groups. Different professionals following different codes of practice regarding confidentiality, for instance, teachers, health care staff and social workers, which can further add to young people’s anxieties about breaches of confidentiality. This is borne out in findings of young people’s views:

“There is a need for consistency of practice, and the highest of professional standards, in terms of confidentiality. All young people, but especially under 16 year olds, fear that adults will break confidentiality. If young people perceive that such breaches are likely they will not use services when they need them. Young people identify their concern over confidentiality is particularly strong in the school setting.”
(Morrison and McCulloch, 2003)

Removing the criminalisation of sexual activity could help provide a more consistent approach to helping young people take appropriate action to protect their sexual health and wellbeing.

Barnardo’s Scotland recognises that how the message is portrayed is as important as the message itself. It is a subtle message that decriminalises this behaviour whilst seeking to dissuade young people from engaging in it in the first place. For this reason, Barnardo’s Scotland suggested that it was important to
avoid the perception that the age of consent had been changed. We are aware that many young people receive information on sexual health through the media and that the reporting of this issue can be heated and that:

“In the absence of other reliable sources of information and advice, unbalanced and inaccurate media messages can lead to pressures and confusion over the realities of sex and sexuality. Young women, in particular, reported the media as one of their main sources of information” (NHS Health Scotland, 2005)

A lack of knowledge about available services combined with confidentiality fears are a factor in preventing young people from seeking the help they need. A change in the law could enable appropriate support to be made available in a non-punitive way and which is in the best interests of the individual child or young person. However, it would need to be accompanied by a comprehensive sexual health programme, which is currently patchy in its coverage. Barnardo’s Scotland suggests this would need to be addressed in parallel with the introduction of any new measures.

It would also require the re-instatement of the proposal to form a new ground of referral to the Reporter where there were welfare concerns relating to the sexual behaviour.

Other matters

Barnardo’s Scotland understanding is that, at present, where there is a recorded charge of unlawful sexual intercourse, the discretion to place this information on subsequent disclosure forms rests with the Police. This can lead to situations where consensual sexual intercourse for 13-15 years olds can be entered into Disclosure checks, because of the sexual nature of the offence. The long term effect of a young person’s consensual sexual activity and a criminal offence resulting could have a significant impact on their career opportunities at a later date.

Barnardo’s Scotland is aware that there have been only 8 cases in the past three years, where matters of unlawful sexual intercourse involving 13-15 year olds were dealt with through court proceedings. The potential gain by removing the criminal aspect of this could be outweighed by the potential benefits in terms of uptake of health services. This could have the impact of changing their behaviour, or at least assist them to protect their health, however, at present, young people hide their sexual behaviour resulting in continued high levels of teenage pregnancy, increasing levels of chlamydia, affecting the most vulnerable children to a disproportionate degree.

Barnardo’s Scotland understanding of the Bill proposals is that consensual penetrative sex remains a criminal offence between 13-15 year olds, but all other
consensual activity is not. It is also our understanding that where there is consensual penetrative sex, it is now an offence for both parties, which could raise an issue of whether a person charged could also be a potential victim of an offence. In general terms, both of these proposals require a clear understanding of the law on the part of young people and further strengthens Barnardo's Scotland calls for consistent coverage of sexual health services. It is important that, what ever results come from the Bill, there is a need to have an improved provision of a comprehensive sexual health approaches for young people. Recent government announcements in terms of rural areas are encouraging. It would be useful if a similar approach was extended to the rest of Scotland in line with the comment:

"the evidence points to having a combined multi-faceted approach comprising
sex and relationships education across a range of settings supported by parents
and professionals, improved access to specialist and generic sexual health
services and a systematic marketing of positive sexual health messages. The
greatest short term improvements may be yielded by targeting those most
at risk from sexual ill health"
(NHS Health Scotland, 2005)

In conclusion, Barnardo’s Scotland believes decriminalising consensual sexual activity for 13-16 year olds would have health related benefits for young people. It would need to be accompanied by comprehensive sexual health services, which is required in any case, whatever proposals come from the Bill.

References


GENERAL INTRODUCTION

The Scottish Child Law Centre (SCRC or the Centre) is an independent charity, based in Edinburgh which provides services to the whole of Scotland. The aim of the Centre is to promote knowledge and use of Scots law and children's rights for the benefit of children and young people in Scotland. SCLC provides free advice by telephone, email, text and letter on all aspects of Scots law relating to children and young people. In addition the Centre provides publications on a range of subjects as well as providing training, conferences and seminars. SCLC also has a consultative and advisory function for local and central government and through this seeks to improve the content and practice of the law as it relates to and affects children. The Centre employs qualified solicitors to carry out its legal work.

The Scottish Child Law Centre agrees that there is a need to reform the current law regarding sexual offences against children. The Centre's remit is limited to the law relating to or affecting children, and thus we shall not comment on those sections of the bill that relate only to adults.

Comments specific to Part 4: Children

The Scottish Child Law Centre generally supports the proposed changes to the scope and definition of sexual offences against children. We particularly welcome the change to a system that is “gender-neutral”. Under the current system protection is weighted in favour of girls. The Centre believes that boys and girls should have equal protection under the law. The Centre also supports the distinction between offences against younger and older children.

s. 14 Rape of a young child

The Centre supports the retention of the principle that young children cannot consent to sexual intercourse. The Centre supports the change to the age of 13 from 12. It is not incompatible with current law where special rules are applicable to sexual intercourse with a girl under 13. It also has the advantage of cross-border consistency with the protection provided to children under English Law.

s. 15 Sexual assault on a young child

The Centre supports this proposal, and welcomes the inclusion of the concept of “reckless activity”. The Centre also supports the objective test as to whether or not the behaviour is “reckless”.
While the Centre supports the retention of the principle of strict liability for this
offence we believe that there is a separate issue where the sexual activity is
between children. We comment on this at s. 20 below.

We would suggest the addition of the words "and any article of clothing which
B is wearing" at the end of section 15 (2) (d).

s. 16 Causing a young child to participate in a sexual activity

The Centre supports this proposal and welcomes the test in subsection (2).

Ss 17 – 19

The Scottish Child Law Centre supports the proposals and welcomes the wide
definitions of "sexual activity", "image of a sexual activity", "sexual visual
communication" and "sexual written communication". The Centre also supports
the proposals for the "purposes".

The Centre believes that notwithstanding the insertion of the "purposes" in
sections 17 (2), 18 (2) and 19 (2) but believes that there should be clear
exemptions for those who work with children in counselling, medical and sexual
health services who may need to use such images in their work.

The Centre has concerns with regard to criminal liability for a child who
commits such an offence. These concerns are discussed below.

S 20 Belief that child had attained the age of 13 years.

The Scottish Child Law Centre supports this but has concerns with regard to
the criminal liability of a child that commits such an offence. The Centre
believes that this defence should be available to a child who has committed
such an offence and who is within two years of the age of the victim of the
offence.

Ss 20 – 26

The Scottish Child Law Centre supports these proposals but again believes
that there should be clear exemptions for those who work with children in
counselling, medical and sexual health services.

The Scottish Child Law Centre is concerned that this proposal criminalises
consensual sexual activity between children between the ages of 13 and 16.

The Centre is concerned that criminalising consensual sexual activity is likely
to be ineffective in preventing sexual relationships between those in the 13 –
16 year old age groups. Under current law where boys and girls between 13
and 16 engage in sexual activity, the boy has committed an offence. This has
not been effective in preventing under age sex. The Centre is concerned that
the current proposals make consensual sex between older children between

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the ages of 13 and 16 serious criminal offences which in Schedule 1 are punishable on summary conviction by a maximum penalty of imprisonment by a term not exceeding twelve months or a fine, and on indictment by either a fine or a term not exceeding ten years or both.

The result of this is that consensual sexual conduct between older children would be dealt with in the adult criminal justice system. For some decades it has been the case in Scotland that children under the age of 16 are not generally prosecuted in the criminal courts. In the great majority of cases, children who offend are dealt with through the Children’s Hearing System. The Scottish Child Law Centre believes that this is the appropriate forum for disposal of the cases of the majority of children who offend. The Children’s Hearing system deals in a holistic manner with the offending child who is in need of compulsory measures of care. It supports the child by looking at the causes of the behaviour and by addressing the needs and interests of the child rather than taking the punitive approach of the adult system.

The Scottish Child Law Centre does not believe that it is in the interests of older children who engage in consensual sexual activity to be criminalised, or to be dealt with through the adult system. The Centre does not believe that it is a proportionate response to under-age consensual sexual behaviour. The Centre supports the original approach of the Scottish Law Commission which de-criminalised consensual sexual behaviour between older children, but made such behaviour grounds of referral to the Children’s Hearing.

s. 29 Defences in relation to offences against older children

The centre would repeat its concerns re criminalising consensual sexual activity as detailed above. Further the centre is concerned that at subsection (2) the defence is not available to someone previously charged by the police with a relevant offence. It is not uncommon for charges to lead to no action due to lack of evidence. Being charged with an offence is not equivalent to being found guilty of an offence.

The Centre also supports the defence in subsection 3, but suggests that this be dealt with, not as an offence, but as a ground of referral to the Children’s Hearing. We would repeat our comments in our response to s. 28 above.

Part 5. Abuse of Position of Trust

The Scottish Child Law Centre supports the principle that abuse of a position of trust merits special attention.

Conclusions:

While the Scottish Child Law Centre supports and welcomes much contained in the Sexual Offences (Scotland) Bill, we believe that criminalising consensual sexual behaviour between children is disproportionate and will lead to potentially serious consequences:
1. The proposed offences would result in older children who are convicted of offences resulting from consensual sexual behaviour having a criminal record for a sexual offence. This is likely to appear on a disclosure certificate and can seriously limit the career and work prospects of that child in later life. This is a disproportionate punishment for consensual conduct. If these children are considered to be Schedule One offenders it can impact on their future family relationships with their own children.

2. Should the decision be to proceed with criminalising consensual sexual activity between older children, but for cases to be dealt with through the Children’s Hearing System we are concerned that this can still have serious consequences for the child in adult life. Currently offences by children that are disposed of by the

Children’s Hearing system do not result in criminal record, however we are concerned that currently such offences can appear in later life in the area of a Disclosure Certificate knows as the “soft area”. This is not appropriate and can have a prejudicial effect on the child in adult life. If consensual sexual conduct between older children is to be dealt with by the Children’s Hearing system as was originally proposed we urge that consideration is given to withholding such offences or charges from Disclosure Certificates once the child is an adult.

3. We are concerned that given the current high rates of under age pregnancies and sexually transmitted disease that this proposal would have the effect of discouraging those in this age group from seeking and obtaining sexual health advice, contraception and medical treatment. We are concerned that older girls who become pregnant may delay the seeking of medical advice and may jeopardise their own and their babies’ health. The Centre believes that it is important to engage with older children to encourage them to protect their sexual health and to seek appropriate advice and treatment, and that that engagement is likely to be at risk if the current proposals to criminalise sexual conduct between older children become law.

While the Scottish Child Law Centre welcomes the changes to sexual offences against children contained in the Bill, we have concerns about the proposals to criminalise consensual sexual conduct between children. The Centre believes that the the original proposals by the Scottish Law Commission are more proportionate, and that the appropriate forum for consideration of consensual sexual offences between children is the Children’s Hearing System.

Morag C Driscoll
Director
Justice Committee

Sexual Offences (Scotland) Bill

Written submission from the Church of Scotland

The Church of Scotland Church and Society Council are broadly supportive of the intentions behind the proposed legislation. We recognise that this is a very complex area of legal interpretation and thus do not wish to comment in detail on most of the proposals.

We welcome the moves to define consent more closely and to simplify the range of offences in this difficult area. In this regard we find the outline list in §10 to be helpful.

We are not persuaded by §27-29 of the Bill. We recognise that there has been considerable thought around the area of consensual sex between older children aged between 13 and 16. We believe that the law is brought into disrepute if legislation is passed which is not intended to be enforced. The Policy Memorandum makes it clear that there is a significant amount of sexual activity within Scotland between older children. The statistics in §114 of the Memorandum are inconsistent but show that there are significant numbers of under 16 pregnancies in Scotland and thus, it appears safe to assume, significantly higher incidences of sexual activity and yet we are unaware of there being the large number of prosecutions for offences being committed. The law as it stands is not being enforced and that situation is to be retained under the proposed legislation. The proposed legislation does offer a number of defences to a charge that make a conviction unlikely in the event of consensual sex between ‘older’ but that serves only to undermine the principle of the legislation.

We remain convinced that sexual activity in under 16s is a matter of concern. We remain convinced that sexual activity in 13-16 year olds is not appropriate. We do not wish to see a lowering in the age of consent and thus would like to see reversion to the original proposal from the Scottish Law Commission that evidence of sexual activity be grounds for referral to the Children’s Reporter. We agree with the statement in the Policy Memorandum: “the law is an important aspect I guiding young people’s behaviour in approaching sexual intercourse” (§113) but would argue that that is a reason for referral to a Children’s Reporter being enshrined in legislation rather than a Court proceeding that will not occur. As the law currently stands we hear it to say that such activity is viewed as a criminal offence but not one that is serious enough to merit prosecution – a poor model of the role of law. We prefer the message, following from statutory referral to a Children’s Reporter, that this is a serious health and welfare issue that is being acted upon because those participating are children. We see this as a clear message that can be enforced and, along with appropriate and robust
services and education, could lead to improvements in the levels of sexual activity and sexual health in our young people.

We would be happy to part of ongoing discussions on the Bill.

Rob Whiteman
Associate Secretary
Justice Committee

Sexual Offences (Scotland) Bill

Written submission from the Scottish Trades Union Congress

The STUC represents trade unions with a total membership in excess of 640,000 workers, and our structures also reflect representative involvement of different communities, including women, young people and Black and ethnic minorities. The STUC engages with a wide range of organisations across civic society.

General Statement

The STUC welcomes the work done by the Scottish Law Commission, and the establishment of the representative Advisory Group to aid consideration of the issues which arose.

Whilst there will always be a difficulty with defining ‘reasonable’ and other such terms, the STUC welcomes the proposals in the draft Bill to seek clearer definitions.

Section 10

The explanatory notes to the Bill indicate that the list of circumstances indicating lack of free agreement is non-exhaustive. However, this does not appear on the face of the Bill, and we would suggest that consideration be given to making that clear.

The nature of the offence is such that not all circumstances can be predicted, and therefore the legal framework should exist to enable prosecution in any case where there has been no free agreement.

Specific additional points which the STUC does not consider to be adequately contained in the draft Bill would include:

Trafficked Women

The particular position of women who have been trafficked and/or who are involved in prostitution, where it can be demonstrated that the accused knew or was reckless to the fact that the complainer was being held against her will by a third party. This is a factual situation which should be listed in Section 10.

Adult Entertainment/Sexual Exploitation

We are concerned about the risks faced by women working in night clubs, lap dancing and other ‘adult entertainment’ locations, and would seek assurances
that the Bill makes clear that no assumptions of ‘free agreement’ will be made that are linked to the environment in which the complainer works.

**Pre-existing relationship of violence or sexual exploitation**

The STUC would raise a concern that the Bill is not sufficiently explicit in recognising that a presumption of ‘no consent’ should apply in circumstances where the complainer has been the victim of sexual or physical abuse at the hands of the accused on previous occasions. We understand that Scottish Women’s Aid and Rape Crisis Scotland have raised similar concerns, and we would echo these.

There are a number of other general areas on which we know other organisations are seeking clarity, including on the concept of ‘advance consent’ and the possible inclusion of ‘reckless behaviour, and we will be following the deliberations at Committee with interest.

**Ann Henderson**  
*Assistant Secretary*
INTRODUCTION

The Law Society of Scotland ("The Society") welcomes the opportunity to comment upon the Sexual Offences (Scotland) Bill as introduced in the Scottish Parliament on 18th June 2008 and has the following comments to make upon its terms.

GENERAL COMMENTS

The Society initially responded to the Scottish Law Commission’s Discussion Paper on Rape and other Sexual Offences in April 2006 and has been actively engaged with the Scottish Government on this matter, with particular reference to the Scottish Government’s Consultation issued in January 2008 which followed the Scottish Law Commission’s final report “Recommendations for the Reform and the draft Bill on Rape and other Sexual Offences” on 18th December 2007.

The Committee agrees there is a need for an examination of the law on Sexual Offences to achieve a clear, practical and gender neutral statement of the law, free from the historical and other anomalies which have characterised this area of law, for the benefit of both the public and those, such as lawyers, judges and juries, applying the law. The Society commends the approach of the Bill in first ascertaining which behaviour should be deemed criminal and thereafter, how best the constituent elements should be defined to ensure that this is achieved. The Society, in particular, agrees with the Bill’s focus on the centrality of consent in the law relating to Sexual Offences and supports the recommendations for provisions to ensure the protection of vulnerable individuals, particularly children, in a consistent and transparent manner.

The Society is concerned, however, that there is room for public misconception as to the purpose of this legislation. It is the Society’s understanding from discussion between the Society’s Criminal Law Committee and the Scottish Government’s Bill team and perusal of the Bill itself that the proposed legislation is intended to be a consolidating and not a particularly innovative measure.

With reference to the general provisions of the Bill, it attempts to set out in clear language what the current law is and will not of itself resolve any of the apprehended difficulties that exist in relation to the low conviction rate in relation to rape cases.

With reference to the response made by the Society’s Criminal Law Committee raised in response to this discussion paper on rape and other Sexual Offences in April 2006, one of the Criminal Law Committee’s concerns
at that time was that the proposals in the discussion paper had been made in the absence of comprehensive evidence based on conviction rates drawn from research covering the entire investigative and prosecution process. The Criminal Law Committee stated at that time that it was not aware of any research into the operation of the Criminal Justice system as it relates to Sexual Offences from start to finish, that is from the original complaints to the police to the jury’s verdict and that there was a widespread perception that the current system was not working. The Criminal Law Committee stated at the time that a comprehensive review of the entire investigation and prosecution system in this area was required in order to establish the failings of the system. A particular point that the Criminal Law Committee raised in response to this discussion paper was that there did not appear to be any research on how juries function in sexual offences cases and that juries cannot be asked to disclose their reasoning. The Criminal Law Committee stated that it was aware of research from other jurisdictions which had been carried out on this issue and that it seemed appropriate that consideration should be given as to whether research into jury verdicts in Scotland should be carried out, although this may well require a change in the current law. The Society remains of the view that a full and detailed research into the whole system of investigating, prosecuting and consideration of verdicts should be recognised and carried out complimentarily to any amendments to the law as proposed in this Bill.

PART I RAPE ETC.

Section 7 (Sexual Exposure)

The Society notes that it is currently an offence for a person to expose his or her genitals thereby causing alarm or distress to someone else. This would be prosecuted as a breach of the peace. As breach of the peace is not a crime of intent, there is therefore no need to establish that the person intended to cause alarm or distress. The new offence proposed in section 7 would therefore be more difficult to prove than the current common law crime of breach of the peace.

The Society would therefore question of what advantage there would be in creating a new offence in terms of section 7 of the Bill

PART 2 CONSENT AND REASONABLE BELIEF

Section 10 (Circumstances in which Conduct takes place without free agreement)

The Society agrees with this approach and is of the view that this should ensure greater clarity in the operation of the law. The prosecution will be able to have regard to the list of factors in determining whether to prosecute a case, although it is appreciated that the list will not be exhaustive. Similarly, solicitors for an accused will be able to provide detailed advice in regard to how a court will consider relevant factors in the case and this may therefore assist in advising clients in relation to a plea.
The judge will also have a framework within which he or she can direct the jury, and the jury will have a point of reference to assist in deliberations.

Such an approach may also have the important advantage of making these offences clearer and more easily understandable for the general public.

With reference to its comments above, the Society would, however, state that the terms of section 10 (2) appear simply to codify the common law, they do not in any way add to the circumstances in which the agreement to consent is absent. The Society would guard against this perhaps false expectation on the part of the public, particularly with reference to section 10 (2) (a), as the circumstances will still require to be corroborated.

With particular evidence to section 10 (2) (c) The Society notes that one circumstance listed in which the agreement is not present is "where B agrees or submits to the conduct because of violence used against B or any other person, or because of threats of violence made against B or any other person".

The Society would highlight that, although it is noted and referred to above and that the list contained in section 10(2) is without prejudice to the generality, there will be of course situations where sexual activity is agreed to as a result of other types of threat. A somewhat distressing example of this may well be where a threat is made to either kill or harm a family pet. In all the circumstances, the Society would take the position that threats other than those of violence, would result in the removal of free agreement would suggest that the circumstances where a threat is made that results in consent being given where consent would otherwise not have been given should be listed in section 10 (2) as circumstances in which conduct takes place without free agreement.

PART 3 MENTALLY DISORDERED PERSONS

Section 13 Capacity to Consent

The Society welcomes the statutory definition of capacity to consent as outlined in sub-section 2 and that "mental disorder" has the same meaning as in Section 328 of the Mental Health (Care and Treatment) (Scotland) Act 2003.

PART 5 ABUSE OF POSITION OF TRUST

Section 34 Sexual Abuse of Trust: Defences

The Society agrees with the terms of the defences as outlined in Section 34

Section 35 Sexual Abuse of Trust of a Mentally Disordered Person

The Society would envisage difficulties with regard to the definition of when individuals are in a position of trust such as health professionals and would
suggest that the definition is widened to include those in a voluntary role. The Society would also question whether individuals can, or should be defined mainly in relation to the service that they are receiving rather than on the capacity to consent and would welcome suitable clarification.

In particular, the Society notes that, in terms of section 35 (5) of the Bill, “care service” has the same meaning as contained in section 1 and section 2 of the Regulation of Care (Scotland) Act 2001.

As well as widening the definition to include those in a voluntary role as referred to the above, the Society would respectfully suggest that there are other categories of individuals which may well be in a position of trust such as advocates, employers and employment support workers.

The Society would question whether there has been any research carried out with regard to circumstances in which such relationships are likely to arise.

One practical difficulty that the Society would highlight at this stage, and with reference to the above, is that individuals are defined in relation to the service they are receiving. The move towards self directed support should be considered here in that this model would result in the person receiving the service being the employer and accordingly it may be difficult to regulate such a relationship. The Society would suggest that a different form of regulation might be necessary here.

The Society would also welcome information with regard to prosecutions and convictions under the current legislation in order to establish as to whether the law with regard to sexual abuse of trust of mentally disordered persons is effective.

Stuart Drummond
Law Reform Officer
Supplementary written evidence

I refer to the above and to previous correspondence and in particular to our telephone conversation of 9 December 2008.

Following the evidence session on 18 November, at which the Society was represented by myself and by Bill McVicar, the Society’s Criminal Law Committee Convener, I can confirm that the Society’s Mental Health and Disability Sub-Committee has had the opportunity to reconsider its position on the Sexual Offences (Scotland) Bill, particularly in relation to ENABLE’s revised views on sections 35 and 36 of the Bill.

The Sub-Committee previously commented that it agrees with the Scottish Government’s intention that it should be an offence for a person to engage in a sexual activity with a mentally disordered person where he or she (a) is providing care service to the mentally disordered person or (b) works in, or is a manager of, hospital where the mentally disorder person is been given treatment. Such provisions would be similar to those currently found in the Mental Health Legislation. The Sub-Committee would wish to reiterate that comment and recognises that the present protection is inadequate.

The Sub-Committee is aware of research such as “Sexual Boundary Issues in Psychiatric Settings”, Royal College of Psychiatrists (2007) which has reported situations where psychiatrists have allegedly abused their position and entered into relationships with vulnerable people, and also where patients have found it hard to have their evidence believed. Members of the Sub-Committee have also reported examples, arising in course of their professional work, where there have been instances of such abuse. The Sub-Committee believes, therefore, that there is real evidence of abuse encouraging in practice and that, even if it has been rarely prosecuted, it is appropriate that such abuse continues to be a criminal offence. The link to the research report, referred to above is as follows:


Alan McCreadie
Deputy Director, Law Reform
15 December 2008
For over 120 years CHILDREN 1ST, the Royal Scottish Society for Prevention of Cruelty to Children, has been working to give every child in Scotland a safe and secure childhood. We support families under stress, protect children from harm and neglect, help them recover from abuse and promote children's rights and interests. We provide 41 services in 23 local authority areas as well as six national services including ParentLine Scotland which is the free, national telephone helpline for parents and carers. The CHILDREN 1ST Chill Out Zone in Bathgate is a drop-in centre for young people that provides health advice and support, including sexual health advice.

Many of the issues raised by this Bill relating to children and young people are complex and difficult, and there are no easy answers. The Bill brings challenges such as the application of law in principle or in reality, our view of adolescence, and the different age boundaries that currently exist for different issues - for example, young people can be held criminally responsible from 8 years old, are deemed capable to consent to medical treatment from 12 years old, can marry at 16 years old, and can drive a car from 17 years old. Our concern in responding to this legislation is the protection of all children, defined as those up to 18 years old, from exploitation or harm, and the protection of childhood for children’s current and future happiness and wellbeing.

The context
It is important to note the context within which this Bill is being developed. We know that around 30% of Scots have sex before 16 years old, with many more under-16s engaged in other forms of sexual activity. To note therefore, that having sex before 16 years old is still not the ‘norm’ but is common. We also know from research and our work with young people, that some young people’s early sexual experiences are problematic and place them at risk. We know for example, that some young people are using alcohol to succumb to peer pressure and to overcome reluctance to have sex (as many adults do). Evidence shows that those engaged in early sexual activity are more likely to experience early pregnancy or STIs, or later express regret at their actions.

In addition, we know that sex and relationships education is increasing but it still patchy and of differing quality across Scotland. Whilst there are increasing sexual health advice services for young people, many young people, particularly those in rural areas, cannot access these easily or confidentially.
We also know that many children and young people are the victims of a sex offence every year. It is estimated that around 16% of children under 16 years old experience sexual abuse during childhood\(^1\), with most of this abuse occurring at the hands of those they know such as family members or friends. Much of this abuse goes unreported, and even where it is reported, convictions are relatively rare.

Report summarising key issues
We are concerned that the implications of this legislation are fully debated and explored before being finalised. To this end, we held a conference in June 2008 jointly with ChildLine in Scotland to debate the issues raised within the Scottish Law Commission recommendations. The event included participants from across many different sectors such as police, social work, sexual health advisers, and education.

You may find the summary of key issues raised at this event to be helpful for informing your consideration of the Bill – the summary report is available at www.children1st.org.uk

1. **Definition of consent**
We welcome the approach taken in outlining the situations where consent is deemed not to exist. We raise two areas which we feel need also need to be included in this definition: where a person has previously been the victim of physical or sexual abuse by the accused, thus recognising the power imbalance that already exists and thus the context of exploitation; and where the person agreed or submitted to the act because he or she was subject to emotional or psychological abuse.

2. **Young children aged under 13 years old**
We believe that the principle behind the absolute unacceptability and therefore criminality of sexual activity by an adult with an under 13 year old is correct. Younger children are particularly vulnerable and this statement in law sends this message clearly.

Our understanding is however, that as the Bill stands, when two under 13-year olds engage in sexual activity with each other (and this includes low level activity such as kissing, as well as sexual intercourse) they could both be guilty of rape. This is inappropriate and does not make sense when the Bill otherwise regards young children as incapable of consent and in need of special care and protection. We recommend that the Bill be changed so that an under-13 year old cannot be charged with a sex offence.

3. **Older children aged 13 - 15 years old**
The aspects of the Bill which deal with sexual activity with older children are particularly sensitive and complex, with tension between implementation of

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law in practice, the reality of older children’s sexual activity, and the message that the law portrays. There is a difficult balance to be struck but it is important that the emphasis is on what would work best in practice for young people’s safety and wellbeing.

Given that much of the debate around sex offence law and older children stems from a lack of certainty around its likely impact upon young people’s behaviour, we are concerned that the Government neglected to consult with young people in advance of the Bill’s introduction. We ask the Committee to raise this with the Minister.

CHILDREN 1ST has consulted with young people. Our discussions with young people resulted in a range of views being raised: some young people spoke about their right to make decisions about their own sexual health and about when they were ready to have sex, whilst others felt that any actual or perceived change in 16 as the age of consent might lead to more early sexual activity and more unwanted pregnancies. Significantly, some young people spoke about using 16 years old as a form of ‘buffer’ or excuse to withstand peer pressure to have sex earlier than this age boundary. We believe that the message of the law as understood by young people and its impact upon their behaviour is of the greatest importance in the development of this law.

In light of this, and of our concern for the wellbeing of all young people, we believe that the Bill should seek to ensure that:

- young people are not criminalised unnecessarily for consensual sexual activity with each other. This is because of the potentially very negative impact upon their childhood of investigation and prosecution, as well as the potential impacts on their future of having such an offence on their record. We are concerned to ensure that any aspect of the Bill as introduced, such as the guidance discussed below, work to ensure that no young person is criminalised unnecessarily.

- positive action is taken to protect young people’s safety and wellbeing where needed; and,

- there is clarity about the law and implementation of the law, so that young people’s access to services is strengthened and encouraged and to ensure young people’s ability to speak openly with appropriate professionals about their sexual health concerns. Evidence shows that one of the impacts of enabling young people to seek such advice and support is delay in their engagement in sexual activity.

- **No unnecessary criminalisation**

We welcome the inclusion in the Bill that the Lord Advocate will give guidance to the police about when prosecutions would take place (Section 27). Our understanding is that this guidance is intended to avoid unnecessary
investigations of consensual sexual activity between 13-15 year olds. As discussed below, this guidance should also include unnecessary prosecutions against young people up to the age of 18 years old.

We would further expect that if action was required to deal with problematic sexual behaviour within the legal system, such cases would always be dealt with by the Children’s Hearings system, rather than criminal courts. This would allow a young person’s needs to be considered and their child status to be recognised. We seek assurance that this is the case.

- **Guidance on response to disclosure of underage sex**

  We note however, that it is not only the police who need to be clear about how the law is implemented in practice, as suggested in Section 27 (7). Confusion and uncertainty is rife amongst those who work with young people and amongst young people themselves about when action, whether through the legal system or otherwise, would be taken to address sexual activity between 13 – 15 year olds. Such uncertainty is hampering positive advice and openness between adults and young people around sexual health, and ultimately damaging young people’s sexual wellbeing.

  We are aware that the Government has, for some time, convened a working group on disclosure of underage sexual activity. We urge the Committee to amend the Bill so that the Government must make guidance publicly available outlining how decisions should be made on action to be taken in response to disclosure of underage sexual activity.

- **Reduce confusion in the Bill**

  We understand the rationale behind the ‘2 year rule’ in Section 29(3) and agree that it makes no sense to criminalise normal and non-exploitative relationships between a 16 -17 year old and for example a 14 -15 year old. However, we believe that including such an aspect in criminal law is confusing, unworkable and difficult to communicate clearly to the young people who may be in these circumstances. Therefore, we suggest that this aspect of the Bill be withdrawn but instead, that the guidance discussed above and the guidance from the Lord Advocate to the police includes details about the situations where prosecution of sexual activity between a 16-17 year old and a 14-15 year old would or would not take place.

  We also question the distinction between vaginal or anal penetration, or oral penetration within the Bill. Such a distinction does not seem to be related to the impact of such acts upon the victim. We suggest that the Committee seek explanation of this aspect of the Bill.

- **Addressing sexually harmful behaviour by young people**

  It is unfortunately the reality that some young people sexually harm other young people, most often because they themselves have suffered harm, neglect or a lack of appropriate sexual boundaries. It is vital for their future
wellbeing, and for other’s safety, that they are given help and support to address this behaviour. However, despite the evidence that suggests that treatment at a young age can prove very effective in preventing further offending and promoting healthy future sexual relationships, we know that often, these young people are given no treatment or services to address this.

We strongly urge the Committee to consider an addition to the Bill that ensures that young people who commit a sexual offence get the treatment and supervision that they need.

Furthermore, while we believe that children who display sexually harmful behaviour need to be monitored where they pose a danger to others, this should be for the purpose of supervision and treatment. The need for registration on the adult register as sex offenders should be reviewed by an expert panel. Likewise, an under 18 year old’s inclusion on the list of those unsuitable to work with children, as defined by the Protection of Vulnerable Groups (Scotland) Act, must not be automatic but always given specific consideration. This recognises the particular characteristics of adolescent sexual offenders and the high likelihood of the success of treatment and support in changing their behaviour. We urge the Committee to question the Minister as to whether this will be the case.

4. Abuse of position of trust
We welcome this aspect of the Bill as essential for the protection of some of our most vulnerable children. Our understanding is that the abuse of ‘position of trust’ was developed to deal with situations where someone had particular knowledge of a child because of their position in relation to that child, which meant that there was a power imbalance. This imbalance was then exploited in abuse of the child. We recommend that the Committee consider further the wording of this aspect of the Bill in light of this.

In particular, we believe that there is no rationale that the person with parental rights or responsibilities (or partner of, or formerly had, such rights and responsibilities) must be in the same household as the child to be a position of trust in relation to them. We also consider that former foster carers should also be included within the position of trust definition.

Mhairi Snowden
Policy and Information Officer
Justice Committee
Sexual Offences (Scotland) Bill

Written submission from British Naturism
Room T3.60
The Scottish Parliament
Edinburgh
EH99 1SP

22 September 2008

Dear Sir,

Sexual Offences (Scotland) Bill – Section 7, Sexual Exposure.

There are many more naturists and naturism is much more widely accepted than most people believe. We do sometimes meet with considerable prejudice so few naturists are prepared to come out and when dressed the disguise is perfect. Most people are ambivalent to nudity but there is a small and vocal minority who are vehemently opposed. NOP has carried out an authoritative poll so we can be confident that the following figures are reasonably accurate. Within Scotland's adult population of around 4 million there are about 50,000 people who describe themselves as being a naturist. There are about 300,000 who have sunbathed nude and about 700,000 who have swum nude. Roughly half of the adult population thinks that garden nudity should be legal. The number who consider that beach nudity merits a complaint to the police is too small to measure. I enclose a briefing note with statistical information for the UK as a whole.

The law on nudity in Scotland is already amongst the most draconian in Europe. Indeed we only know of two countries which are comparable. The law on nudity does not need to be drawn so widely as to necessitate special protection for theatres or to put naturists at risk of conviction for a sexual offence.

As presently worded this legislation will be used to harass or prosecute people for actions which do not harm others, are not intended to harm others and for which this legislation is not intended.

Societies with a more mature attitude to the human body have better, often very much better, outcomes for social indicators ranging from teenage pregnancy to eating disorders. This legislation will encourage and legitimise attitudes which the research evidence shows to be harmful.

All of our concerns relate to section 7 Sexual exposure. The published justification for this section is a quote from Setting the Boundaries. That in turn was an extrapolation from the Setting the Boundaries Literature Review which relied on a single piece of research from the 1980s. It beggars belief that a deeply flawed and unpublished student dissertation should influence the legislative process at all but in this case it seems to be driving it. The study greatly exaggerated the incidence and effects of aggressive exposure and the proposed legislation is in consequence disproportionate. I enclose two documents which consider in more detail the research and the way in which it has been misused.
Request 1. Please take the necessary steps to ensure that the Committee and Parliament are informed of this serious shortcoming in the information provided to them.

I will interleave comments with the proposed text of section 7.

7 Sexual exposure

(1) If a person (“A”) intentionally exposes A’s genitals in a sexual manner to another person (“B”)

We welcome the “sexual” requirement. It is absolutely essential but it does not, in itself, provide adequate safeguards. There are many people, including many people in the criminal justice system, who assume that nudity is automatically sexual.

with the intention that B will see them and A either—

(a) intends that B will be caused alarm or distress by the exposure, or

(b) is reckless as to whether B will be caused alarm or distress by it,

This makes the measure over broad. It would be more acceptable if we could be confident that nudity would not automatically be assumed to be sexual.

then A commits an offence, to be known as the offence of sexual exposure.

(2) For the purposes of subsection (1), a manner of exposure is sexual in any case if a reasonable person would, in all the circumstances of the case, consider the manner of exposure to be sexual.

(3) It is a defence to a charge under subsection (1) that what A did—

(a) was done in the course of a performance of a play, and

(b) conformed to the directions of the presenter or director of that performance.

(4) In subsection (3)(a), “play” has the meaning given by section 18(1) of the Theatres Act 1968 (c.54) (interpretation of expressions used in that Act).

The theatre should not need special protection. If paragraph (1)(b) is deleted then paragraphs (3) and (4) will no longer be required.

Request 2. That the Scottish Parliament should delete paragraph (1)(b) which will also allow paragraphs (3) and (4) to be dispensed with.

Request 3. The sexual requirement is absolutely essential and must be retained.

Yours sincerely

Malcolm Boura
Research and Liaison Officer

Enc: Statistics Briefing Note, McNeil Briefing Note, Chinese Whispers.
A Critique of “Flash ing: Its Effect on Women” by Sandra McNeill


In the early 1980s Sandra McNeill carried out research into the effect of flashing on women. As she acknowledged in her dissertation that research had significant shortcomings. The location, time, method, researcher and method by which the conclusions were reached conspired to produce a deeply flawed reference. Undoubtedly some incidents of flashing do have significant impact but selective quoting from the findings of this study followed by a process of chinese whispers through various government documents has lead to statements that greatly exaggerate both the extent and the severity. It is of serious concern that an unpublished student dissertation should be used in this way.

The underlying research has not been published so there has been little opportunity for critical review. It is described as being an unpublished dissertation by S. McNeill, Social Administration Dept., University of York, 1982. Ms McNeill draws heavily upon it when writing a chapter for the book Women, Violence and Social Control1 and this critique is largely based on that chapter.

The study was carried out:

\[\lambda\] at an unrepresentative time
\[\lambda\] in unrepresentative locations
\[\lambda\] with unrepresentative samples
\[\lambda\] using a method vulnerable to researcher bias
\[\lambda\] by a researcher with a conflict of interest.

No date is given for the survey work but the dissertation date is 1982 so it was probably either 1981 or 1982. There was at most 2 years and probably only a year between the survey and the last of the Yorkshire Ripper murders. It is difficult 30 years later to appreciate the effect that Peter Sutcliffe's five year campaign of murder and attempted murder had on women in the Leeds area (and beyond).

“I became involved in feminism because of Sutcliffe - I came across women who were so angry at police incompetence and lack of care about women's lives they would parade around the city centre painting "No Curfew on Women, Curfew on Men!" on billboards. ... On the 2nd January 1981, as Sutcliffe prepared to kill another woman, I was in Leeds helping organise a conference on sexual violence. On my way home that night I armed myself with a spray can and daubed "Men are the enemy" on the walls along the route. ”Julie Bindel.2

Police advice to women at the time: “Don't go out after 8pm.”

The study was of "twenty five students (occupants of a residence block), twenty five women attending a woman's liberation conference and fifty women from a door-to-door survey in Leeds".

The last of Peter Sutcliffe's victims was murdered near her home in a Leeds student residence block. We do not know which residence block was shortly afterwards used for the survey.

The delegates at the woman's liberation conference were equally non-representative and given the circumstances could be expected to give answers that promoted their cause.3 We do not know the conference location.

The door-to-door survey was carried out in Leeds but the exact location is not given so we cannot assess how it relates to the murder sites or make any assessment of the sample demographic.

What constituted flashing for the purposes of the paper is not stated. This may help to explain the surprisingly high rate4 of incidents and why so few of them, 14 out of 233, were reported to the police. That 14 were supposedly reported is also most surprising. The British Crime Survey5 (recorded offences) indicates a figure less than a twentieth of that.

The method used, unstructured interviews, is very susceptible to researcher bias and there was a significant conflict of interest.6

Letting things develop in ways that hadn't been envisaged may allow interesting and useful information to surface, but it runs two major risks. First, essential information, eg the interviewee's background, bias and reliability, may not be collected and, second, the interviewee's own interests and bias can cue the interviewee towards delivering material which the interviewer relishes. It can indicate areas for further research but, especially for emotive topics, it is not reliable.

The lack of a large representative sample, the almost completely undocumented status of the interview arrangements (it appears McNeill adopted essentially open-ended question and answer), the almost complete absence of numerical data makes the paper of only limited value to the seeker after objective and substantiated information.

McNeill's review of other research is characterised by ridicule of anyone who fails to share her anger. Where other (male) authors have failed to deliver outrage at the outrageous behaviour of flashing, they are lambasted for promoting a phallocentric world view where women have to put up with whatever behaviour male sexuality, orthodox or not, causes to become manifest.

The book chapter tells us much more about militant feminism than it does about the putative subject.

We have been told that the author acknowledges many of the shortcomings in her report but this is not reflected in the use that others have made of it. It beggars belief that a deeply flawed and unpublished student dissertation should influence national policy. British Naturism would welcome properly conducted research so that decisions can be based on reliable evidence.

3 There was widespread outrage at the lack of effective and appropriate action by the police, much of it justified. The last victim, the student mentioned above, would probably have lived if the police had acted differently. They later paid substantial damages.
4 According to the McNeill research there was an average of 2.3 per woman. In conversation with numerous friends we found none.
6 ... the women's movement in the late 1970s and early 1980s. Many of the key movers are interviewed, including Sheila Jeffries and Sandra McNeill, as an intricate story is told of separatism, radicalism and militancy. The revolutionary feminists were... for them women were an underclass and patriarchy was the ruling oppressive force. Review of BBC documentary. The Guardian 15 June 2006.
The Evidence on the effects of Flashing
A tale of quoting out of context and chinese whispers. 21 September 2008.

<table>
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<tr>
<th>Source</th>
<th>Comment</th>
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<tr>
<td><strong>Student dissertation by Sandra McNeil. 1982.</strong></td>
<td>This unpublished dissertation has very serious flaws, most of which were pointed out by the author in her report. Unfortunately this was lost when some of the findings were quoted. There is a British Naturism briefing note that considers this dissertation in detail.</td>
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<tr>
<th>Setting the Boundaries. Volume 2. Supporting Evidence. Literature Review.</th>
<th>Setting the Boundaries was the Green Paper that was the precursor to the Sexual Offences Act 2003. <em>It failed to give any mention of the shortcomings of the McNeil study.</em></th>
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<tr>
<td>Page 117. Statistical Background Home Office statistics do not reveal the number of offences of indecent exposure recorded annually. In McNeil’s study, which involved interviews with 100 women who had experienced indecent exposure, few had reported the matter to the police. It seems likely that this offence, in common with other sexual offences, is considerably under-reported. Page 119. McNeil’s study of victims of indecent exposure tends to support this view. She found that fear, shock and disgust were the most common reactions and that the fear concerned was the fear of death.</td>
<td>When statistics did become available they showed that the incidence of flashing was very, very much lower than McNeil had indicated. The interviews were not with 100 women who had experienced indecent exposure. It was three highly unrepresentative samples taken in the context of Peter Sutcliffe, the Yorkshire Ripper. That there should be fear and that it should be fear of death is to be expected given the context in which the study was carried out. The time and the locations were highly unrepresentative and the methodology unreliable. McNeil's study is largely devoid of quantitative information so there are no figures to show how prevalent fear was.</td>
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<tr>
<th>Setting the Boundaries. Volume 1.</th>
<th>There was no evidence in Setting the Boundaries concerning the effect on victims apart from the McNeil study. If the authors were impressed by the evidence then clearly they had taken the literature review at face value. Setting the Boundaries does not adduce any evidence to support the statement concerning the erect penis and masturbation. It appears to be an extrapolation from the McNeil research. These shortcomings were pointed out to the Home Office. The exposure clause was very extensively amended.</th>
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<tr>
<td>Page 120. 8.2.3 These nineteenth century offences of indecent exposure now seem quaint, and this contributes to the overall impression that indecent exposure is a minor nuisance rather then genuinely criminal behaviour. We do not think that this is a valid assumption. We were impressed by the evidence of research amongst victims that it can indeed be a very traumatic experience. It is not just the unpleasantness of the experience: in incidents where the exposed penis is erect or being masturbated, the effect is to induce fear, shock, disgust and a powerful fear of rape or death.</td>
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Sexual Offences (Scotland) Bill. Policy Memorandum

This document relates to the Sexual Offences (Scotland) Bill (SP Bill 11) as introduced in the Scottish Parliament on 17 June 2008

The Government endorses the SLC’s conclusion in their final report that:

“In the Discussion Paper, we took the view that indecent exposure was in many ways similar to a sexual assault. It is a form of sexual attack but without any direct physical contact. We also took note of research which indicated that indecent exposure aimed at specific victims is not experienced as a minor nuisance or as trivial in nature.3” (para 5.13)

Footnote

3. The Home Office Review Group stated that “We were impressed by the evidence of research amongst victims that it can indeed be a very traumatic experience. It is not just the unpleasantness of the experience: in incidents where the exposed penis is erect or being masturbated, the effect is to induce fear, shock, disgust and a powerful fear of rape or death.” (Setting the Boundaries, para 8.2.3)

British Naturism drew the shortcomings of the statement in Setting the Boundaries to the attention of the Scottish Executive but presumably that was not passed on to the Government.
We agree that aggressive nudity should be criminal but the research evidence does not support this statement of the severity of the effects.

The McNeil study was set firmly in the context of Peter Sutcliffe, The Yorkshire Ripper. It was carried out:

λ at an unrepresentative time
λ in unrepresentative locations
λ with unrepresentative samples
λ using a method vulnerable to researcher bias
λ by a researcher with a conflict of interest.

Some of the findings were then quoted out of context and without any mention of the shortcomings. It gained credence as it was copied from one official document to another and various plausible extrapolations were made. It beggars belief that a deeply flawed and unpublished student dissertation should influence the legislative process at all.
Statistics


It is extremely difficult to determine how many naturists there are without a high quality survey. When naturists get dressed the disguise is perfect and naturists do sometimes encounter appalling prejudice so most are very careful whom they let know. Naturism is much more popular and much more generally acceptable than many people believe.

At least 1.2 million people describe themselves as being a naturist which is roughly the same as the membership of the Church of England but it could be double that number. About 1 person in 4 has swum nude and nearly as many have sunbathed nude. One in five has seen a neighbour nude and a similar number have themselves been nude in their garden. Two thirds said that garden nudity should be legal.

Naturists are considered sensible by nearly half of the general public and a massive 9 out of 10 said that they are harmless. Conversely only 7% thought that naturists were disgusting, a tiny 2% thought that they were criminal and only half of those, 1%, thought that it was criminal enough to be worth informing the police.

Children in the household had no discernible effect on peoples attitudes with respect to beach naturism but it did make a small difference for public swimming pools 57/64% and back gardens 64/69%. It is clear that the concerns of some people about families and children are unfounded.

None of the polls and surveys have been repeated so some caution is needed when identifying trends but nudity and naturism do seem to be becoming more common and more accepted.

NOP Poll

A 2001 poll by one of the major polling organisations. Sample size 1823 and demographically representative so it is accurate.

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<th>Experience of unclothed activities %</th>
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<tr>
<td>Have you ever:</td>
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<tr>
<td>a) sunbathed without a costume to get an all-over tan?</td>
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<tr>
<td>b) swum without a costume?</td>
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<tr>
<td>c) been on a foreign naturist beach?</td>
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<tr>
<td>d) visited a British clothes optional beach, resort or Club?</td>
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<tr>
<th>Attitudes to naturists %</th>
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<tr>
<td>Naturists enjoy activities such as sunbathing and swimming without clothes. Do you think such people are:</td>
</tr>
<tr>
<td>a) criminal?</td>
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<tr>
<td>b) disgusting?</td>
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<tr>
<td>c) harmless?</td>
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<tr>
<td>d) sensible?</td>
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<th>Attitudes to public nudity and the law %</th>
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<td>If it is not intended to give offence, do you think adult nudity should be legal:</td>
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<td>a) in back gardens?</td>
</tr>
<tr>
<td>b) in quiet areas of public parks?</td>
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<tr>
<td>d) at certain times in public swimming pools?</td>
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<tr>
<td>e) anywhere that is specifically declared a &quot;clothing optional&quot; zone?</td>
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<th>and would you describe yourself as a naturist of not? %</th>
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<tr>
<td>Yes</td>
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<tr>
<td>2</td>
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<tr>
<td>97</td>
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Local authority

Beach visitors, Wirral. Invited to state their dislikes. Dogs 27.1%, litter 14.5%, naturist beach 6.8% and car park 6.3%. Note close agreement with NOP "disgusting" figure.

Other polls

There have been numerous other, although less reliable polls. The agreement between them is really quite remarkable.

Beach use

In 2001 the National Trust told us that on a good day the naturist beach at Studland has about 2½ thousand users.

Property Finder Poll

A 2006 online poll. A useful addition to our knowledge of public behaviour and attitudes.

84% would buy a home next door to naturists:
- No concerns at all 50%
- Ok if not seen 34%
- Not want to buy 16%

Many people are relaxed about nudity:
- Been nude outside at home: 20%
- Seen a neighbour nude: 21%

Younger people are more likely to be free from concerns:
Under 45 59%, over 45 41%
16% would not want naturists next door but people hate:
- Night time party noise 46%
- Music through walls or floors 45%
- Domestic arguments 39%
- Music in garden or balcony 37%
The Faculty of Advocates is pleased to have the opportunity of considering the Sexual Offences (Scotland) Bill. The objective of the Bill is to reform the law on rape and sexual offences. The Scottish Law Commission was tasked with undertaking a review of “the law of rape and other sexual offences and the evidential requirements for proving such offences and to make recommendations for reform”. Their final report and draft Bill was published in December 2007. The Sexual Offences (Scotland) Bill was introduced in the Scottish Parliament on 17 June 2008. The question of evidential requirements has been referred to the Scottish Law Commission in order that they examine certain aspects which are relevant to sexual offences in the context of a wider examination of the law of evidence more generally, including corroboration. Thus the Bill does not deal with any evidential matters.

The Faculty notes that the Bill proposes change in the law in regard to rape and sexual offences and most of this response is in relation to these matters. Various matters are thought to be productive of possible difficulties, to which attention is drawn. The Faculty notes that changes in the law in respect of sexual activity by children are proposed, and that the law on sexual exploitation of mentally disordered persons and sexual exploitations by those in a position of trust is brought into one statute. The changes proposed and the restatement of the law in these areas are not commented on in this response as the Faculty does not anticipate any difficulty with the proposals.

The Response refers to the particular sections of the Bill. Where the Response is silent in relation to any particular section, the Faculty has no comment to make.

PART 1

1 RAPE

(1) This provision introduces into the offence of rape the concept of recklessness in the actus reus, that is the action required to constitute the crime. Previously recklessness was relevant to mens rea, that is the state of mind necessary to commit the crime, and whether the accused reasonably believed that the complainer had consented to intercourse. Recklessness is not defined within the Bill. It is not easy to envisage a situation in which the actus reus of the offence could be committed “recklessly”. 
The offence of rape is extended to include anal and oral penetration by a penis. While there is merit in the former, it is not clear why the offence has been extended to oral penetration. The crime of rape is one that is readily identifiable with vaginal and anal penetration. The same cannot be said of oral penetration. The public have a clear idea of the crime of rape as involving sexual intercourse without consent. There may be difficulty in extending the definition to other assaults, which are sexual in nature but do not amount to intercourse. Such matters, including an assault involving penile penetration of the mouth, could be dealt with as a sexual offence under section 2.

(2) and (3)
These sub sections read with sections 9 and 11 provide that where the victim initially consents to penetration then changes his/her mind, the act becomes rape. As drafted, a failure by A to withdraw immediately on being notified of a change in consent (and recklessness in so failing) leaves A falling within the provisions and exposed to a conviction for rape.

It appears that the enactment of these provisions may raise a number of potential risks:

- abuse by B with a grievance against a previous partner, A, and
- where penetration has occurred with consent, but consent is withdrawn by B at a stage when A has reached the stage of ejaculation, it may be physically difficult for A to withdraw immediately; it seems doubtful that in such circumstances A’s act should amount to rape, but that would appear to be the effect of the provisions.

Given the terms of subsection (1) and the requirements in relation to consent of B, it is questionable whether these further subsections necessary where the situations covered will fall within subsection (1).

(4)
This subsection defines vagina to include vulva. The vulva is the female external genitalia. The current law of rape requires penetration of the vagina. If there is no such penetration, but there is penile contact with the external genitalia, then the crime committed is attempted rape. The institutional writer, Stair, states

‘There must be penetration of the woman’s vagina by the accused’s penis…placing of the penis against the labia (of the vagina) will be at most attempted rape.’

It is not clear why the definition of rape should be extended in this way. Experience indicates that juries are prepared to convict of attempted rape when there is evidence of an attack during which the act has not been fully carried out. There is a risk juries would be inclined not to convict of rape in such circumstances.
2 SEXUAL ASSAULT

(1) This provision introduces the offence of sexual assault. As with rape, the offence can be committed recklessly. The same comments about extension of the offence to reckless acts as outlined above apply. The comments concerning change in relation to consent also apply.

(6) Offences under this provision extend to the offence of rape as defined in section 1. Therefore as the Bill stands A could face prosecution under either section 1 or 2 for the crime of rape. The Scottish Law Commission recognises that rape could be charged under either section 1 or section 2; the expectation being that it would be charged under section 1. This is an unsatisfactory position. It would be a matter for the Crown to decide which section to apply. It is not satisfactory to have alternative applicable sections. There may be a danger that this would lead to a distinction between different “classes” of rape. Further, section 1 simply requires penetration by a penis without consent or reasonable belief of consent. Section 2 requires that the perpetrator ‘penetrates sexually’. In terms of subsection (3) penetration is sexual if a reasonable person would in all the circumstances of the case consider it to be sexual. If that is correct there seems to be a difference between the sections which is apparently unintended. It is well documented that the crime of rape can feature not only in apparently sexual situations but also where there is no apparent sexual element and the motivation of A appears to be the exerting of power and violence over B. If that is accepted then, perhaps unwittingly, these sections could be read as suggesting that some cases of penile penetration are sexual and some are not. There is a danger in encouraging such a distinction.

The Scottish Law Commission explain the necessity for this by giving an example of a hypothetical case in which the charge is of B being penetrated in some fashion by A, but not knowing what object was used. If A is prosecuted for a sexual assault and in evidence the object was shown to be a penis, then without subsection 6 the Scottish Law Commission is concerned that no conviction would follow; an unsatisfactory outcome. It is suggested that the example is of an unlikely scenario.

3 SEXUAL COERCION

This section refers to A coercing B to participate in sexual activity. It is implicit that it refers to A coercing B into sexual activity with someone other than A. While it is clear that coercion by A of B into sexual activity with A would be a sexual assault and therefore dealt with under sections 1 or 2, it would be useful to make
it explicit in this section that its provisions are directed at coercion by A of B into sexual activity with another person.

4, 5 and 6  COERCING A PERSON TO BE PRESENT DURING SEXUAL ACTIVITY, TO LOOK AT AN IMAGE OF SEXUAL ACTIVITY, AND COMMUNICATING INDECENTLY.

Each of these sections requires that A does something ‘for a purpose’ mentioned in the particular section. In each section the purposes are said to be -

(a) obtaining sexual gratification,
(b) humiliating, distressing or alarming B.

It is noted that B’s embarrassment is not included. The Crown will have to prove, under subsection 2(b) not that B was humiliated, distressed or alarmed, but that A intended he should be. This may lead to problems of proof. The effect on B is more important than the motivation of A. Presumably B will complain if, and only if, aggrieved. But his feeling of being aggrieved will not be the crucial fact for the Crown to prove; rather it will have to prove what purpose was in A’s mind. In relation to subsection 2 (a), it is not clear whose sexual gratification is referred to. Difficulty would arise if A claimed that he committed the act not for his own sexual gratification but because he intended to give sexual gratification to B. Does that come within the definition? As drafted it would not.

8  ADMINISTERING A SUBSTANCE FOR SEXUAL PURPOSES.

It is suggested that in subsection (1) after the words ‘overpowering B’ there should be inserted

‘so as to render B incapable of giving consent and thereby’

Subsection 2 (b) will cause difficulties of proof. It is suggested that there should be deletion from the word “is” in line 2 to the word “is” in the penultimate line of the subsection and that the words ‘will not cause any adverse reaction’ should be inserted.

PART 2

This part of the Bill is generally to be welcomed as providing some clarification of the meaning of “consent” in the context of sexual offences, and defining circumstances when it is not present.

9  CONSENT

This section defines consent as “free agreement”. There is nothing to take issue with in this straightforward general definition of consent. The Scottish Law Commission envisage that over time case law will evolve on what constitutes lack of consent in this general sense. Scots law does not provide any specific
definition of consent at present, and it has been held that judges should not attempt to offer a definition to juries [Marr v HMA 1996 SCCR 696]. There does therefore seem to be merit in making the law as clear as possible in this important area.

10 NON EXHAUSTIVE LIST OF SITUATIONS IN WHICH THERE IS NO FREE AGREEMENT.
This section provides that, without prejudice to the generality of s 9, free agreement to consent is absent in certain specific defined circumstances. The cumulative effect of the general and particular definitions in sections 9 and 10 is to provide non-exhaustive illustrations of the key element of the non-consent based sexual offences. Where the Crown proves one of the statutory situations, that establishes the absence of free agreement because there is either no agreement at all, or any agreement was not free in nature.

(2) (a)
This is not a new departure in the law, as instances of this are charged as rape at present. The inclusion of this subsection is appropriate, but does nothing to assist in determining at what point a person is too drunk to consent. Difficult questions may arise over whether the amount of drink he or she has taken is enough to lower his/her inhibitions (no crime) or render him/her incapable of consenting freely (a crime).

(2) (e)
This subsection as drafted could cause difficulty. If A obtains intercourse with B by falsely asserting that A is unmarried and intends to marry B, when in fact A is already married, it could be argued that B consented to the act of intercourse as a result of deception as to the nature or purpose of the act. If so, then there was no free consent and A would be guilty of rape. It is unlikely that juries would be prepared to convict in these circumstances.

11 CONSENT: SCOPE AND WITHDRAWAL

(4)
It is suggested that this provision is subjective and unilateral. On one view it might criminalise A’s behavior simply where B in fact decided that he/she was no longer a willing participant. There is no requirement that he/she communicate that fact to A by words or actions. There is an argument for some qualification of this subsection to make it clear that what is needed to bring consent to an end is something beyond an alteration of the state of mind of B. There would be merit in amending the provision to make it clear that it only applies “where A was or ought to have been aware of that withdrawal of consent”; or, “where that withdrawal of consent has been communicated expressly or by implication to A…”
12 REASONABLE BELIEF

This section provides that in determining whether a person’s belief as to consent or knowledge was reasonable regard is to be had to whether the person took any steps to ascertain whether there was consent. The philosophy behind this is to encourage A to ask rather than to assume. As such it is a useful provision. The difficulty noted in regard to section 11(4) above remains. Once conduct has started it is more difficult to assert that A has no reasonable belief that consent continues, even if he/she took no steps to ascertain that consent continued.
Written submission from the Crown Prosecution Service

1. The Sexual Offences Act 2003 (SOA 2003) received Royal Assent on 20 November 2003 and came into force on 1 May 2004 in England and Wales. It re-defined some offences such as rape and created a range of new offences (varying from assault by penetration to voyeurism). The Act provided a definition of ‘sexual’, made express provision in relation to the key issue of consent and established a range of new measures intended to guard against the commission of further offences by sex offenders.

Consent

2. Section 74 SOA 2003 provided for the first time a statutory definition of consent: ‘a person consents if he agrees by choice, and has the freedom and capacity to make that choice’. The clarity provided by this definition has been welcomed.

Reasonable Belief in Consent

3. In the offences of rape, assault by penetration, sexual assault and causing a person to engage in sexual activity without consent, a person (A) is guilty of an offence if (s)he:

- acts intentionally;
- (B) does not consent to the act; and
- does not reasonably believe that B consents.

4. Deciding whether a belief is reasonable is to be determined having regard to all the circumstances, including any steps A has taken to ascertain whether B consents (subsection (2) of sections 1-4). It is likely that this will include a defendant’s attributes, such as disability or extreme youth, but not if (s)he has any particular fetishes.

5. This is felt to be a significant improvement in the law as the Act abolishes the Morgan defence of a genuine though unreasonably mistaken belief as to the consent of the complainant. It means that the defendant (A) has the responsibility to ensure that (B) consents to the sexual activity at the time in question. It will be important for the police to ask the offender in interview what steps (s)he took to satisfy him or herself that the complainant consented in order to show his or her state of mind at the time.

Presumptions

6. Section 75 SOA 2003 contains a number of rebuttable presumptions. If the circumstances in the presumptions exist then consent is presumed not to have been given. These presumptions highlight circumstances where there is no agreement by choice or where the victim does not have the freedom
and capacity to make a choice. For example, if a person is asleep it is clear that that person does not have the capacity to make any sort of choice.

7. In practice however, the presumptions in Section 75 of the Act are rarely used as they are easily rebutted.

8. It is arguable the presumptions merely serve to highlight situations where it would have been obvious under the previous legislation that valid consent could not exist. This part of the Act has had little practical effect upon rape prosecutions.

Definition of Rape

9. The broadening of the definition of rape to include penetration of the mouth has been broadly welcomed.

Offences Involving Children and Persons with a Mental Disorder Impeding Choice

10. It is felt that the creation of a new statutory framework of sexual offences relating to children and the mentally disordered has modernised and significantly strengthened the protection which the law gives to these particularly vulnerable categories of victims. The removal from the legislation of archaic and offensive terms such as ‘mental defective’ has also been widely welcomed.

New Offences

11. The SOA 2003 created a number of wholly new offences. These include:

- Assault by penetration (s. 2)
- Causing a person to engage in sexual activity without consent (s. 4)
- Meeting a child following sexual grooming (s.15)
- Trafficking for sexual exploitation (ss. 57-60)
- Voyeurism (s. 67)
- Sexual penetration of a corpse (s. 70)

12. It is felt that these new offences have been helpful to prosecutors, by criminalising reprehensible sexual conduct, which under the previous legislation was not covered adequately or at all.

Policy Directorate
Crown Prosecution Service
Justice Committee

Sexual Offences (Scotland) Bill

Written submission from Professor Jennifer Temkin

1. Consent

Clause 10b

“Where at the time of the conduct B is asleep or unconscious in circumstances where B has not prior to becoming asleep or unconscious consented to the conduct taking place while B is in that condition”

This clause is highly problematic for the following reasons:

- It seriously undermines the concept of consent since consent is not required at the time sexual intercourse takes place.
- It deems consent to have been given at the time of sexual intercourse because it has been given some time beforehand.
- The clause places no time limit on when that prior consent may have been given.
- By divorcing consent from the time of intercourse, it does not allow for the possibility that consent would not have been given on that occasion.
- It undermines the autonomy of women by failing to afford them the right to have sexual intercourse only when they consent specifically to the act in question.
- It harks back to the time when marriage was deemed to imply consent to sex ever afterwards.
- It undermines the change in the law in relation to marital rape making marital rape a crime.
- It is inconsistent with the principle also contained within the Act that consent does have to exist at every moment that sexual intercourse is taking place: see clause 11(3) which provides that consent to conduct may be withdrawn at any time before or in the case of continuing conduct during the conduct.
- It continues the backward tradition of Scottish law in respect of rape.
- It stands in stark contrast to English and Welsh law which has recognised from the late nineteenth century that to have sex with a woman who is asleep or unconscious is rape because she cannot consent when she is in such a state.
- Similarly it is in contrast to the English decision in Malone where it was held that absence of consent does not have to be specifically expressed.
- It will lead to unmerited acquittals in rape within a relationship since it will lead to false claims of prior consent.
- It will make relationship rape still harder to prosecute than it is already and will thus widen rather than reduce attrition in rape cases.
2. Clause 4 Coercing a person into being present during a sexual activity

There is much to be said for an offence along these lines but the clause is defective for the following reasons:

- It requires proof of an additional purpose. It should be sufficient that A uses coercion to force B into being present during the sexual activity of others.
- The additional requirement of having to prove a specific purpose will help to ensure that this offence is rarely used.
- The introduction of offences which will in practice rarely be employed undermines the purpose of law reform and reflects badly on the legislature.
- The same objections apply to Clause 5 “coercing a person into looking at an image of a sexual activity”

3. The sexual abuse of “older children”

- This terminology is unfortunate. A child is a child. By describing some children as “older”, this undermines the general message that sex with all children under 16 is against the law. We tend to equate older with wiser so that an “older” child invites the perception of a knowing child in less need of protection.
- The English legislation is to be preferred in simply designating children according to their ages, under or over 13.

Professor Jennifer Temkin LLD, Barrister

*University of Sussex*

Author: *Rape and the Legal Process* (2002)

*Sexual Assault and the Justice Gap* (2008)
Introduction
The Convention of Scottish Local Authorities (COSLA) welcomes the opportunity to contribute to the Justice Committee evidence gathering. As such, we trust the following brief response will be useful to the Committee’s deliberations.

COSLA’s View on the Bill
The Bill appears to be bringing about clarity to the spectrum of sexual offending in Scotland by breaking sexual offending down into specific component parts under one piece of legislation. As such COSLA broadly welcomes the Bill as most of it seems to be common sense and focuses greatest attention on those sexual offences which are most damaging to individuals and society.

The Bill also provides greater clarity in areas where there existed certain doubts under Scots Law. However, we would question who would be responsible for enforcing the Bill in term of its provisions and the possible allegations that it condones sex between minors. That said, the clarification of what constitutes ‘rape’, ‘coercion’, ‘consent’, etc is helpful and welcome.

We believe the Bill would not result in a significant burden on resources for local authorities other than some education issues to provide clarity on the changes to young people in schools. In addition, there are some potential issues for those people who are in local authority care, but nothing that really changes from the current situation except a strengthening of the responsibility to protect vulnerable people.

As regards the further detail of the Bill this is best articulated in the detailed responses from Local Government officer networks such as ADSW and SOLAR.

Cllr Harry McGuigan
COSLA Community Wellbeing and Safety Spokesperson
Children in Scotland welcomes both the opportunity to submit written testimony and the invitation to appear before the Justice Committee on 4 November 2008. Our testimony is confined to issues within this Bill regarding children and young people.

There are many aspects of this Bill that we support. We are particularly heartened by its emphasis on ending the sexual exploitation and sexual abuse of children by adults – including adults having positions of trust in relation to children. No adult has the right to harm children in these ways and a criminal justice response to the perpetrators is fully justified. Assisting child victims of sexual exploitation or abuse also should be a priority.

Children in Scotland favours a Bill that will lead to a renewed, active effort by all relevant parties and individuals to achieve the following three general outcomes:

- **Actively and effectively discourage** sexual intercourse not only among everyone under the established age of consent (16), but also among older teenagers who are not ready to become fully sexually active. There is little evidence of the benefits – and significant evidence of the personal, social and economic costs – of full sexual activity by pre-16-year-olds.

- **Actively and effectively encourage** all children below the age of consent (16) - - who, despite robust advice to the contrary, choose to engage in sexual intercourse - - to behave in a manner that will have the fewest and least serious negative consequences. This means easy, confidential access to first-rate information about, and support for, avoiding pregnancy, preventing the transmission of sexually transmitted infections and dealing well with the social/emotional effects of sexual relationships.

- **Ensure that this Bill and other relevant law, policy, guidance and professional practice are based upon the best attainable evidence, rather than competing sets of assumptions, ideologies and preferences.** This includes heeding the call by Scotland’s Commissioner for Children and Young People for in-depth research and a meaningful consultation process. Views should be sought from a national cross-section of children and young people about what messages and measures would really discourage early sexual intercourse, as well as what information and assistance would really encourage behaviours having the fewest and least serious negative consequences. A robust consultation process would be in keeping with Article 12 of the UN Convention on the Rights of the Child.
With these broad outcomes in mind, we have several specific comments and recommendations about Part 4 of the Bill. These deal with the use of age boundaries; criminal records for younger children; gender equalisation; criminalisation versus decriminalisation of consensual sex between 13-15 year-olds; and, the uniqueness of Scots law and Scottish policy.

**Age boundaries**

While they are useful tools in law and policy, it should be remembered that the age boundaries appearing in this Bill are only rough proxies for actual individual maturity, knowledge and ability. All aspects of human development (intellectual, sexual, social and emotional) can, and do, vary widely for children of the same age. No fundamental transformation occurs on young people’s 13\textsuperscript{th} or 16\textsuperscript{th} birthdays.

And yet, the Bill draws strict lines between the actions/consequences of a 12-year-old and a 13-year-old, as well as between a 15-year-old and a 16-year-old. While only months apart in age – and sometimes equals in understanding and capacity – one would be classified as a ‘victim’ and the other as a ‘perpetrator/criminal’ for engaging in exactly the same behaviour.

There is at least one way of retaining these age boundaries in this Bill without causing problems in the implementation/enforcement process. We suggest that a presumption be added within the Bill that criminal charges will not be made against either party in a consensual sexual relationship occurring between young people whose ages are within two years of each other.

This suggested solution to the problem of artificial distinctions at the upper and lower ends of the 13-15 age boundaries also is imperfect. However, it might present significantly fewer difficulties in practice than strict adherence to the age boundaries in the current Bill (or the proposed use of “age proximity” as a defence in a criminal proceeding). After all, for the “age proximity” defence to be used, a criminal charge must already have been made – an event that is not likely to benefit (or advance the welfare of) the young people involved.

**Criminal records for younger children**

Children in Scotland shares the concerns raised by various other groups (mentioned in the SPICe briefing of 23/10/08) about the potential of this Bill to result in criminal records for children – when both are below the age of 13 -- who participate in a wide array of ‘sexual activities’ with each other. These include behaviours far short of sexual intercourse.

We see the potential of significant harm – and no significant benefit or advancement of the best interest of younger children – in identifying and treating their non-coerced, non-exploitative sexual explorations with each other as criminal behaviour. There are cases when such behaviour among younger children signals important health and welfare problems. In such
cases, the appropriate and proportionate response is to ensure health and welfare interventions that will result in them getting the help they need.

**Gender Equalisation**

One distinctive positive feature of this *Bill* is its recognition of the gender inequalities of current sexual offence laws. We support the intent to promote gender equality in this *Bill* -- with one exception.

For reasons explained later in this testimony, we do not agree with the Part 4 provisions about ‘older children’ (13-15 years-old) that would expose these young women to a new set of potential criminal charges for consensual sexual intercourse with other older children. While this would make their legal status/vulnerability equal to that of young men of their age, we do not share the view that either males or females of this age should be treated as *criminals* for engaging in consensual sexual intercourse with each other.

In the memorable words of Kathleen Marshall during a recent Radio Scotland interview, this *Bill* should make the law “equally right not equally wrong”!

**Criminalisation versus Decriminalisation of consensual sex between 13-15 year olds**

Children in Scotland endorses the recommendation of the Scottish Law Commission (2007) that consensual sexual intercourse between two older children (13-15 year-olds) should be *decriminalised*. The Law Commission, the SPICe briefing on this *Bill* and the written evidence provided by other children’s and sexual health organisations make the essential arguments in favour of decriminalisation cogently.

We wish only to add a few other points omitted or underemphasised to date:

1. The Scottish Government’s stated intent toward older children -- throughout the *Bill* and its related *Policy Memorandum* -- is to be benevolent and protective (not punitive). However, it is a curious version of ‘advancing welfare’ that seeks to lay criminal charges against the very people it ostensibly seeks to benefit.

In the absence of a meaningful, extensive consultation process with children and young people across Scotland, their views of such governmental actions cannot be stated with certainty. And yet, it seems plausible that a large percentage of Scotland’s children and young people would not welcome powerful adults criminalising their behaviour as an act of kindness or as ‘protection’. Indeed, they might think they need more protection *from* criminal charges than protection *through* such criminalisation.

It also seems likely that few children and young people would themselves view consensual sexual intercourse with people their own age as *criminal* behaviour. Robbing a shop, stealing a car, selling cocaine, knifing someone, vandalising a building – all of these would be recognised by children and
young people as *criminal* behaviour. Far fewer (if any) are likely to identify making love with a girlfriend/boyfriend of roughly the same age as similarly *criminal* behaviour.

2. The Scottish Government explicitly wants to use this *Bill* to ‘send a message’ to older children about society’s disapproval of sexual intercourse between them. Children in Scotland shares the same aspiration. We agree that all children should receive the message loud and clear that sexual intercourse is not a healthy or wise choice for them to make while still children themselves. We also agree that government at all levels (as well as the rest of adult society) has a major role to play in communicating this good advice.

Clearly, the intent of this *Bill* is for 13-15-year-olds throughout Scotland to take on board the following message:

- **Going all the way and having sexual intercourse is such a bad idea and so dangerous to the health and well-being of people my age that they have made it a crime. The Government is serious about this and I will be too -- by not having sexual intercourse until I am at least 16 years old.**

Doubtless, there will be some older children who would understand the message in the way intended, take it to heart and refrain from any sexual intercourse during these years. That would be a positive and welcome outcome.

Nevertheless, we think it is plausible (indeed likely) that at least as many 13-15-year-olds will end up interpreting the ‘message’ of this Bill in one or more of the following unhelpful (and unintended) ways:

- **Drinking alcohol, smoking tobacco and lousy eating/exercise habits all are really bad for my health, so why aren’t they illegal for me to do at home, too?**

- **They say that having sex is illegal, but it turns out that it’s just fine for us to have all the oral sex we want.**

- **They say it’s a crime for us to have sexual intercourse, but it turns out that they’re just trying to scare us -- because nobody is even thinking about arresting or prosecuting us.**

- **It’s illegal for us to have sexual intercourse. That’s another reason to do it!**

- **It’s a crime. So what? They just hate that they’re old and we’re young, so they try to stop us from having fun and feeling good. Forget the law.**
• The Government doesn’t ‘get’ that making love with my girlfriend/boyfriend has nothing in common with anything else that I understand to be a crime.

• If I buy contraceptives, then I am admitting to planning a crime. Forget contraceptives.

• If I think I might have an STI and go to get it treated, then I am confessing to a crime. They will not keep my crime confidential. Forget seeking treatment.

• I’m pregnant, so now I’m going to be a mum -- and a criminal. I have to hide this baby for as long as possible while I figure out what to do. Forget ante-natal care or even discussing what to do with any doctors or nurses.

• I’m pregnant and the baby is proof of my crime. I have to get rid of the baby. OR My girlfriend’s pregnant and I know they can prove I’m the father, so we have to get rid of the evidence or we’ll be locked up.

3. These examples illustrate the potential for serious gaps between the intended message of the Bill to 13-15 year olds and the unhelpful meanings these older children easily could derive from this Bill making consensual penetrative intercourse between them a criminal offence. This is not simply a question of misinterpretation on the part of young people. Rather, these examples bring into sharper focus the dilemma the Bill creates by being understood either as an empty threat or as a genuine threat of criminal sanctions.

At a minimum, criminalising these behaviours creates a powerful disincentive for older children to seek contraception, health services or adult counsel. At the same time, making consensual sex a criminal offence could create difficulties for involved adults. Health professionals know that confidentiality is a key factor encouraging older children to seek their advice, assistance and services. But, confidentiality will be much harder to promise (and to believe), as well as to maintain if criminal behaviour becomes part of the equation.

Although the Bill itself is silent on this point, it raises concerns about both the legal liability and the moral responsibility of other adults involved. Just to cite one of many examples, will there be legal liability for an adult who sells condoms to an older child (as there is now for selling them alcohol or tobacco)? Would giving free contraception to older children constitute aiding and abetting a crime?

4. There also is a potential communication problem with the course of action that we recommend – namely, that the Bill should be revised to give young men the same non-criminal status currently accorded to young women. The understandable worry is that decriminalisation of non-coercive, non-exploitative sex between older children will be interpreted by these young
people to mean that the Government and society approves of sexual intercourse between under-16 year olds – or, at least, doesn’t view it as a significant problem.

Unlike the inherent difficulties of getting the right message across in the face of criminalisation of sexual intercourse between 13-15 year olds, there is a straightforward way of making it plain to older children that decriminalisation does not equal approval. That way is for the government and other relevant adults to say so – loudly and clearly. In other words, the solution is to link decriminalisation to a major new public health campaign directed to – and conducted with the active participation of – young people across Scotland. As noted earlier, this campaign should have two complementary purposes:

- **Actively and effectively discourage** sexual intercourse not only among everyone under the established age of consent (16), but also among older teenagers who are not ready to become fully sexually active.
  The point is to tell young people that the age of consent remains at 16 and to explain why sexual intercourse between younger people is a bad idea and unhealthy behaviour.

- **Actively and effectively encourage** all children below the age of consent (16) -- who, despite robust advice to the contrary, choose to engage in sexual intercourse -- to behave in a manner that will have the fewest and least serious negative consequences.
  This means easy, confidential access to first-rate information about, and support for, avoiding pregnancy, preventing the transmission of sexually transmitted infections and dealing well with the social/emotional effects.

5. There is a valuable precedent within the Scottish Government’s Policy Memorandum accompanying this Bill. In dealing with the perceived public misunderstanding of rape and the rape-related laws (including among potential jurors), the Government accurately noted the need for – and its responsibility to provide the resources for – a significant public awareness campaign to spread the right message throughout our nation.

The Government’s positive action to combat misinformation and misunderstanding about rape should be mirrored in an expanded educational/public health campaign sending the right message about sexual behaviour and sexual health to children and young people in appropriate, effective ways. Doing so would remove the main pitfall to granting young men and young women equal non-criminal status in Scotland’s sexual offence law. It also would reinforce the common sense idea that there are unwise, risky, dumb or unhealthy behaviours that effectively can be discouraged -- without resorting to the heavy hand of criminal law to express societal disapproval.

This recommended heightened public health campaign should be accompanied by a redoubling of Scotland’s current efforts to make sexual
health and relationship education an integral part of what children and young people actually learn at school. After all, this is an area in which ignorance does not remain bliss for very long.

The uniqueness of Scots Law and Scottish policy

One of the distinguishing characteristics of public policy in Scotland (when compared to England) is the tendency to view and treat children as children, even in the aftermath of their negative or worrying behaviour. For more than 40 years, Scotland’s Children’s Hearings system has received justifiable accolades internationally for providing a sensible and effective alternative to the criminalisation of children and young people. That admired Scottish tradition should be reflected and extended through revisions to this Bill.

Once children are labelled (or come to regard themselves) as “criminals”, there are a series of both documented and predictable negative consequences. In part, it is a matter of young people living up – or, more precisely, living down – to this negative expectation. In part, one consequence for some children and young people is the development of an ‘in for a penny, in for a pound’ attitude – i.e., if I’m going to be considered to be a criminal anyway, then why not stop with only this crime?

The last thing that the Scottish Government or any other responsible group of adults wants is for the passage of the new Sexual Offences Bill to result in more teen pregnancies, more STIs, more disrespect/disregard for the law or more young people avoiding competent adult counsel and assistance in making decisions about, and dealing with, sexual matters. Our concern, however, is that criminalising consensual sexual behaviour between older children will have all of these unwanted effects.

That is why Children in Scotland – along with the Scottish Law Commission, Scotland’s Commissioner for Children and Young People and a variety of respected children’s and sexual health groups – recommends that the current Bill be revised to decriminalise consensual sexual intercourse between young people.

This Bill offers commendable improvements to the ways in which sexual offences by adults against children are defined and will be handled by the criminal justice system. Stopping adults from exploiting, abusing and harming children is where all relevant parties should focus their attention and resources.

Dr Jonathan Sher
Director of Research and Policy
The British Medical Association (BMA) would like to draw your attention to some significant health concerns regarding the Sexual Offences (Scotland) Bill. As the Bill is currently laid out, it fails to strike the right balance between deterring young people from early sexual activity and protecting them from the longer term adverse consequences of such activity. Although the Association is aware that the Justice Committee’s call for written evidence has now closed, as oral evidence is still being taken, it hopes that the committee will still be able to consider the comments outlined here.

The BMA is particularly concerned by the sections of the Bill that criminalise some consensual sexual activities between older children. The Association acknowledges the importance of promoting the health and welfare of young people by discouraging early sexual activity and helping children under the age of 16 resist any pressure to engage in sexual intercourse. It also recognises the role legislation has to play in shaping the sexual habits of young people and their approach to the age of consent. The BMA feels, however, that these considerations fail to justify the potential public health risks posed by extending the scope of the criminal law in this way.

Whilst the threat of criminal prosecution may send out a clear message that underage sex is wrong and that society does not condone the idea of children consenting to have underage sex with one another, it is also highly likely to deter young people from seeking the advice of health professionals on sexual health matters. The uptake of services intended to protect children from pregnancy or sexually transmitted infection, and which thereby act in the wider interests of public health, may well face a significant reduction if young people feel that, in seeking advice or treatment, they would risk criminal prosecution. The BMA therefore feels that the provisions of the Bill as it currently stands could in fact exacerbate the public health risks of early sexual activity rather than acting to alleviate them. In the Association’s view, concern to avoid such risks must override the Scottish Government’s desire to avoid a decriminalisation of consensual sexual activities between older children being mistakenly interpreted as a lowering of the age of consent.

It is the BMA’s view that, when medical professionals treat or advise older children who are in sexually active relationships with other older children, they should consider carefully whether any child protection issues are raised. For example, doctors should be alert to any evidence of an abusive or exploitative relationship, particularly where there is a wide age disparity between the children involved. Doctors identifying such concerns should be prepared to speak to the relevant authorities but should always explain to the child their reasons for doing so. In this way, medical professionals can fulfil a vital role in protecting the welfare of young people. Criminalising some sexual activities between older children would limit the degree to which doctors were able to
provide such protection by acting to deter young people from seeking out the support of sexual health services.

The BMA would therefore urge the committee to reconsider those sections of the Bill covering offences relating to consensual sexual activities between older children. Instead of criminalising such activities, the BMA believes that the Scottish Government should concentrate on sending out a strong public health message.

Martin Woodrow
Scottish Secretary
Supplementary submissions received by the Justice Committee

Association of Chief Police Officers in Scotland
Cabinet Secretary for Justice
Care Commission
Cross-party Group on Sexual Health
Crown Office
Equality and Human Rights Commission
Law Society of Scotland
Mental Welfare Commission for Scotland
SAMH
Scottish Consortium for Learning Disability
Scottish Social Services Council
Justice Committee

Sexual Offences (Scotland) Bill

Supplementary written submission from the Association of Chief Police Officers in Scotland

On 18 November 2008 ACC Bill Skelly and DCI Louise Raphael provided evidence to the Scottish Parliamentary Justice Committee on behalf of the Association of Chief Police Officers in Scotland (ACPOS) in relation to the Sexual Offences (Scotland) Bill. A number of supplementary issues were raised during the process requiring further research prior to a response. This paper will endeavour to provide clarity in relation to these matters.

1. From your experience do you have in mind particular situations in which current definitions or directions to juries have given rise to problems following a police investigation and a case being brought to court? Can you come back to the Committee with any practical examples, anonymised, in which the police service found it difficult to prepare a case for prosecution as a result of difficulties around the meaning of “consent” and assessing whether consent did or did not exist.

As stated in oral evidence, the issue of consent is undoubtedly the most recurrent and contentious element of rape investigations and prosecutions in relation to the meaning of consent, the accused honest belief of whether consent was given and whether a passive response by the complainer is in itself is sufficient to assume consent.

An example of the complexities that exist in reconciling consent can be found as follows:

The victim and accused attended a party. There were several other persons present and alcohol was consumed by all. The accused and the victim left the party and walked home together. On route they entered an area of rough ground where a degree of consensual sexual activity took place. The consensual activity however developed beyond that which was acceptable to the victim and the accused forcibly held her down, raped her and subjected her to anal penetration.

Subsequent medical examination revealed abrasion’s on the victim’s back consistent with lying on rough ground. Due to her menstruating, only evidence of previous penetration could be found. There was no anal injury however anal spasm during examination suggested recent anal penetration.

During police interview the accused admitted that whilst having consensual vaginal intercourse the victim had 'changed her mind half way through because it was her bad week' and it 'had been the same from behind'. He stated he stopped having both vaginal and anal intercourse with the victim 'a couple of seconds' after she asked him to stop.
The issues of consent centred round victim saying the sexual and anal intercourse was totally without consent and accused saying both had been consented to and consent was withdrawn while the acts were ongoing. The time taken to effect withdrawal was an important factor.

The subsequent court case was found not proven.

2. In what circumstances are the police called to investigate the possibility that a child has committed a sexual offence? Could you distinguish between younger and older children, consensual and non-consensual and give details of the number and outcomes of such investigations. As much detail as possible.

The following table provides details of sexual offence cases in which the suspect or accused was a child under 16 years. Please note that Strathclyde Police were only able to provide details of statistics relating to accused persons.

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The following are examples of consensual and non-consensual sexual activity by accused/suspects under 16 years of age:

Non-consensual

a. 15 year old male charged with raping his 11 year old and 9 year old sisters and additionally attempting to have anal intercourse with the 11 year old sister. Crimes occurred within the family home – full cooperation provided to police and case detected.

b. Lewd & Libidinous Practices
Victim aged 4 at time of offence
Accused aged 13 at time of offence
Historical complaint of sexual abuse by victims cousin - several occasions
MO: "did expose your penis to female child between four and eight year old, did induce her to touch your naked penis and to masturbate same"
Detected crime - report submitted to the PF
c. Accused aged 14  
Victim aged 13  
Charge – Rape  
Accused and victim are known to each other, on the evening of the Rape, both were in each others company with other friends, all of whom were consuming alcohol. The victim was drink at the time of the Rape, and although the accused had been drinking, he was not drunk. The accused and victim later walked to a local supermarket and during this time, the accused told the victim that he found her attractive, but the victim rebuffed his advances. As they walked through waste ground the victim tripped over and fell to the ground, the accused then got down on the ground and asked the victim to have sex with him. She refused however the accused then removed the victims trousers and underwear, grabbed her victims ankles and lay between her legs. The accused then penetrated the victim and had sexual intercourse with her, during which the victim continued trying to push to accused away. The victim’s mother was made aware of the incident, police were contacted. The accused was ultimately charged with rape.

Consensual

a. 13 year old girl disclosed to her mother that she had been involved in a consensual sexual relationship with her boyfriend of a similar age. The mother contacted the police but girl refused to cooperate, refused to provide a statement or consent to medical examination. The girl indicated that she had been a willing participant, did not consider that she had been abused and did not cooperate further with the investigation. Case referred to reporter and SWD.

b. Victim aged 12 at time of offence  
Accused aged 16 at time of offence  
Relationship between accused and victim spanning several months. Accused was aware of victims age as he was advised by her mother that she was only 12. Consensual sexual relationship took place during this time at several locations. Victim was, on some of the occasions, under the influence of alcohol but was insistent in her interview that the intercourse had been consensual and that she was a willing participant.

c. Accused aged 14  
Victim aged 12  
Charge - Sexual Intercourse with a girl under 13  
Accused and Victim in a relationship. Grandfather of victim became aware that she was sexually active with the accused and contacted Police. Victim was then taken to local Police Station as a place of safety. Victim admitted that she had been sexually active with the accused.
Accused was cautioned and detained, when questioned, he admitted having consensual sexual intercourse with the victim on about 6 occasions. When Victim was interviewed she admitted having consensual sexual intercourse with the accused on two occasions. She further stated that they had been in a relationship for about 3 months before having sexual intercourse. Accused admitted that he knew the legal age of consent was 16, but he considered that he didn't follow rules. At the time Police became involved, the accused and victim were still in a relationship. Accused was cautioned and charged with unlawful sexual intercourse.

3. Is every under 16 girl who is pregnant reported to the police? How many reports to the police have there been in the last 3 years? What actions have been taken?

Any person who has or attempts to have sexual intercourse with a girl under the age of 16 commits an offence against the Criminal Law (Consolidation) (Scotland) Act 1995, Sec 5(3). Underage pregnancies are recorded by the police as a contravention of this legislation. It naturally follows therefore that an offence has been committed in every occasion in relation to girls under the age of 16 who become pregnant and the circumstances therefore should be reported to the police.

ACPOS are unable to provide details of all cases of underage pregnancy reported to the police in the last 3 years as requested as the retrieval of the information would require scrutiny of each individual Sec 5(3) offence (to establish which ones resulted in a pregnancy).

By way of an indication however we are able to confirm that, in 2006 (the last available statistics) National Health Service statistical information showed that there were 772 recorded underage pregnancies throughout Scotland. During that same period the police in Scotland recorded 407 contraventions of section 5(3) of the Criminal Law (Consolidation) (Scotland) Act 1995 (this figure rose to 447 in the financial year 2007/2008).

The previously articulated concerns ACPOS hold in relation to the decriminalisation of intercourse between older children was recently highlighted in a much publicised case in which a 14 year old girl had engaged in regular sexual intercourse with her 22 year old boyfriend. Considerable public concern was expressed in relation to the age gap between the 2 parties and whether the girl was sufficiently mature to provide informed consent. Whilst there was no suggestion of coercion or manipulation in this case, this was only determined following a thorough police investigation. As previously stated, the absence of legislation prohibiting intercourse with a girl under the age of 16 would mean that circumstances such as these would not come to the police attention and would therefore not be subject of a robust investigation.
4. In your written submission you state that there are persons who have attained the age of 18 but who are nevertheless vulnerable. What groups do you refer to and are they not covered by legislation elsewhere? Mention was made of those who remain in care. What other groups is ACPOS thinking of?

In the written submission to the Justice Committee ACPOS stated:

ACPOS welcomes the provision in the Bill to extend the offences relating to abuse of trust from under 16 year olds to under 18 year olds however is of a view that persons who have attained the age of 18 but who are nevertheless extremely vulnerable within society will not benefit from the overarching protective principle the Bill endeavours to achieve.

The comment relates to Part 5 of the Bill, ‘Abuse of Position of Trust - Children’. It is acknowledged that the Bill as presented has been amended from the original Scottish Law Commission discussion paper that proposed the age threshold should be set at 16 years.

ACPOS are of a view that, despite the age threshold extension, the Bill may not protect those who are vulnerable as a result of a degree of impairment in respect of their ability to exercise sexual autonomy (e.g., persons with learning difficulties), but where the degree of impairment does not fall within the provisions of either section 35 of the Bill (Mentally Disordered Persons) or the Adult Support and Protection (Scotland) Act 2007 (the Act defines adults at risk as those who ‘are unable to safeguard their own well-being, property, rights or other interest and are at risk of harm because they are affected by disability, mental disorder, illness or physical or mental infirmity’). We are of the opinion that the threshold test in relation to adults at risk may be set too high to adequately cater for those mentioned above.

In evidence we made referral to those who remain in care. Section 25(3) of the Children (Scotland) Act 1995 provides that ‘A local authority may provide accommodation for any person within their area who is at least eighteen years of age but not yet twenty-one, if they consider that to do so would safeguard or promote his welfare.’ Clearly those in local authority provided accommodation in these circumstances would not be protected by the Bill, despite the fact that the explicit purpose of their placement within such accommodation is to safeguard their welfare.

In respect of persons in a position of trust within a family environment, it is relevant to highlight that the structure of many contemporary family units do not necessarily represent the stereotype of a ‘traditional household’ and are often fragmented and complex. Parental functions are now commonly discharged by persons such as those referred to in section 32(6) of the Bill.

Abuse often begins when the victim is under the age of 16 and continues into adulthood. The lack of control and inability to escape the influence of the abuser, as experienced by victims of extensive abuse, can be exacerbated by
issues such as financial dependency or emotional loyalty to the natural parent, thereby making the individual extremely vulnerable.

ACPOS would conclude that there are vulnerable individuals whose circumstances do not meet the criteria as outlined in existing or proposed legislation but who are nevertheless vulnerable to influence and manipulation. As an alternative ACPOS propose that an offence would be committed where:

(a) there was a position of trust between the parties and
(b) the sexual activity occurred as a result of a position of trust

I trust that this information will provide sufficient clarity to the matters under scrutiny.
Sexual Offences (Scotland) Bill

Thank you for your letter of 27 November about this Bill. This letter replies to the questions you raise and provides more details on the issues I highlighted towards the end of my evidence session on 25 November. I also attach a draft copy of Multi-Agency Guidance on the Reporting and Handling Disclosures of Underage Sexual Activity, which I hope will aid your consideration of the Bill.

‘Negligence’

You ask whether the Bill provides that rape can be committed ‘negligently’. The wording of the offences at sections 1-6 is such that the required mens rea has to be intention or recklessness. The offences cannot therefore be committed ‘negligently’ in the sense of negligence being part of the actus reus for the offence.

The accused could be negligent in the sense of being careless as to whether there was consent. The Bill provides that, where the accused claims that he or she believed that the other party consented, that belief in consent must be reasonable. Thus, while the physical acts constituting the offence cannot be committed negligently, consideration of whether the accused’s belief that the other party consented was reasonable, when looked at objectively, may include the extent to which the accused acted negligently.

Application of sexual offences to children under the age of 13

You also ask whether the Government considers that there is an inconsistency in seeking to prosecute children under 13 using offences which have been created to protect such children. This does not represent a change from the current law. We think it would be inconsistent to provide, on the one hand, that a child under the age of 13 is incapable of consenting to sexual activity and that sexual activity without consent is criminal, but on the other, that certain sexual activity between young children is not a criminal offence.
The age of criminal responsibility in Scotland at present is 8. We do not think it would make
sense to have a different age of criminal responsibility in respect of sexual offences.
However, it would only be in exceptional circumstances that we would expect children under
the age of 13 to be prosecuted in the criminal courts for sexual offences.

For young children under the age of 12, the Lord Advocate decides whether prosecution is
appropriate and has prepared guidelines to the police on the crimes and offences committed
by all children over the age of criminal responsibility up to and including 15 year olds that
should be considered for prosecution. In all circumstances the Children’s Reporter will be
involved in discussions with prosecutors about the most appropriate course of action and
whether concerns regarding public safety outweigh the best interests of the child. As a result
the wider circumstances affecting the child’s life will always be taken into consideration.

We expect that common sense and discretion will continue to be used in dealing with sexual
activity between young children where it occurs. Even where a young child is engaging in
non-consensual sexual activity with another young child, it would not normally be in the
public interest to prosecute the child through the criminal courts. Research tells us that the
earlier we can intervene with this type of behaviour, the greater chance we will have of
preventing future sexually harmful behaviour, and thereby protecting the public from future
harm. Prosecuting children through the courts can delay the opportunity to work with them
to change their behaviour which can be more harmful. However, there may be very
exceptional circumstances in which it is in the public interest to bring a prosecution.

The police do have some discretion when dealing with these cases. Depending on the
circumstances it may be more appropriate to refer the child to an agency which specialises
in working with children displaying sexually harmful behaviour. Alternatively, the police can
refer the child to the Children’s Reporter on welfare grounds thereby avoiding the question of
criminality. In some cases referral to the Procurator Fiscal and Reporter will be the
appropriate course of action. Whatever the circumstances, it is vitally important to take early
and effective action that is proportionate to the crime or the behaviour and that will prevent
future harm while also taking into account the needs of the victim.

Consultation

You ask about the references to consultation in the policy memorandum. I can confirm that
references to consultation in the Bill’s policy memorandum are to the Scottish Government’s
consultation on the Scottish Law Commission’s report and draft Bill. The Bill introduced in
Parliament in June 2008 is largely the same as the draft Bill contained in the Law
Commission’s report. The very limited changes are principally those arising from our
consideration of responses to our consultation on the SLC’s Bill. As you are aware, those
are the changes made to the provisions concerning sexual activity between children under
the age of 16 and the removal of provisions which would have legalised consensual sexual
violence.

I have attached a list of the 54 organisations which responded to the Scottish Government’s
consultation and the 14 individuals who agreed for their names to be made public. It should
be noted that a further 1,210 responses were received from individuals who did not give
permission for their names to be made public. You will be aware from the Policy
Memorandum that the overwhelming majority of those individual responses were critical of
the SLC’s proposals on underage sex.
I hope it is helpful to you if I go on to say some more about the issues I raised when I gave evidence. As I indicated, there are aspects of the approach taken by the SLC in their draft Bill which the Government have been considering, with a view to potential improvements which might be made to the Bill. A great many of those issues have of course been raised with the committee in the evidence you have taken but there are a number which have not been part of the public debate during Stage 1. I would therefore like to provide you with some more details on those issues and hope that is of assistance to the Committee in your considerations ahead of the conclusion of Stage 1. If you would like any further explanation of these issues I would be very happy to provide it. There will no doubt be other issues which arise as consideration of this legislation proceeds and I look forward to working with the Committee during Stage 2 to address issues arising in a spirit of partnership to ensure that we strengthen Scots law in the most effective way we can.

Sections 5, 18 and 25: Definition of ‘image of a sexual activity’

The offences at sections 5, 18 and 25 apply in respect of images of a ‘sexual activity’. However, as the Bill is drafted, it is not clear that they would apply to a sexual image which is not an image of a sexual activity per se. Our concern is that the Bill does not make it clear that offence would also be committed by someone who, for example, sent a picture of their genitals to a third party, with the intent of obtaining sexual gratification or causing humiliation, alarm or distress. We will consider this with legal advisers and if necessary bring forward amendments at stage 2.

Section 7: Drafting of offence of ‘sexual exposure’

The offence of ‘sexual exposure’ at section 7 of the Bill is drafted differently from those at sections 4-6. We are currently looking at this wording in the context of the offence it relates to and considering if it is necessary for consistency to replicate the drafting of sections 4-6.

Sections 4-6, 17-19 and 24-26: Evidential burden for ‘non physical’ sexual offences – Requirement that accused acts for the purpose of obtaining sexual gratification or humiliating, alarming or distressing the victim

The offences at sections 4-6, and the equivalent offences concerning children at sections 17-19 and 24-26, are committed where the accused acts intentionally, and for the purpose of obtaining sexual gratification or of causing humiliation, alarm or distress to the person towards whom the conduct is directed. I understand that there are concerns that it would be difficult for the Crown to prove beyond reasonable doubt the purpose for which the accused acted as a matter of subjective fact. We therefore propose to amend the Bill so as to provide that the accused may be convicted where it can reasonably be inferred from all the facts and circumstances that he or she acted either for the purpose of obtaining sexual gratification or causing humiliation, alarm or distress. A similar approach is contained in the offence at section 57 of the Civic Government (Scotland) Act 1982 of being on premises without lawful authority with intent to commit theft. The offence provides a person may be convicted where, in all the circumstances, it may reasonably be inferred that he intended to commit theft.

Section 8: Administering a substance for a sexual purpose

Section 8 of the Bill provides for an offence of ‘administering a substance for a sexual purpose’. Unlike the current offence at section 7 of the Criminal Law (Consolidation) (Scotland) Act 1995, it applies to all sexual conduct, and in respect of both male and female victims. However, unlike the existing provision, the offence does not apply where the
accused administers a substance for the purpose of allowing a third person to engage in sexual activity while the victim is incapacitated. We intend to amend the Bill at stage 2 to address this.

Sections 21, 22, 27 and 29: Sexual activity between older children, age proximity and gender and sexuality neutrality

Our intention is that the provisions in the Bill concerning sexual activity with or between children should not discriminate with respect to gender or sexuality. In general, the provisions meet this aim, equalising the age of consent for boys and girls at 16, and providing that both boys and girls commit an offence by engaging in sexual intercourse below that age. However, the effect of the age proximity provisions, which apply to all offences except that of 'having intercourse with an older child', is that it is a criminal offence for a 16 or 17 year old to engage in penetrative sexual intercourse with a person under 16, but within 2 years of age of the older party, only if the 16 or 17 year old penetrates the child. In practice, this means that, for example, a 16 year old boy engaging in sexual intercourse with a 14 year old girl commits a criminal offence, while a 16 year old girl who engages in sexual intercourse with a 14 year old boy does not. This is not in keeping with our intention that the Bill does not discriminate according to gender or sexuality. We therefore propose to amend the Bill so as to provide that the defence of 'age proximity' does not apply in respect of sexual intercourse with a child under the age of consent under any circumstances. This ensures that there is consistency in the legislation with activity which would be unlawful where both parties were under 16 also being unlawful where the older party is over 16, but within two years in age of the child.

Section 31: Definition of ‘position of trust’ for offence of ‘sexual abuse of trust’

Section 31 of the Bill contains provisions criminalising a person in a position of trust in relation to a child under the age of 18 who engages in sexual activity with that child. This offence is largely based on the current offence provisions contained in the Sexual Offences (Amendment) Act 2000. However, the Scottish Law Commission’s (SLC) approach differs from that contained in the current legislation in one key respect. The Bill as drafted requires that, for a position of trust to exist, the adult must regularly care for, train, supervise or be in sole charge of the child in question. The 2000 Act, by contrast, requires only that the adult must regularly care for, train, supervise or be in sole charge of children at the institution in question. Therefore, under the current legislation, any teacher or care worker, for example who works in an particular institution commits an offence if they engage in sexual activity with any child being cared for in that institution.

The SLC adopted this approach because they considered the existing approach was too wide in its scope, noting in their report that “it would have the effect of creating a relationship of trust, for example, between a lecturer in a law school in one campus of a university and a student of medicine based in another campus even though there was no professional contact between the two.” (SLC report, para. 4.131).

However, on reflection, we consider that teachers and care-workers, at least, should be deemed to be in a position of trust in relation to a child if they work in the institution where the child is being care for or taught. We intend to bring forward amendments to address this at stage 2.

Section 38: Power to convict for offence other than that charged
Where an accused is charged with an offence under the Bill, section 38(1) permits the court or the jury to convict of an alternative offence, provided it is one of the alternative offences corresponding to the offence charged set out in schedule 2 to the Bill. At present, it is a precondition of the exercise of this power that the accused has been given fair notice of the effect that section 38(1) might have on his case. It is further provided that "fair notice" will be deemed to have been given where a notice of the alternative verdicts which would be available in the accused’s case is appended to the indictment or complaint. The Government’s view is that it is undesirable to place unnecessary procedural burdens on the prosecution and, if a statute provides for statutory alternatives the accused can be deemed to have been given sufficient notice of the possibility of being convicted of an alternate offence.

We take the view that section 38(1) and schedule 2 together will in themselves provide the accused with sufficient fair notice of the possibility of being convicted of an alternate offence and therefore propose to amend section 38 so as to remove the explicit reference to the giving of fair notice as a precondition to the operation of section 38(1).

Definition of “sexual”

Throughout the Bill the word "sexual" is used to describe particular types of conduct which is to be criminalised. This approach is used in sections 2, 3, 4, 5, 6, 7, 8, 15, 16, 17, 18, 19, 22, 23, 24, 25, 26, 28, 31 and 35. We consider that repetition of the circumstances in which conduct is considered to be sexual is unnecessary, given that in substance it will always be where the reasonable person considers the conduct to be sexual. We therefore propose to amend the Bill so as to provide a single definition of “sexual” rather than, as the Bill does as presently drafted, defining the term separately for each of the offences for which a definition is required.

Underage sexual activity – Multi-Agency Guidance

Finally, having followed the Committee’s evidence sessions, I am also aware that concerns have been expressed by a number of those giving oral evidence as to how the provisions concerning sexual activity between children under the age of consent will operate in practice. It is important that agencies such as health, education, police and social work respond appropriately when they become aware that a child is engaging in sexual activity. For some young people, this will be mutually agreed activity, for others it may be a response to peer pressure or may indicate concerns that the young person is being abused or exploited. Young people who are sexually active will therefore present with differing needs. A Short Life Working Group on Reporting and Handling Disclosures of Underage Sexual Activity has developed multi-agency guidance for professionals to assist decision making in this complex area. The guidance is drafted to allow professionals to make confident, careful and robust assessments in individual cases. The principal point is that the guidance calls for a proportionate response from professionals, in keeping with meeting the needs of the young person in question. The guidance is in draft at the moment, and will be subject to further revision and consultation. However, I am providing the draft guidance to the Committee so that it can inform the Committee’s consideration of the provisions within the Bill on underage sexual activity.
I hope that my reply, the additional information on the issues I raised when I gave evidence and sight of the enclosed draft guidance are helpful to you in your consideration of the Bill.

KENNY MACASKILL
Draft guidance on appropriate disclosure of information in cases of underage sexual activity where there are concerns about a child or young person

[This guidance will remain in draft until the Sexual Offences (Scotland) Bill is passed by the Scottish Parliament.]

**Purpose**

1. To provide agencies and professionals with guidance on appropriate disclosure of information in cases of underage sexual activity where there are concerns about a child or young person.

2. The guidance recognises that individual agencies and professionals will have different roles and responsibilities in relation to a young person engaging in underage sexual activity i.e. some agencies and professionals may give direct support while others may simply help the young person access support from another appropriate agency. However, there should be a consistent approach to assessing individual cases, and agreeing an appropriate response (including whether information should be disclosed), no matter what agency the young person comes into contact with.

3. The guidance aims to assist agencies and professionals in their decision-making processes by:
   - Setting out principles upon which practice should be based
   - Providing criteria to assist professionals to make quality assessments of the needs of the individual young person they are in contact with and whether information should be disclosed to other agencies
   - Providing advice for professionals as to what they could do on the basis of their assessment. The guidance does not outline what processes should be put in place at a local level. Local areas should, on an inter-agency basis, develop their own protocols outlining how this guidance will be put into practice.

**Background**

4. The overarching purpose of the Scottish Government is to focus government and public services on creating a more successful country with opportunities for all of Scotland to flourish, through increasing sustainable economic growth. This is underpinned by 5 strategic objectives: Wealthier & Fairer, Smarter, Healthier, Safer & Stronger and Greener. This guidance links into the healthier and safer & stronger objectives.

5. The Scottish Government's strategy for sexual health is set out in *Respect and Responsibility, Strategy and Action Plan for Improving Sexual Health* (http://www.scotland.gov.uk/Topics/Health/health/sexualhealth/respect). This strategy places particular emphasis on respectful relationships and encouraging young people to delay engaging in sexual activity. Early sexual experiences which
are loving and positive play a significant part in young people's ability to form solid trusting relationships throughout their lives. It is important therefore that young people are mature and ready before they engage in sexual activity.

6. A recent stock taking review of Respect and Responsibility has resulted in revised outcomes for 2008 – 2011. Although the original strategy still stands, these outcomes identify focused action for all stakeholders. One of the outcomes is focused on young people, including the provision of guidance on providing services for young people which will be delivered across Scotland.

7. The Bichard Inquiry Report recommends that, to better protect children, the police should be notified when a criminal sexual offence has been committed or is suspected of having been committed against a child, unless there are exceptional reasons not to do so. The Short Life Working Group on Reporting and Handling Disclosures of Under Age Sexual Activity (SLWG) has been asked to consider whether national guidance is required to support these recommendations whilst also taking the Sexual Health Strategy and other related activity into account.

8. The Scottish Law Commission (SLC) published its report on rape and other sexual offences in December 2007 and a Scottish Government consultation on its findings ended on 14th March 2008. The Sexual Offences Bill includes sections on underage sexual activity and continues to treat some of this activity as unlawful.

9. It has become clear through the work coming out of the sexual health strategy, the Bichard recommendations, the SLWG, the SLC proposals and subsequent Bill that services and professionals need to be better equipped to recognise and respond to the differing needs of sexually active young people. This guidance seeks to provide this support.

10. This guidance seeks to strike a balance between assuring the freedom of young people to make decisions and protecting them from activity which could give rise to immediate harm and/or longer term adverse consequences to one or both of them. The law continues to make clear that society does not encourage sexual intercourse in young people under 16 as it can be a cause of concern for the welfare of the child, even where it is, or appears, consensual. It does not follow that every case has child protection concerns and it is important to ensure that a proportionate response is made and that appropriate cases are brought to the attention of the Police. If there are no child protection concerns there may still be needs in the child’s life that require to be addressed either on a single agency or multiagency basis.

Who does it apply to?

11. This guidance applies to all professionals who work with and have a duty of care towards children and young people, at least one of whom is under the age of 16 years, who are engaged in, or planning to be engaged in, sexual activity with another
person. It may also be relevant to those working with 16 and 17 year olds in certain cases.

12. Whilst this guidance is applicable to all professionals who work with and have a duty of care towards children and young people, it recognises the different roles and responsibilities that each profession brings to the situation. Examples of professionals covered by the guidance include professionals working in agencies such as health, local authorities, schools, police and voluntary organisations. Professionals should not give advice, provide services or make assessments which they are not competent to offer. Should professionals have any doubts on these matters, they should refer to a more senior person within their organisation. It may be appropriate in some circumstances to signpost the young person to another service or agency.

Principles

13. Professionals and agencies should bear in mind the following principles and values when working with children and young people. The principles are closely linked to the UN Convention on the Rights of the Child (UNCRC). The UNCRC has not been incorporated into Scots law and is not therefore enforceable in the domestic courts. The Scottish Government is, however, committed to the principles of the UNCRC in the development of policy, practice and legislation. These principles recognise young people as rights' holders who, according to their evolving capacities, can progressively exercise their rights to promote their health and development:

**Welfare of the child is paramount (Article 3 of UNCRC)**

14. The founding principle of legislation relating to children and young people clearly states that the child’s welfare or ‘best interests’ is the paramount consideration.

**Young people should be able to voice their opinions (Article 12 of UNCRC)**

15. Professionals should ensure that all children and young people are given a genuine chance to express their views freely on all matters that affect them. To safely and properly exercise this right, professionals need to listen and to create an environment based on trust, information sharing and sound guidance that is conducive to children and young people’s participation.

**Young people should be protected from harm (Article 19 of UNCRC)**

16. Professionals have an obligation to ensure that all children and young people are protected from all forms of violence, abuse, neglect and exploitation. Underage sexual activity may not necessarily be a child protection issue but there may still be concerns that result in a young person requiring support.
Young People should be protected from sexual abuse (Article 34 of UNCRC)

17. Professionals have an obligation to ensure that all children and young people are protected from sexual abuse.

Young People have a right to special support (Article 39 of UNCRC)

18. If a young person has been hurt or badly treated they have the right to special support to help them recover and professionals should take this into account when planning an appropriate response to a child's needs.

Young people should be able to access information (Article 17 of UNCRC)

19. Professionals should ensure that all children and young people are provided with, and not denied, accurate and age appropriate information on how to protect their sexual health and well-being and practice healthy sexual behaviours.

Young people have rights to confidentiality

20. Children and young people have the same right to confidentiality as adults i.e. that personal and private information should not be shared without consent, except in certain exceptional circumstances. The exceptional circumstances referred to are where there is the potential of significant harm to themselves or others (please note that some agencies will have a duty or power to provide information in other circumstances because of their statutory functions).

21. If there is a reasonable concern that a child or young person may be at risk of significant harm as a result of sexual behaviour and/or relationships, this always overrides the professional requirement to keep confidentiality. In these circumstances, professionals have a duty to act to make sure that the child or young person is protected from harm.

22. Professionals are required to ensure that children and young people are informed from the outset that confidentiality is not absolute but that every reasonable attempt will be made to discuss with them beforehand if confidentiality needs to be departed from. Prior to disclosing information, attempts should be made to gain the child or young person's consent to passing on information. However, in individual cases it may not always be appropriate to seek consent where there is justification to share without it.

23. It is also crucial that children and young people should be advised of how their personal information may be shared within the team or agency they have contact with and what the limits to that sharing might be. It is essential that agencies have a worked through confidentiality policy which addresses this issue.

Young people should have their information rights respected

24. Professionals should discuss any concerns and relevant information about a young person or their circumstances with those other professionals or agencies with responsibilities for the protection of children when it is in the child's best interests to
do so. The needs of each child are the primary consideration when professionals decide upon the relevant and proportionate sharing of information. All decisions and reasons for them should be recorded appropriately. Agencies should actively manage and support the sharing of information recognising that confidentiality does not prevent sharing information where there is the potential of significant harm to themselves or others. Professionals should take account of each child’s (or other data subject’s) views when deciding when to share information without their consent and should provide reasons and explain to them when they have shared information without consent. However, in individual cases it may not always be appropriate to seek consent where there is justification to share without it.

25. All professionals recording information or releasing information to other parties and persons have legal and professional duties to ensure that the information recorded is accurate, relevant and sufficient for its purpose, and that any disclosure is lawful – either through the consent of the young person concerned, or where there is the potential of significant harm to themselves or others which outweigh lack of consent.

To consent to health interventions

26. Scots law presumes that people aged 16 and over have the capacity to consent to their own medical treatment. For those under 16, there is no presumption of capacity but the provisions of the Age of Legal Capacity (Scotland) Act 1991 and specifically section 2(4), will apply. It should be noted that capacity is not an all or nothing concept and will be judged in terms of the specific treatment proposed, both the procedure itself and the possible consequences of having it. Capacity will be a matter of clinical judgment which, as indicated in the Good Practice Guide on Consent for Health Professionals in NHS Scotland will depend on several things, including: the age of the child; the maturity of the child; the risks associated with the procedure or treatment. But fundamentally, the medical practitioner will be testing whether (in their opinion) the young person understands the information relevant to the decision (so sufficient information on procedure and consequences has to be provided to allow the young person to make an informed choice) and whether that information is retained.

Involving Parents (Article 5 of UNCRC)

27. Professionals should encourage children and young people to share information with their parents where it is safe to do so. This is in recognition of the responsibilities, rights and duties of parents to direct and guide their children in the exercise of their rights, consistent with their evolving capacities.

28. Sexual health services have long recognised that assurances of confidentiality for young people are essential if they are to be encouraged to seek their help and advice. Sexual health practitioners are encouraged to help young people to speak to their parents and involve them in their decision making, but ultimately the practitioners are not required to inform the young person’s parents at any stage of giving them advice or treatment. This confidentiality has limitations - if the practitioner believes that where there is the potential of significant harm to themselves or others information can be passed on without consent. Practitioners
should do their best to involve children and young people in giving informed consent to share information with other services where this will help them. However, in individual cases it may not always be appropriate to seek consent where there is justification to share without it.

29. Specifically in relation to child protection matters, the decision to share information with parents should be based on professional judgment using the foregoing principles and agency guidelines. Education Authorities have duties towards pupils, first and foremost. This includes respecting their confidentiality where possible.

30. Getting it right for every child should underpin practice with children and young people. The principles provided at Annex A have been developed in the context of the Getting it right for every child programme and will be refined, although not fundamentally altered, as the programme develops and is evaluated. They pick up on many of the principles outlined with the above section.

Making assessments and taking decisions about appropriate disclosure of information

31. When a professional becomes aware that a young person is sexually active or is likely to become sexually active they should undertake an assessment of risks and needs to ensure that the appropriate response is provided. The professional has a duty of care to ensure that the young person’s health and emotional needs are addressed and to assess whether the sexual activity is of an abusive or exploitative nature. It is recognised that this process may not always be straightforward and so it will require sensitive handling and the use of professional judgment. In line with their own inter-agency agency procedures, professionals can seek the advice of a colleague or line manager to assist them in making an assessment. Where appropriate, professionals should advise the young person of their intentions to speak with a colleague. In order to make a full assessment, it may be appropriate to consult other agencies including the Police. Professionals should also assess whether information needs to be disclosed and what action, if any, should be taken to protect the young person. Appropriate services should be provided whether a child protection response is required or not.

32. It is recommended that professionals consider the Getting it right for every child practice model for assessing risk and needs. The Getting it right for every child approach in practice builds from the foundation of support available in the family, community and universal services. It uses the Well-being Indicators (healthy, achieving, nurtured, active, respected, responsible, included and above all, safe) to record observations, events and concerns and as an aid in putting together a child’s plan, and The My World Triangle and the Resilience Matrix to gather, structure and assist in the analysis of information. It also supports the recording of information in a consistent way that allows it to be collated when needed to provide a shared understanding of the child’s needs. Further details are in the information pack ‘The Guide to Getting it right for every child’ [http://www.scotland.gov.uk/Publications/2008/09/22091734/0] which was published on 4th September 2008.
33. If having undertaken this assessment it becomes clear that a young person has risks and needs in the area of sexual health and wellbeing, professionals should undertake a more in depth look at this area of the child's life in order to assess the appropriate response.

34. It is essential to look at the facts of the actual relationship between those involved and to take into account the wider needs of the young person. Crucial elements of this assessment relate to issues of consent, the ages of those involved, the circumstances of the sexual activity and the vulnerability of the young person involved. A list of indicators can be found at paragraph 37 of the guidance.

35. Information about sexual behaviour involving a young person can come from a variety of sources e.g. directly from the young person, from a third party, from direct observation etc. The source and the nature of the information will determine the timing and who is best placed to seek clarification from the young person. In addition, the skills, confidence and the level of responsibility of the professional involved and their knowledge of the young person will determine who is best placed to speak with the young person.

36. All cases have to be looked at individually, on their own facts and circumstances. In making assessments, professionals should take into account:-

- The age of the young person. Consensual sexual activity is not unlawful when both parties are aged 16 or over but this guidance may be used to help professionals make assessments of a small group of particularly vulnerable young people between the ages of 16 -17 years who may be placing themselves at risk or who are at risk.
- Particular vulnerabilities of those groups of young people more likely to experience discrimination or disadvantage within society such as young people with disabilities, young women, young gay men and women, those affected by poverty, those living away from home etc. as these individuals may be particularly vulnerable to sexual abuse or exploitation.
- Relevant legislation and policies (see Annex B for details).

37. If a professional feels that there are concerns around the young person’s sexual behaviour, the indicators set out below may help the professional decide on the appropriate response and whether information should be disclosed. What follows is a non-exhaustive list of some typical factors to help professionals make a determination of need and risk. It is not intended to be used as a checklist but forms the basis of a risk assessment: depending on the presenting situation, not all of the following will require exploration. Factors for consideration include:

- Whether the young person understood the sexual behaviour they were involved in.
- Whether the young person agreed to the sexual behaviour at the time.
- Whether the young person's own behaviour e.g. use of alcohol or other substances, placed them in a position where their ability to make an informed choice about the sexual activity was compromised.
• Whether a concerning power imbalance existed in the relationship e.g. differences in size, age, material wealth and/or psychological, social, intellectual and physical development. In addition, gender, race and levels of sexual knowledge can be used to exert power. It should not automatically be assumed that power imbalances do not exist for two young people similar in age or of the same sex.

• Whether manipulation, bribery, threats, aggression and/or coercion, were involved e.g. the young person was being isolated from their peer group, the young person was given alcohol or other substances as a disinhibitor etc. (please see para. 38)

• Whether the other person had used ‘grooming’ methods to gain the trust and friendship of the young person e.g. by indulging or coercing the young person with gifts, treats, money etc; by befriending the young person’s family; by developing a relationship with the young person via the internet.

• Whether the other person had attempted to secure secrecy beyond what would be considered usual in teenage sexual activity.

• Whether the other person was known by the agency to be or have been involved in concerning behaviour towards other children and young people

• Whether the young person, male or female, was frequenting places used for prostitution.

• Whether the young man was frequenting places where men have sex with men in circumstances where additional dangers, e.g. physical assault, might arise.

• Whether there was other concerning factors in the young person’s life which may increase their vulnerability e.g. homelessness

• Whether the young person denied, minimised or accepted the concerns held by professionals

• Whether a young person was able to give informed consent (e.g. mental health issues, learning disability etc.)

38. The presence of one or more factors will raise different levels of concern depending on the young person’s individual circumstances. For some young people it will be the combination of certain factors which may suggest that further intervention is required. There are some contextual factors e.g. manipulation, bribery, threats, aggression and/or coercion that will require an immediate multiagency response including involvement of the police while other factors may flag that there should be further exploration of this area.
39. Professionals need to be aware that should information come to their attention about past sexual behaviour and/or relationships involving children or young people, the same consideration should be given as to whether this was abusive or exploitative and appropriate action should be taken. It may be the case that the child or young person in question is no longer at risk of harm; however, this information may have implications for other children.

40. Professionals need to be aware that some young people may not identify abusive behaviour as such.

41. Professionals should ensure that decisions are recorded within their systems in a consistent way. This should include recording decisions taken about whether to contact the police about individual cases.

**Development of local protocols**

42. Local areas should develop protocols to underpin the material within this guidance. The protocols should reflect the principles and criteria outlined. They should ensure that clear processes are in place at a local level to ensure that appropriate action is taken once a professional has judged that disclosure is required and action needs to be taken. Local protocols should link into local handling relating to data protection, information sharing, confidentiality, recording of decision making. It should also link with other local protocols on related matters such as provision of sexual health services, protection of vulnerable persons, sexual exploitation and child trafficking. The protocol should also include a list of local resources (leaflets etc.) and services (voluntary organisations etc.)

43. The protocol should include courses of actions that may be followed and routes through local processes. A flow chart may be helpful. Depending on the outcome of the assessment process, there are several courses of action that could be taken. The following are given as examples but this should be developed on a local basis:-

- If the assessment is that the professional is dealing with mutually-agreed teenage sexual behaviour and/or relationship in which there are no concerns of abuse or exploitation, the professional should, if qualified, provide practical assistance and advice as required. Professionals not qualified to provide this should signpost young people to appropriate services.
- If the professional does not assess the sexual behaviour and/or relationship to be abusive or exploitative but has some concerns about the young person's behaviour e.g. their ability to assess risk, their use of alcohol, the environment in which they seek sexual contacts etc, then the professional should either address these matters directly with the young person or, with their permission, refer them to an appropriate person or agency.
- If the professional, using the indicators set out above, has more heightened concerns about the young person's behaviour or about the nature of the sexual behaviour and/or relationship, they should seek guidance from a line-manager in accordance with their own agency guidelines and decide if any further action is required. Advice can be sought from other agencies to assist in this decision making. If there are concerns about the young person's
sexual partner this information should be shared with the police. While the responsibility to instigate a criminal investigation rests with the Police, they should consider the views of other agencies. Local multi agency Initial Referral Discussion procedures apply when there are child protection concerns. National guidance is available on joint agency investigative processes when this is appropriate http://www.scotland.gov.uk/Publications/2003/09/18265/27036. There will be less serious cases where, after discussion, it is agreed that the best interests of the child are served by a single agency, children’s services led intervention rather than a police investigation and/or joint interview.

- If the professional has definite concerns that the young person has experienced, or may experience, significant harm, but the young person is not at immediate risk, they should make a referral using their local child protection procedures, detailing those who are involved, the nature of concerns etc. In those circumstances where it is appropriate to speak with the young person prior to the referral being made, every reasonable effort should be made to seek their agreement to the referral. If agreement is not reached, the professional should make the referral and inform the young person that this will be the course of action.

- If the child is, or is believed to be, sexually active and is 12 years or under, the matter should automatically be referred as a child protection concern. If the young person is currently 13 or over but sexual activity took place when they were 12 years or under, a referral should also be made.

- If the ‘other person’ is in a position of trust in relation to the young person the matter should automatically be referred.

- If the young person is perceived to be at immediate risk, a referral must be made using local child protection procedures.

- In all of the above situations the professional, in line with their own agency procedures, should make a written record of events, recording all essential detail and including the reasons behind their action. This should include decisions about whether or not to inform the police.

- On each occasion that a professional has contact with a child or young person or receives information about them, consideration should be given as to whether their circumstances have changed and a different response needed.

- In addition, each agency should set in place monitoring procedures to ensure that practice is consistent and appropriate.
Annex A

Getting it right for every child: Principles and Values

For all professions, there are legal powers and duties, professional protocols, quality standards and a range of professional guidance. Getting it right for every child is relevant to a wide range of professionals and there are some underpinning principles within the approach that have broad application across relevant agencies. These principles are being described here as values.

Values inform or influence choices and action across a wide range of role and context. Successful evolution in culture, systems and practices across diverse agencies may depend partly upon on a shared philosophy and value base. The summary below is intended to be both practical and relevant to professionals with a part to play in ensuring that each child is: safe, healthy, active, nurtured, achieving, respected, responsible and included.

Principles & Values:

- **Promoting the well-being of individual children and young people**: this is based on understanding how children and young people develop in their families and communities and addressing their needs at the earliest possible time

- **Keeping children and young people safe**: emotional and physical safety is fundamental and is wider than child protection

- **Putting the child at the centre**: children and young people should have their views listened to and they should be involved in decisions that affect them

- **Taking a whole child approach**: recognising that what is going on in one part of a child or young person’s life can affect many other areas of his or her life

- **Building on strengths and promoting resilience**: using a child or young person’s existing networks and support where possible

- **Promoting opportunities and valuing diversity**: children and young people should feel valued in all circumstances and practitioners should create opportunities to celebrate diversity

- **Providing additional help that is appropriate, proportionate and timely**: providing help as early as possible and considering short and long-term needs

- **Supporting informed choice**: supporting children, young people and families in understanding what help is possible and what their choices may be
- **Working in partnership with families:** supporting, wherever possible, those who know the child or young person well, know what they need, what works well for them and what may not be helpful

- **Respecting confidentiality and sharing information:** seeking agreement to share information that is relevant and proportionate while safeguarding children and young people's right to confidentiality

- **Promoting the same values across all working relationships:** recognising respect, patience, honesty, reliability, resilience and integrity are qualities valued by children, young people, their families and colleagues

- **Making the most of bringing together each worker's expertise:** respecting the contribution of others and co-operating with them, recognising that sharing responsibility does not mean acting beyond a worker's competence or responsibilities

- **Co-ordinating help:** recognising that children, young people and their families need practitioners to work together, when appropriate, to provide the best possible help

- **Building a competent workforce to promote children and young people's well-being:** committed to continuing individual learning and development and improvement of inter-professional practice.
Relevant policy documents and legislation

Bichard Inquiry Report

Respect and Responsibility, Strategy and Action Plan for Improving Sexual Health

*Getting it right for every child* Implementation Plan

*Getting it right for every child* Plan

*Getting it right for every child: A guide to where we are now*

The UN Convention on the Rights of the Child

Protecting Children: A Shared Responsibility

Protecting Children & Young People: Child Protection Committees

Protecting Children & Young People: Framework for Standards

Protecting Children & Young People: The Charter

The Scottish Law Commission (SLC) Report on Rape and other Sexual Offences

Serious Case Review: North East Lincolnshire 1995-2001

General Medical Council 0-18 years: guidance for all doctors – [www.gmc-uk.org](http://www.gmc-uk.org)

Data Protection Act 1998

Age of Legal Capacity (Scotland) Act 1991

Children (Scotland) Act 1995

Sexual Offences (Scotland) Bill
LIST OF ORGANISATION AND INDIVIDUALS WHO RESPONDED TO THE CONSULTATION ON SLC’s REPORT ON RAPE AND SEXUAL OFFENCES

ORGANISATIONS

Angus Child Protection Committee

Archway Glasgow

Association of Chief Police Officers in Scotland

Barnados Scotland

British Naturism

Brook

Caledonia Youth

Care

Catholic Parliamentary Office

Childline Scotland and Children 1st

Church of Scotland

Dundee City Council (confidential response)

East Dunbartonshire Council

East Renfrewshire Child Protection Committee

Edinburgh Child Protection Committee (Confidential response)

Engender

Equality and Human Rights Commission

Equality Network

Evangelical Alliance Scotland

Fife Domestic & Sexual Abuse Partnership

Forth Valley Child Protection Strategy Group

Free Church of Scotland
Glasgow Bar Association
Glasgow Child Protection Committee
Glasgow Community & Safety Services
Highland Wellbeing Alliance
Humanist Society Scotland
Lesbian & Gay Christian Movement
LGBT Youth Scotland (Confidential response)
Lifeline Pregnancy Counselling and Care (Scotland)
Moving on Three Towns Healthy Living Company
NHS Fife
Perth and Kinross Domestic Abuse Forum
Pro-Life Feminists International
Rape Crisis Centre
Rape Crisis Scotland
Reality Adventure Works in Scotland Ltd
Say Women
Scotland’s Commissioner for Children and Young People
Scottish Children’s Reporter Administration
Scottish Women’s Aid
Sense Scotland
Spanner Trust
Stirling Council – Stirling Action for Change
Stonewall Scotland
The Association of Scottish Police Superintendents
The Christian Institute Scotland
The Law Society of Scotland
United Kingdom Men’s Movement
Victim Support Scotland
Women’s Support Project
YMCA Scotland
Zero Tolerance Charitable Trust

INDIVIDUALS WHOSE NAMES AND ADDRESSES BE MADE PUBLIC

Professor Fiona Raitt, School of Law, University of Dundee, DD1 4HN
Rev Dr Donald M MacDonald, Free Church College, The Mound, EDINBURGH, EH1 2LS
Professor Pamela Ferguson, School of Law, University of Dundee, Scrymgeour Building, Park Place, DD1 4HN
Chris Groves, 14 The Beeches, Cylton, AYR KA6 6LJ

INDIVIDUALS WHOSE NAMES BE MADE PUBLIC BUT NOT ADDRESSES

Alexander Dickie
Andrew Bloxham
Eric J Mackay FRCGP MB ChB DobstRCOG
Gavin McFadyen
Jennie Kermode
Naomi Clemence
Paul Robinson
Peter White
Sheena Campbell
Justice Committee

Sexual Offences (Scotland) Bill

Supplementary written submission from the Care Commission

In reference to your recent request for the Care Commission’s opinion in regard to the development of the Sexual Offences (Scotland) Bill, I am writing to confirm that we would broadly support Enable’s comments in regard to Section 35 of the Bill. We note and agree with their differentiation between people with a learning disability who have capacity to make decisions and people who do not have capacity to make decisions. The result of such a differentiation would be that we would support their assertion in cases where people with learning disabilities have the capacity to make decisions. We agree that some issues that arise should not be dealt with as criminal matters. Our view is that these would be more a matter of misconduct which could be acted upon through for example employees’ terms and conditions for their posts, registering bodies codes of practice and through employee’s registration status, for instance with the Scottish Social Services Council or the Nursing and Midwifery Council.

An example of where this may already occur is within the teaching profession where there has been perhaps an inappropriate relationship between a teacher and a 17 year old pupil. This would not be viewed as a criminal matter but is likely to be viewed as a matter of misconduct within the service being provided.

In supporting Enable’s response in regard to the Bill we would want to confirm that our view is that Enable is an organisation in a knowledgeable and well informed position to express these views on behalf of those providing care services and people who are using those services, ie people with learning disabilities.

Finally we would also note that existing criminal law exists for those who break the law in such a way. Therefore law exists already to support and protect those who don’t have the capacity to make such decisions or to give informed consent.

Jacquie C Roberts
Chief Executive
1.1 We welcome the opportunity to submit the comments of CPG members for the Committee’s consideration. Due to recess and scheduling difficulties, the CPG was only able to consider the Sexual Offences (Scotland) Bill as introduced at our meeting on November 5th 2008. The following comments are the result of discussion at that meeting and subsequent electronic consultation with CPG members.

1.2 All CPG members have been given the opportunity to comment and make suggestions on our submission. Whilst we are confident in the broad consensus that has been expressed so far, the short time frame in which we have been working limits the extent to which we can survey our membership and gain explicit sign up. We offer these comments then, as points which have been raised in discussion and/or attracted broad agreement within the CPG and not as the express policies or views of individual members.

1.3 We acknowledge that the Committee is now approaching the end of its Stage One consideration. However, we hope that these comments will be useful and we would be happy to provide further information if required.

Consultation

2.1 An initial point raised by members relates to the consultation surrounding this Bill. Whilst it is acknowledged that there was thorough consultation on the proposals of the Scottish Law Commission (SLC), some of the provisions in this Bill deviate significantly from the SLC’s recommendations. Indeed, in the case of older children it could be suggested that the provisions put forward by the Scottish Government, in the terms in which they are outlined in the legislation, run contrary to those proposed by the SLC.

2.2 Some members felt then that the way that the consultation has progressed surrounding this section of the legislation has meant that it has been inadvertently weighted towards receipt of submissions outlining opposition. The suggestion was made that many individuals and organisations may not have responded to the initial consultation due to being either in complete agreement with the SLC or, given that no other alternative provisions were set out, satisfied that the status quo would be maintained if the Scottish Government remained unconvinced by the SLC’s case. Had the full range of provisions been set out in the original consultation, including the criminalisation of older girls, some members felt that the profile of the responses received would have been different and perhaps more representative.
2.3 Members were concerned that some of the provisions in relation to older children have not been adequately evaluated or tested prior to introduction, and that the limited time available for Parliamentary scrutiny may not be sufficient to determine their suitability.

Part 1. Rape etc

1) Penetration with an object

3.1 A number of members echoed the support outlined by organisations such as the Equality Network, Stonewall and the LGBT Domestic Abuse Project for the inclusion of an offence of Rape with an Object, which stands in equal seriousness to that of Section 1 Rape. As it currently stands the Bill, if enacted, would effectively prohibit rape being recognised within certain relationships, such as that between two women.

4) ‘artificial’ genitalia

3.2 Members also outlined support for the amendment of the Part 1 (4) to remove the wording relating to ‘artificial’ genitalia, and recommended a more suitable wording be sought in line with the suggestions made by the LGBT Domestic Abuse Project.

Part 4. Children

Section 15 (C), Sexual assault on a young child

5.1 Members expressed concern that this section appears to effectively criminalise all young children under the age of 13 displaying normal childhood behaviour towards their peers such as kissing. CPG members support the priority which must be given to protecting children from sexual assault. However, members saw no value in criminalising young children for sharing experiences which are a natural part of childhood development. Given the potential impact which a record of a sexual offence could have on a child’s life and future prospects, members agreed that it is imperative that the law should be clear in these cases.

5.2 We would urge the Committee to seek further explanation and assurances surrounding the offence of sexual assault on a young child: specifically how two young children of similar ages, regardless of whether one has reached the age of 13, could be dealt with in such instances. It may be that a defence to the offence needs to be considered, with regards to non penetrative sexual activity, on the understanding that the accused is also a child.

5.3 Another point which was raised relates to the significant body of research indicating that children displaying sexually harmful behavior often have been subjected to some form of past, or ongoing, abuse themselves; be that
sexual, physical, emotional or neglect (Blues et al, 1999; Cavanagh Johnson, 1989; Matthews et al, 1997; O’Callaghan and Print, 1994; Ryan and Lane, 1997; Saradjian, 1996). As the Bill currently stands children as young as eight years old could be tried in an adult court rather than dealt with by the Children’s Hearings System. Given that many of these children will be very vulnerable themselves, concerns were raised as to whether the criminal courts were an appropriate place to deal with such cases.

Section 27 Older children engaging in penetrative sex with each other

5.4 The CPG supports the aim of the Scottish Government to encourage young people to delay having sex until they are ready. We acknowledge also the real concerns around unintended pregnancies and sexually transmitted infections (STIs) in Scotland. However, CPG members advocated strongly that the most effective interventions to support young people to make these decisions are those which directly address their social, educational and health needs. There is no evidence to suggest that the changes outlined in section 27 of the bill will have any effect in deterring young people under 16 engaging in penetrative sex with each other. Indeed, current rates of sexual activity, unintended pregnancies and STIs in Scotland in under 16s stand as evidence to the fact that the law is not capable of affecting this change.

5.5 Since 2005 the Scottish Government and the then Scottish Executive have committed to and invested in Respect and Responsibility, Scotland’s first national sexual health strategy. A recent stock take review of the strategy found that, whilst progress has been made, particularly in the improvement and availability of sexual health services, there is still a huge amount of work to be done in changing Scotland’s culture and attitudes towards sex and relationships. The Scottish Government has accepted these findings and has prioritised cultural change as an issue.

5.6 If children and young people are to be confident and assertive enough to make choices such as delaying sexual activity and resisting peer pressure, we have to ensure that they have access to the education and support they need, rather than relying on the criminal law. Crucial to this also is the space for young people to discuss their concerns and issues without fear of censure or repercussions. CPG members expressed disappointment then that the Scottish Government did not choose to explore in more detail the SLC’s recommendations on older children, as many felt that this would have been in keeping with the aim of a culture which is more comfortable and open in discussing sex and relationships.

Accessing services

5.7 The issue of research is a significant one. The CPG would have welcomed further research and exploration of the SLC’s proposals. As it stands the Scottish Government has erred on the side of caution in rejecting those provisions on the basis of what it sees as a lack of supporting evidence. It
could be suggested however, that this reasoning is also applicable to the extension of criminalisation to include older girls and we would urge the committee to consider the following points.

5.8 From the perspective of unintended pregnancy, it is essential that girls can access confidential services to obtain advice and contraception and it is the case across Scotland that girls access services more regularly than boys. Whilst assurances have been given that the new provision will not change the current access given to girls, the change in the law will receive media coverage and messages will be interpreted by a wide range of people from girls themselves, to parents, medical professionals, teachers and individual police officers.

5.9 CPG members are not currently convinced that the message that this legislation is attempting to send out i.e. that the law is changing, but that it won’t change anything, has been sufficiently tested and many remain very concerned that it could, even if only in the short term, discourage girls from, or affect their experiences of, accessing services. It could also lead to an increase in cases being investigated, even if only to be rejected by the Procurator Fiscal: resulting in stress and anxiety for individual young people and word of mouth concern amongst their peers. Whilst the CPG appreciates the equalities arguments put forward around this issue the majority of respondents remained unconvinced that the criminalisation of young girls would be of any benefit to anyone, and could in fact result in compromising girls’ access to contraceptive services.

5.10 Professionals currently working with children and young people face a complex range of procedural considerations in relation to child protection and confidentiality. These procedures differ depending on whether the professional works in a health or educational setting. For example the disclosure of sexual activity by an older child to a guidance teacher could result in very different outcomes than if the same child had disclosed to a medical professional. This can often result in young people being passed from service to service and is often an issue of frustration in the delivery of sexual health services to young people. Whilst it is not of immediate concern to this legislation, it is an area which could see further confusion as a result of this Bill. Similarly Health Care professionals working in non specialist settings such as General Practice can find these issues particularly difficult on account of not receiving the same level of continuous support or guidance and this legislation could potentially result in greater reluctance to engage on these issues.

5.11 The suggestion was also made that health professionals already frequently struggle with the decision to refer a girl under 16 to child protection where the possible consequences of so doing are not likely to be in her best interests. If professionals have the added issue of criminalisation to consider, it may make them more reluctant to refer young women to child protection and this could result in mistakes being made and girls’ welfare being compromised. A number of members therefore suggested that the
criminalisation of young girls will not assist professionals supporting children and young people and is very likely to complicate the area further. (For examples of possible clinical scenarios provided by CPG members, please see Appendix)

5.12 From a sexual health perspective, questions were also raised with regard to the provisions set out in 27 (3). Clearly penile penetration is to be considered criminal under the terms of this section and penetration by the mouth i.e. oral sex is not. Member’s concerns relate to the fact that stimulation or penetration of the vagina by the fingers will be criminalised whilst similar stimulation of the penis will not be. This is inconsistent both in terms of STI prevention and the message it sends to young people. Unprotected penile penetrative sex carries the greatest threat of sexually transmitted infection. Oral sex however also carries a reduced level of risk, with mutual masturbation, considered to be the least problematic of the three. From a harm reduction perspective, sexual activity which carries little or no risk of pregnancy or STIs can often be a legitimate diversionary activity for young people who are determined to be sexually active.

5.13 The suggestion was therefore made that the committee may want to investigate restricting the offence outlined in section 27 to that involving penile penetration only, as this would provide greater clarity for service providers, young people and the criminal justice system and would be consistent with sexual health interventions and harm reduction.

In conclusion we offer the following summary:

Consultation: Concerns provisions on criminalisation of older girls not given same level of consultation as decriminalisation.

Part 1 Rape

- Support for introduction of an offence of ‘Rape with an Object’
- Support for amendment of references to ‘artificial’ genitalia

Part 4 Children

Section 15 (C), Sexual assault on a young child

- Concern that young children under the age of 13 displaying normal childhood behaviour towards their peers such as kissing will be criminalised.

- Defence to the offence, in the case of non-penetrative, may need to be considered on the understanding that the accused is also a child.

- Concern that adult court system is not an appropriate setting
to deal with problematic sexual behaviour among children.

Section 27, Older children engaging in penetrative sex with each other

- No evidence to suggest that the changes outlined will have any effect in deterring young people under 16 engaging in penetrative sex with each other

- Concerns regarding the lack of research on the possible effects of criminalising older girls

- The message the legislation is sending out is confused i.e.: that the law *is* changing, but that it *won't* change anything, and could be misinterpreted by young people, parents, teachers and police officers. Could result in rise in cases being pursued

- Concerns older girls will be discouraged from accessing services or that their experiences of those services will be affected

- Provision will not help professionals working with children and may work to complicate the area further.

- Committee may want to investigate restricting the offence outlined in section 27 to that involving penile penetration only, as this would provide greater clarity for service providers, young people and the criminal justice system and would be consistent with sexual health interventions and harm reduction.
Scenario 1

Client is a 15 year old wishing to train as a teacher after leaving school. Her father is a prominent community member in their area. Her boyfriend of 2 years is almost 17 and going to university to study medicine next year.

Because she is ‘under age’ and they have concerns about confidentiality, the couple have been relying on condoms for contraception in the 6 months or so they have been having sex. They did not want to attend locally for fear that their relationship becomes public.

When she misses a period they travel a considerable distance to another town to access confidential services. They attend together and only have each other for support because they fear the consequences of discussing their relationship and the pregnancy with their families – they fear that the boy will be prosecuted and have a criminal record, and that they will no longer be able to continue their relationship.

Subsequently her family find out about the pregnancy after she misses school to attend a hospital appointment, and her father contacts the police. Although after initial investigation no prosecution takes place there is considerable distress to both families, including the young woman, who requires psychological support which she accesses locally. She defaults for further contraceptive advice but it is not clear if the relationship has ended or if it has just resumed in secret.

Young people have real and perceived barriers to access to information, advice, and sexual health services at present. The potential concern is that for this couple under the new legislation they would face greater barriers, and be less likely to attend if they both feared criminal proceedings.

Scenario 2

12 year old girl attended services for emergency contraception. She stated that had been ‘mucking around’ with a male friend who is also 12, and ended up having consensual but immediately regretted sex. She asked him to stop and he did, but she wasn’t sure if it was ‘soon enough’ and her older friend had recommended she attend sexual health service for advice. She seemed very clear that this was a ‘one-off’ event that she had no desire to repeat. She had emergency contraception prescribed.

Local protocol recommends referral of sexually active 12 year olds to social work services which was done with her cooperation and no other concerns were identified.

She did not attend any further appointments.

Some 18 months later she was recognised in the waiting room by the doctor who
had seen her at her initial visit. She had re-registered with a similar name but a
date of birth that made her seem to be 16, and had been attending services
under this name for about 6 months. When this was discussed she disclosed
that she had lied to avoid the embarrassment of potentially having social work
involvement again. She felt that if the staff thought she was 16 they wouldn’t
worry about her so much.

*There is clear potential for her to be less likely to attend at all if there was a
possibility that she and her friend would be criminalised.*
The Right Honourable Elish Angiolini QC

LORD ADVOCATE’S CHAMBERS
25 CHAMBERS STREET
EDINBURGH EH1 1LA

Telephone: 0131-226 2626
Fax (GP3): 0131-226 6910

Bill Aitken MSP
Convener, Justice Committee
c/o Justice Committee Clerks
Room T3.60
The Scottish Parliament
Edinburgh
EH99 1SP

0312/08M
January 2009

Thank you for your letter of 27 November seeking clarification on some issues in respect of the Sexual Offences (Scotland) Bill.

Firstly, you have asked if the Bill’s provisions mean that rape could be committed negligently. The Bill specifies that the act must be committed intentionally or recklessly. Recklessness in this sense has frequently been described in Scots law as something quite different from and more serious than simple negligence; the Bill would not therefore mean that the act of penetration could be committed negligently in terms of the necessary mens rea.

In those cases where the accused’s defence to the new offence is that the victim consented (or at least that the accused believed that the victim consented), the Bill specifies that the accused’s belief in that consent must have been reasonable. This means that an objective test would be applied to the accused’s belief and it will be for the courts to determine in light of the facts and circumstances of individual cases whether a belief in consent was reasonably held. In making that assessment the Bill provides that regard is to be had to whether the accused took any steps to ascertain whether there was consent and, if so, what those steps were. For this limited purpose, evidence that the accused was negligent in ascertaining whether the victim consented may be one of a number of factors to be taken into account when determining whether any belief was reasonably held. The Bill does not provide that evidence of negligence will necessarily be sufficient to exclude a reasonable belief that the victim was consenting.

Secondly, you have asked for information about prosecutions of older children for contraventions of sections 5(1) or 5(3) of the Criminal Law (Consolidation) (Scotland) Act 1995 (sexual intercourse with a girl under 16 years). I can advise that the Crown prosecuted eight such cases over the period 2004-2007. With regard to the ages of the child accused, two were aged 14 years and the remaining six were aged 15 years. The ages of the victims ranged from 12 years to 14 years.
In all but one of the cases, the child accused was reported to the Procurator Fiscal on an allegation of rape. In five of the seven cases containing an allegation of rape, there was insufficient evidence to prove a charge of rape and the child accused were prosecuted for having unlawful sexual intercourse with a girl under the age of 16. Of the remaining two cases containing an original charge of rape, one proceeded to trial on a charge of rape and having unlawful sexual intercourse with a girl under 16 years. After precognition investigation in the other case, no further proceedings were taken.

I hope that this information assists the committee.

ELISH ANGIOLINI
In its oral evidence to the committee on 11 November, the Commission undertook to respond in writing to the question posed by Robert Brown MSP, with reference to Section 12 of the Bill, regarding the possibility of borrowing the phraseology in the England and Wales Sexual Offences Act 2003, which states that the reasonableness issue is to be determined "having regard to all the circumstances".

Please accept my apologies for the slight delay in replying, but I was anxious to raise this with a number of colleagues in England before getting back to the committee. Unfortunately, it appears that no assessment of the English changes to the wording around evidence of consent has been made. Colleagues advise that it is too early to be sure of the effects of the change. While there is some evidence of a slight increase in the conviction rate, it is not clear what has contributed to this.

More generally, it would appear that the Scottish and English wording take the same general approach and would achieve very much the same outcome. Perhaps, as was suggested during the session, this question might be better situated within a wider discussion on the laws of evidence in Scotland.

Euan Page  
Parliamentary and Government Affairs Manager
I refer to the above and to previous correspondence and in particular to our telephone conversation of 9 December 2008.

Following the evidence session on 18 November, at which the Society was represented by myself and by Bill McVicar, the Society’s Criminal Law Committee Convener, I can confirm that the Society’s Mental Health and Disability Sub-Committee has had the opportunity to reconsider its position on the Sexual Offences (Scotland) Bill, particularly in relation to ENABLE’s revised views on sections 35 and 36 of the Bill.

The Sub-Committee previously commented that it agrees with The Scottish Government’s intention that it should be an offence for a person to engage in a sexual activity with a mentally disordered person where he or she (a) is providing care service to the mentally disordered person or (b) works in, or is a manager of, hospital where the mentally disorder person is been given treatment. Such provisions would be similar to those currently found in the Mental Health Legislation. The Sub-Committee would wish to reiterate that comment and recognises that the present protection is inadequate.

The Sub-Committee is aware of research such as “Sexual Boundary Issues in Psychiatric Settings”, Royal College of Psychiatrists (2007) which has reported situations where psychiatrists have allegedly abused their position and entered into relationships with vulnerable people, and also where patients have found it hard to have their evidence believed. Members of the Sub-Committee have also reported examples, arising in course of their professional work, where there have been instances of such abuse. The Sub-Committee believes, therefore, that there is real evidence of abuse encouraging in practice and that, even if it has been rarely prosecuted, it is appropriate that such abuse continues to be a criminal offence. The link to the research report, referred to above is as follows: http://www.rcpsych.ac.uk/files/pdf/cr145.pdf.

I trust this information is sufficient for your purposes but should you wish to discuss further, please do not hesitate to contact me.

Alan McCreadie
Deputy Director, Law Reform
What I am saying here applies equally to anyone with a mental disorder other than learning disability

The issues are:

- People with learning disability must receive assistance, education and support to enjoy sexual relationships
- People with learning disability who have the capacity to decide for themselves on sexual relations must be able to do so
- People who lack capacity to make decision must have appropriate support and protection
- While understanding the position of ENABLE, I think there is an inherent danger in persons with learning disability engaging in sexual relationships with people in a professional caring role. The risk of this being an exploitative relationship is greater than if an "ordinary" relationship develops. I therefore think the wording of the Bill (being very similar to the 2003 Act) is appropriate. There is an issue about guidance as to how a care worker should respond where a person with learning disability states a wish to have a sexual relationship with them.
SAMH is Scotland’s leading mental health charity and is dedicated to mental health and wellbeing for all. SAMH provides an independent voice on all matters of relevance to people with mental health and related problems (including homelessness and addictions), provides advice and guidance to a wide range of national bodies and delivers direct support to over 3300 people in 86 services across Scotland.

The SAMH Centre for Research, Influence and Change lobbies for the development of legislation, policy and practice that is based on the real life experiences of people with mental health and related problems and that respects their human rights. The Centre also provides a range of information, training and consultancy on mental health and mental health problems.

SAMH is committed to challenging the stigma and discrimination experienced by people who live with mental health problems. SAMH provides direct line-management to respectme (Scotland’s anti-bullying service) and seeme (Scotland’s anti-stigma campaign).

GENERAL COMMENTS

SAMH welcomes the opportunity to comment on the provisions of the Sexual Offences (Scotland) Bill, with specific regard to Sections 35 and 36. The opinions in this report reflect those of SAMH. In arriving at these opinions discussions have taken place with a number of stakeholders, however, it is SAMH’s intention to discuss these issues further with our members and service users as the Bill progresses through Parliament. SAMH has also referred to a number of the submissions already received by the Parliament in response to the Bill.

SAMH has also referred to the existing International and UK Human Rights framework in considering its response to the Bill both in terms of the principles underpinning Human Rights (Freedom, Equality, Dignity, Respect and Autonomy) and the following European Convention Rights:

Article 3: Prohibition of torture, inhuman or degrading treatment or punishment
Article 8: Right to respect for private or family life
Article 13: Right to an effective remedy

The Bill in general and the proposals contained in Section 35 and 36 especially require careful consideration in light of these principles and rights, and a balancing of the different rights as they relate to a mentally disordered person.
DETAILED COMMENTS

In order to consider the appropriateness of Section 35 and 36 SAMH considered the concept of ‘free agreement’ as the basis for consent, the test for capacity and the proposals in Section 10.

Sections 9 and 13
SAMH believes that ‘free agreement’ (as outlined in Section 9) provides an appropriate conceptual approach in relation to consent and the test of capacity (outlined in Section 13) is appropriate.

Section 10
However, with regard to Section 10, SAMH believes the circumstances in which conduct takes place without free agreement are narrowly defined in the Bill and as such there is a risk that some forms of threat, coercion or persuasion used by people to convince others to enter into a sexual relationship will fall outwith the scope of the proposed legislation.

This is especially important when considering the behaviours of sexual predators, whether they are in a position of trust or not. Sexual predators can operate in highly skilled and sophisticated ways to ensure that their adult victims consent to sexual relations.

This ‘grooming’ process can be the same for victims who are children, young people or adults and can focus on complex psychological manipulation and distortion of reality. Section 311 (3) (b) of the Mental Health (Care and Treatment) (Scotland) Act 2003 contains the following four grounds ‘threat; intimidation; deceit; or persuasion’ and SAMH believes the provisions of Section 10 of the current bill would be strengthened by the inclusion of all four grounds.

Sections 35 and 36
With regard to the proposed offence of sexual abuse of trust of a mentally disordered person (Section 35), SAMH has considered these proposals in detail and believes that the following points are of central importance:

- The fact that criminalising conduct that an adult with capacity has consented to is a serious matter;

- The proposed offence only refers to people who are mentally disordered – this could be construed as discriminatory as it sets them apart from other people who are vulnerable or at risk;

- The autonomy of people who are mentally disordered and the concept of recovery are critically important. In the modern world it is essential to limit this only where absolutely necessary. To do otherwise re-inforces outdated models of practice based on paternalism and dependency;

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1 Recovery is a Belief that people can live a fulfilling life, regardless of the problems and difficulties they may be facing. (Recovery Works, SAMH, 2007)
- There has been a very small number of convictions brought under the existing legislation (Section 313 of the Mental Health (Care and Treatment) (Scotland) Act 2003.

However, the following considerations have been critical in forming SAMH’s current position:

- Section 10 of the Bill does not go far enough in listing the circumstances in which conduct takes place without free agreement;

- A sexual relationship between someone in a position of trust and someone whom they provide care services to is wrong. Central to this is the inherent power imbalance within such a relationship;

- SAMH is also aware of the pivotal role played by support staff in the life of people who have mental health problems. The staff member is often viewed as their main social and emotional support in a life which is otherwise defined by social exclusion and isolation. This role cannot be clouded or in any way confused by the development of a sexual relationship;

- Some people who use care services will feel unable to disclose where a sexual relationship has developed between themselves and someone providing care services for a variety of reasons. These include the fear of retribution; that fear that they might be blamed; and/or the fear that the service might be withdrawn from them. SAMH believes that the onus is therefore on the State to ensure that a clear statement is made regarding the unacceptability of the sexual abuse of trust;

- SAMH does not believe that regulation of the workforce goes far enough in addressing the fundamental nature of these issues, especially in relation to the points made regarding Section 10;

- SAMH is aware of a number of occasions where a sexual relationship has developed between someone in a position of trust and someone to whom they provide care services. This has had a significant negative impact on the individual service user both during and after the relationship;

**Conclusion re Section 35 and 36**

Given all of the above SAMH believes the Sexual Offences Bill (Scotland) is correct in proposing the new offence of Sexual Abuse of Trust.

SAMH suggests that consideration be given to framing this in relation to ‘a person at risk’ rather than only ‘a mentally disordered person’.

Section 35 (2) should be expanded to include those providing care services as a volunteer as well as those providing care services in a paid capacity.

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2 A World to Belong To, SAMH, 2006
ADDITIONAL INFORMATION

Whilst perhaps outwith the scope of the current Bill SAMH believes that the rights enshrined in it must become both practical and effective. This is particularly important with regards to prosecution of people who commit the offence proposed in Section 35 and 36.

SAMH is aware of a number of instances where prosecutions have begun in relation to inappropriate sexual relationships between people with a mental health problem and someone else, only for them to be abandoned as a result of the person with the mental health problem being considered an unreliable witness.

This issue must be addressed. It directly impacts on the rights of a person with mental health problems to an effective remedy (Article 13, ECHR).

FINAL COMMENT

SAMH trusts this information is of use to the Justice Committee. We would like to highlight that this an initial position and is based on limited discussions within the organisation. We intend to test the robustness of our decisions regarding the above sections through fuller consultation and discussion with our members and the people who use our services as the Bill moves through the parliamentary process.
Supplementary written submission from the Scottish Consortium for Learning Disability

Thank you for your inquiry of 14 November. Within the timescale it is not possible for us to seek further views from people with learning difficulties. However I would personally support ENABLE Scotland’s position that people are citizens and that the use of the criminal law might not be helpful in bringing to light situations where there has been a breach of trust.

I should point out that ENABLE Scotland is a partner organisation of Scottish Consortium for Learning Disability.

Lisa Curtice
Director
Thank you for your letter of 14 November 2008 and for the opportunity to provide comments. We did speak on Monday December 1 and following our conversation I agreed to write to you. I think it might be helpful to say something about the work of the Scottish Social Services Council (SSSC) and what we were set up to do in October 2001.

The SSSC is the body set up by Scottish Government to register and regulate the social services workforce and their education and training. We were given three policy objectives:

1) To protect people who use services;
2) To raise standards of practice;
3) To support and strengthen the professionalism of the workforce.

Our responsibilities are:

1) To set up registers of key groups of social services workers;
2) To publish Codes of Practice;
3) To regulate the training and education of the workforce;
4) To promote education and training;
5) Workforce development and planning.

We are unique as a Regulatory Body in that we register a wide range of workers in the social care sector. I have set out below the group of workers and the dates when we opened the register to these workers.

**Phase 1**

<table>
<thead>
<tr>
<th>Group</th>
<th>Date</th>
</tr>
</thead>
<tbody>
<tr>
<td>Qualified Social Workers</td>
<td>April 2003</td>
</tr>
<tr>
<td>Students on the new honours degree in social work</td>
<td>Spring 2004</td>
</tr>
<tr>
<td>Care Commission Officers</td>
<td>December 2004</td>
</tr>
<tr>
<td>Managers of residential child care services</td>
<td>June 2005</td>
</tr>
<tr>
<td>Residential child care worker workers with supervisory responsibilities</td>
<td>October 2005</td>
</tr>
<tr>
<td>All other residential child care workers</td>
<td>July 2006</td>
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<tr>
<td>Managers of adult day care services</td>
<td>January 2006</td>
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Phase 2

<table>
<thead>
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<th>Group</th>
<th>Date</th>
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</thead>
<tbody>
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<td>Managers/lead practitioners in day care of children services</td>
<td>From October 2006</td>
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<tr>
<td>Practitioners in day care of children services</td>
<td>From March 2007</td>
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<tr>
<td>Support workers in day care of children services</td>
<td>From October 2008</td>
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<tr>
<td>Supervisors in adult residential care</td>
<td>From September 2007</td>
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<td>Practitioners in adult resident care</td>
<td>From January 2009</td>
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<tr>
<td>Support workers in adult residential care</td>
<td>From April 2009</td>
</tr>
<tr>
<td>Workers in housing support services</td>
<td>From autumn 2009</td>
</tr>
</tbody>
</table>

All workers in the social services sector are required to adhere to a Code of Practice (I have attached a copy for your information). Their employers are also required to adhere to a Code of Practice. The codes for workers specifically state that workers must:

- strive to establish and maintain the trust and confidence of services users and carers
- respect the rights of services users while protecting them as far as possible from danger or harm.

When they register social service workers sign to confirm they will adhere and uphold the codes. All employers are required to ensure their staff are properly trained, supported and equipped to carry out their duties. The Care Commission and the Social Work Inspection Agency monitor adherence to the employers’ code.

In order to be registered a worker has to be competent and of good character and conduct. If their conduct is such that their registration might be called into question then the SSSC will investigate. Inappropriate relationships, particularly where a worker had a sexual relationship with a service user would definitely call into question a person’s suitability to be on the register and is a matter we would expect to be reported to us by the employer and we would investigate the matter.

I hope this information is of some assistance, if I can assist further please let me know.

Carole Wilkinson
Chief Executive
Present:
Jackson Carlaw                         Helen Eadie
Tom McCabe                             Ian McKee
Gil Paterson (Deputy Convener)         Jamie Stone (Convener)

Apologies were received from Malcolm Chisholm.

1. **Decision on taking business in private:** The Committee agreed to take item 10 in private.

2. **Sexual Offences (Scotland) Bill:** The Committee agreed to defer this item until later in the meeting.

9. **Sexual Offences (Scotland) Bill:** The Committee took oral evidence on the Bill at Stage 1 from—

   Mr Gery McLaughlin, Bill Team Leader, and Mr Gordon McNicoll, Scottish Government Legal Directorate, Scottish Government.

10. **Sexual Offences (Scotland) Bill:** The Committee considered the evidence taken under item 9, and agreed to reconsider the bill at its meeting next week.
Sexual Offences (Scotland) Bill: Stage 1

14:37

The Convener: I refer members to agenda item 2. I extend a warm welcome to our colleagues from the Scottish Government who are here to answer questions raised by our consideration of the bill at stage 1. Gery McLaughlin is the bill team leader and Gordon McNicoll is from the Scottish Government legal directorate.

We wrote to the Scottish Government about a number of the delegated powers in the bill, and after considering the Government's response, we agreed to explore further the intended use of those powers by holding an evidence-taking session, and that is why we are where we are today. We will address issues that relate to section 29, which confers a power to specify relevant offences for the purposes of section 29(2), and section 32, which confers a power to amend the definition of what constitutes a "position of trust" in respect of the offence of sexual abuse of trust at section 31.

We will begin with section 29. By way of setting the scene, could you set out the purpose of the ministerial power to specify relevant offences? I would be grateful if you could address the significance of the term "relevant offence" in relation to the defence that might be available to an accused person in circumstances where he or she has been charged with sexual activity involving a child. It would be helpful to have your comments on that.

Gery McLaughlin (Scottish Government Criminal Justice Directorate): Section 29 is, as you said, about the specification of relevant offences. Section 29(1) provides that there shall be a defence for an accused person who is charged in proceedings with an offence under sections 21 to 27 of the bill—which are concerned with sexual activity involving an older child, which is one aged between 13 and 15—that he or she "reasonably believed" that the child with whom he or she engaged in sexual activity "had attained the age of 16 years."

Section 29(2) restricts that defence to those who have not "previously been charged by the police with a relevant offence."

Section 29(5) provides that "a relevant offence means such offence ... as may be specified in an order made by the Scottish Ministers" and the order-making power is subject to negative procedure by virtue of section 46(2) of the bill.

Now, as regards the relevant offence and its restriction, the defence in section 29(2) is restricted to those not "previously ... charged by the police with a relevant offence" to prevent a serial sexual predator who relied on that defence on a previous occasion but was acquitted of all charges from using the same defence to evade conviction on a subsequent offence or offences.

If the defence in section 29(2) was restricted to those who were convicted of an offence, a person who may have been charged with previous offences but who was not convicted would be able to engage in sexual activity with a child aged between 13 and 15 knowing in advance that he or she could rely on the defence in section 29(2) to escape conviction. In each individual instance, the accused's claim of mistaken belief as to the child's age may appear to be reasonable. However, when considered together, the accused's behaviour would indicate that he or she was deliberately preying on children.

The approach is not a new one. A similar restriction is placed on the defence of mistaken belief as to the age of a child in section 5 of the Criminal Law (Consolidation) (Scotland) Act 1995. That is the comparable existing offence that criminalises sexual intercourse with a girl under the age of 16.

Gordon McNicoll (Scottish Government Legal Directorate): I have two issues to raise, the first of which is the effect of relying on someone being convicted of an offence, particularly if the offence is specified in the bill, which is likely to be the case, as we indicated in our initial response. The first time that someone is charged with the offence and appears in court, they would rely on saying in their defence, "I have never been convicted of this offence." They would therefore not be convicted.

The second time that that person appears in court, the same argument would apply. They could again say, "I have not been convicted." Of course, we know that they were not convicted because they had previously not been convicted. The process could become rather circular. In terms of the offences under the bill, it is therefore not workable to have provisions that rely on conviction and not on charge.

The second issue is the purpose of the provision. Members may take a different view, but I suggest that this is not a get out of jail card, but more of a shot across the bows. Someone needs to be careful that they are unwittingly—or not unwittingly—engaging in sexual activity with another person who is under the age of 16. The effect of charging someone with the offence is that it effectively puts them on notice. In passing the
Bill—if it is passed—the Parliament is saying that it has reached a view that that conduct is unacceptable. I see no real problem in using the word “charging” and not “convicting”. In saying that, I am making the assumption that the purpose of the provision is to discourage people from engaging in this sort of activity.

The Convener: Thank you.

Jackson Carlaw: That is helpful. Other members may have questions on intent; I will focus on process. The committee wants to explore why the decision was made to prescribe some of the limits of the defence in subordinate legislation.

We understand that the current law provides a defence in primary legislation, but that the bill will confer a power on ministers to set out those cases in which having previously been charged with a particular offence will prevent that defence from being available in a subsequent case. Why are you using subordinate legislation and not primary legislation, as is presently the case, to do that?

Gery McLaughlin: The Government did not include a list of relevant offences, either in Scotland or elsewhere, in the bill because it considers that it is more appropriate for those offences to be listed in a single order. There is a strong case for ensuring that a complete list of all the relevant offences is contained not in a mix of primary and secondary legislation but in a single order. By taking that approach, the Government can ensure that a single order always provides a complete list of all relevant offences as any previous order can be revoked when a new order is required to amend the definition of a relevant offence.

14:45

An order-making power also provides flexibility in that it can be quickly amended, revoked and replaced. That is advantageous, given that sexual offences legislation across the United Kingdom is frequently amended, with the effect that new offences are introduced on to the statute book.

Obviously, if we were amending primary legislation in Scotland we could, at the same time, amend any statutory list, but we need the flexibility to take into account changes in the law south of the border, which we would want to reflect in the list of relevant offences. By having that list in secondary legislation, we can react quickly and ensure that the full list is made in an order and not partly by way of an order and partly in primary legislation, which would give a less-than-complete picture.

Jackson Carlaw: I understand the point, but underpinning that is the suggestion that flexibility has been an issue in the application of the current law. Has that been the case?

Gery McLaughlin: It is not an issue at the moment, but we are conscious of the fact that, by legislating to put our sexual offences law in statute, flexibility may become more of an issue. We are spelling out our legislation in that way; previously it was more a case of common law. There have also been developments in England and Wales, where sexual offences legislation was recently renewed. As the committee is aware, there is a continuing focus on this area and there are regular developments in the law. That emphasises the need for flexibility.

Jackson Carlaw: I understand that. I am simply trying to understand in what way the matter had compromised the ability to apply the current law.

Gery McLaughlin: The issue is not any compromise in the ability to apply the current law, but that collecting all the relevant offences in a single place and not partly in primary legislation and partly in an order makes things easily accessible, understandable and comprehensible. Both are functionally capable of reacting to change, but they do not gather everything in the one place.

Jackson Carlaw: I think we have touched on my third question, convener.

The Convener: Yes. I will move to supplementary questions.

Ian McKee (Lothians) (SNP): I am not sure whether the question is sensible, but I am interested in knowing whether any element is retrospective. If someone is charged with an offence that is added to the list of relevant offences in later secondary legislation, can they no longer use the defence even if the offence was not on the list at the time that they were charged with the initial offence?

Gery McLaughlin: I ask Gordon McNicoll to answer.

Gordon McNicoll: Yes, is the short answer. We have to remember that the test is whether the individual has previously been convicted of any relevant offences—

Ian McKee: Charged.

Gordon McNicoll: I am sorry. You are right, I should have said charged. That was a slip of the tongue. If someone is charged with those offences at any time, they would be deprived of the defence.

Ian McKee: But they would not have had the stern warning, about which you spoke earlier, not to commit sin again, would they? At the time, the offence was not on the list of relevant offences.

Gery McLaughlin: The stern warning comes by means of the Parliament passing the bill and going on to pass an order in which the relevant offences
are specified. That gives people a public and stern warning that anyone who has committed the offences that are specified in the order that Parliament has debated and made available publicly should take particular care.

Ian McKee: That does not quite answer my point. I asked about the circumstances in which someone was charged with an offence before it was added to the list of relevant offences. The person would not have had the warning at the time that they were charged because the offence was not on the list of relevant offences when they committed—or allegedly committed—the offence.

Gery McLaughlin: The issue is that the warning applies if someone has been charged with one of the offences on the list. In such circumstances, they can no longer rely on the defence that they mistakenly believed that the other person was of age. Therefore, someone who has been charged with one of those offences should take particular care to ascertain that any person with whom they intend to have sexual relations is of age. The warning not to commit offences is a general one, whereby the law says that certain acts are illegal and people should not put themselves in the position of having committed them. Once someone has been charged with such an offence, they will have been given due warning to take particular care about the age of any persons with whom they are considering having a sexual relationship. Once they have been so charged, the provisions on not being able to use the defence of being mistaken about someone’s age take effect. The disapplication of that defence does not go back further than that. It arises at the point at which a person is charged with a relevant offence.

Ian McKee: What new relevant offences could be added, given that the offence that we are talking about is having sexual relations with a girl who is between the ages of 13 and 16? Surely that is the only relevant offence.

Gery McLaughlin: We might want to take into account a number of relevant offences. The list of relevant offences might be changed because of changes in the law in Scotland or elsewhere in the United Kingdom that meant that we wanted to take account of new offences.

Ian McKee: Would such a change in the law apply retroactively to people who had been charged with such an offence, even if it was not a relevant offence when they were charged with it?

Gery McLaughlin: That would depend on how the legislation was framed. Generally speaking, any new offences would not be retrospective—they would become crimes only when those offences were introduced. In general, new offences are not retrospective, so I would not say that their addition to the list has a retrospective effect. The addition of an offence to the list has an impact only from the point at which that happens and someone is charged with it.

Tom McCabe (Hamilton South) (Lab): In part, my question has already been answered, but I have something to say before I ask it. I am highly conscious that we must concentrate on matters that fall within the committee’s remit. I know that there are other committees that can question the officials on the bill’s intended policy outcomes, but I want to put it on record that I am increasingly uneasy about the convenient interchange of “charge” and “conviction”. It seems that an extremely serious precedent is being set when the fact that someone has been charged with an offence can be treated in almost the same way as if they have been convicted of it. However, it is right that that issue lies within the remit of another committee.

The question that I intended to ask, which has largely been answered, is about the power to specify relevant offences. Our reading of the bill was that that power appeared to allow ministers to specify whatever offence they thought was appropriate, but the officials seem to be saying that there will be a specified list of relevant offences. The only opening is that that list could be added to over time, although when that happens, Parliament will have the opportunity to consider the matter.

Gery McLaughlin: Yes. The list will be specified in an order, which the bill suggests would be subject to negative resolution. That means that any member who objected to it could instigate a debate on the order. Any subsequent changes to the list would be subject to the same procedure so, in that respect, the process would be public.

As regards your point about setting a precedent, I repeat that the approach that the bill takes follows the approach that is already taken for the comparable offence under current legislation. In its use of the word “charged” rather than “convicted”, the bill does not set a precedent.

Tom McCabe: I was wrong to use the word “precedent”, but the point that I was trying to make still applies—the bill’s interchanging of the concepts of “charge” and “conviction”, which I accept has been done in the past, seems to be a pretty significant departure.

Helen Eadie (Dunfermline East) (Lab): I echo the concerns of my colleague and friend Tom McCabe as regards the interchange of charge and conviction.

I would like to move on to the use of negative rather than affirmative procedure for consideration of the order that will specify relevant offences. Although you clarified your thinking in your letter, we would be grateful for further amplification.
because the power to specify those offences is significant and is of great interest to the public.

Gery McLauglin: The use of negative procedure reflects the approach that the Scottish Law Commission took to the use of subordinate legislation powers in the bill. My interpretation is that the commission proposed that when a substantial change to or amendment of the approach that is taken in the bill is proposed, affirmative procedure should be used, but when a proposal is made that is in keeping with the policy direction of the bill, negative procedure could be used. In that respect, the commission suggested that such a power should be subject to negative procedure.

The Government therefore considered that negative resolution procedure provides the appropriate level of scrutiny for an order that specifies the offences that are to be included under the definition of a relevant offence. The order-making power does not allow the creation of new criminal offences, nor does it modify the circumstances in which an offence may be committed. Its effect is only to limit the circumstances in which a particular defence to what would otherwise be a criminal act can be used. The Government considers that, as the prescription of relevant offences is unlikely to be contentious, the use of negative procedure will provide the appropriate level of scrutiny.

The Convener: Before we move on, there are a couple of points that I want to put on the record. I emphasise that our specific interest is the decision to specify relevant offences in subordinate legislation and I make it clear that we are not querying the use of the word “charged” rather than “convicted”.

I will set the scene for our consideration of section 32. Before we move to questioning, will you please set out the purpose of the power to amend the definition of what constitutes a “position of trust” in respect of the offence of sexual abuse of trust, with which section 31 deals?

Gery McLauglin: Section 32 provides for a definition of positions of trust for the purposes of the offence of sexual abuse of trust, which is dealt with in section 31, which criminalises any person who has attained the age of 18 years who engages in sexual activity with someone who is under the age of 18 years when the older person is in a position of trust over the younger person. In accordance with the conditions that are set out in section 32, a person who was in such a position of trust would include someone who worked in a care home, a school or a hospital, or someone who had parental rights or responsibilities in respect of the younger person. Section 32(1) provides that the Scottish ministers may, by order, specify additional circumstances that constitute a position of trust. That order-making power is subject to negative resolution procedure by virtue of section 46(2) of the bill.

The Government’s view is that the widely defined power is required to allow sufficient flexibility to respond to changes in the arrangements for the care and education of young people in Scotland, the nature of which we cannot second guess, and to do so without the need for primary legislation. In the Government’s view, framing the powers more narrowly would risk losing the flexibility to respond quickly to potential changes.

15:00

Ian McKee: You have answered a large chunk of the question that I was going to ask. I am concerned that the power is significant because it has the effect of making criminal conduct that would otherwise be legal if the person involved was 16 or 17. That leads to concern about the open-ended power to define new positions of trust. I gather that you feel that the power is necessary to be able to move swiftly. Why can the power not be restricted to some extent but still be able to address future changes in care arrangements?

Gery McLauglin: It is difficult to speculate about what such changes might be. If the committee would like to suggest how the power could be narrowed appropriately, we would be happy to consider that or any other points on how we could approach amending the power at stage 2. However, having considered the matter, it appears to us that the breadth of the power reflects the uncertainty about what care arrangements might be set out in future, or what changes might be made to them. I am sure that ministers will be happy to give a commitment that the power will be used to respond quickly to any changes in care arrangements, and it will be a matter for Parliament to look at any order and consider whether the power is being used more widely. That is the intent behind the power.

Gil Paterson (West of Scotland) (SNP): I have a question about procedures. We note that the current power to specify additional positions of trust is subject to affirmative procedure, in Scotland and the rest of the United Kingdom. That reflects the importance of the power and the effect of its exercise on the criminal law. Why do you take a different view and consider that negative procedure is appropriate?

Gery McLauglin: I refer to my earlier comments about the Scottish Law Commission’s approach to the use of subordinate legislation in the bill. That approach to the proposed power is consistent with the Scottish Law Commission’s approach.
In judging which procedure is most appropriate, it is necessary to balance the importance of the issue and the need to be flexible enough to respond to changing circumstances in the light of experience, without requiring primary legislation. We also need to make proper use of parliamentary time. Obviously, negative procedure allows any member who objects to the proposed changes to initiate a full and proper debate, and that is not inappropriate. If the committee has a different view, I am sure that ministers will be happy to consider it in advance of lodging stage 2 amendments.

Gil Paterson: Did you say that you will reconsider?

Gery McLaughlin: I am saying that negative procedure is not inappropriate for the power, but if the committee reaches a different view, ministers will take that into account.

Gil Paterson: I understood that the Scottish Law Commission was of the view that the power should be subject to affirmative procedure. Have you any comment on that?

Gery McLaughlin: I am sorry; did you say the law commission?

Gil Paterson: Yes. It took the view that the procedure should be affirmative.

Gery McLaughlin: I am sorry, but I am not in a position to comment on that at the moment. If we can get the background to that, we will be happy to respond by letter if that would be helpful.

Gil Paterson: That would be helpful.

The Convener: It is a racing certainty that that point will be reflected in our report. We will have one final look at the bill at stage 1 next week, before we report. I thank Gordon McNicoll and Gery McLaughlin for their time and trouble; it is appreciated.

Gil Paterson: Before we go into private session, I should declare an interest with regard to the bill. I am a board member of Rape Crisis and the deputy convener of the cross-party group on men's violence against women and children.

The Convener: Thank you.

15:05

Meeting continued in private until 15:19.
Cabinet Secretary for Justice
Kenny MacAskill MSP

T: 0845 774 1741
E: scottish.ministers@scotland.gsi.gov.uk

Bill Aitken MSP
Convener
Justice Committee
The Scottish Parliament
Edinburgh
EH99 1SP

January 2009

SEXUAL OFFENCES (SCOTLAND) BILL  SCOTTISH GOVERNMENT RESPONSE TO JUSTICE COMMITTEE STAGE 1 REPORT (SP PAPER 194)

I am grateful to you and your Committee for your comprehensive consideration of the Sexual Offences (Scotland) Bill. I look forward to working with you to take forward the issues raised in your Stage 1 Report and welcome your conclusion to recommend to the Parliament that the general principles of the Bill be agreed to.

I know that we share the objective of strengthening the law and I believe that this will best be achieved if we continue to take a collaborative and consensual approach to the complex and sensitive issues raised by this legislation.

I am therefore writing to you now with the Government’s initial response to the observations, questions and recommendations contained in your Report (attached at Annex A). My intention is to provide an indication of the Government’s preliminary views on the issues you have raised to enable your Committee to consider them ahead of the Stage 1 Debate. If it would also be helpful to meet ahead of the debate to discuss any of those issues on an informal basis then I would be very happy to do so. I would also be happy for you to contact the Bill Team if a technical explanation of any of these issues would be of assistance. If that would be helpful, you should contact Gery McLaughlin on 0131 244 2218.

My hope is that, once we have had confirmation of Parliament’s views in the Stage 1 Debate, we will be able to reach a consensus on the amendments which should be laid for Stage 2. I would therefore intend to write to you again, following the completion of Stage 1, with draft amendments on at least the key issues, which reflect the considerations set out in your report, the views of Parliament and the Government’s initial response. It would be very helpful therefore to have an early reply to this initial response in order that we can take into account the Committee’s views in drafting amendments ahead of Stage 2. That will help us
to ensure that the amendments reflect the collective consensus on the way forward with this legislation.

I hope that this proposed approach is acceptable to you and that you find the attached response helpful. I stand ready to meet with you to discuss any of the matters raised in the report if you and your committee would find this helpful.

KENNY MACASKILL
Annex A

SEXUAL OFFENCES (SCOTLAND) BILL
SCOTTISH GOVERNMENT RESPONSE TO JUSTICE COMMITTEE
STAGE 1 REPORT (SP PAPER 194)

Attrition – rape and sexual assault

36. The Committee asks the Scottish Government to advise what consideration, if any, it is giving to a full attrition study of cases of sexual assault and rape.

Response: As part of its review of the investigation and prosecution of rape and serious sexual assault, COPFS undertook a study of attrition in rape cases reported to the Procurator Fiscal, an exercise which informed the recommendations of the review and ongoing work in this area. COPFS continues to be involved in research looking at the nature and extent of attrition in Scotland.

In particular COPFS is contributing to a project to compare attrition rates across Europe. That research is being led by Professor Liz Kelly, the author of “Rape: Still a forgotten issue”, which informed the work of the Review of Sexual Offences.

The ongoing commitment of COPFS to be informed by attrition in the prosecution process is also recognised in Recommendation 3 of the COPFS Review of Sexual Offences:

“Crown Office and the Procurator Fiscal Service should commit to the annual publication of information relating to conviction rates in rape cases as a proportion of cases reported to the Procurator Fiscal. This should take place as part of a wider programme of work across the criminal justice system designed to monitor and respond to attrition and should be undertaken with key partners to ensure that the data is comprehensive and can be interpreted in meaningful ways.”

The recommendation is to be implemented by Summer 2009.

The Government will consider the need for a full attrition study following the outcome of the current cross-European study.

Sexual history and character evidence

42. The Committee seeks clarification from the Scottish Government on what is being done at present on issues of sexual history and character evidence.

Response: The reference made to the Scottish Law Commission in 2004 included a request to the Commission to look at the law of evidence with regard to sex offences. The Commission concluded in their Report that consideration of such matters should be conducted as part of a wider review of the law of evidence.
The Government have since asked the Commission to review aspects of the law of evidence, including the use of the Moorov Doctrine, which is of especial relevance in sexual offence cases. In accepting the reference, the Commission undertook to extend the review to consider the question of corroboration more generally. Both issues are particularly pertinent to sexual offence cases, and the Government will consult the Commission on the extent to which their work will include consideration of the use of sexual history and character evidence and write to the Committee to confirm the position.

Rape

57 The Bill provides that the act of penetration may be intentional or reckless. The Committee understands that this would, for example, allow the successful prosecution of a man for rape where there is proof that there was penile penetration of the victim’s vagina, even if the man claims that he only intended to have external sexual contact and the prosecution is only able to prove that he was reckless in relation to penetration.

58. Notwithstanding the Committee’s understanding in this regard, the Committee considers that it would be helpful if the Scottish Government would confirm that this is the case.

Response: The Government can confirm that the Committee’s understanding of this matter is correct. Reckless penetration of the victim’s vagina, anus or mouth would constitute the crime of rape.

65 In its written submission, the Lesbian, Gay, Bisexual and Transgender Abuse Project stated that the language used in section 1 of the Bill to describe genitalia that have been created in the course of surgery, such as gender reassignment surgery is inappropriate. It advised that the term “artificial” is not generally used to refer to surgically reconstructed parts of the body but to prosthetic parts. The Committee notes that the terms “artificial penis” and “artificial vagina” are not used in the Sexual Offences Act 2003, the corresponding legislation for England and Wales.

66 As the Cabinet Secretary undertook to consider this issue, the Committee requests confirmation of the Scottish Government’s intention in this regard and that the appropriate changes will be brought forward by way of amendments at Stage 2.

Response: The Government notes the concerns expressed on this issue. We will bring forward appropriate amendments at Stage 2.

Sexual assault

73. Sense Scotland, an organisation which provides services for people who are deafblind, have sensory impairment or other physical, learning or communication difficulties, said that under current legislation, it is almost impossible to provide sexual health information to some of the people it...
supports. Primarily this is because of the tactile nature of communication, a general lack of formal language, the impossibility of fully understanding new information or concepts without experiencing them and therefore difficulties with consent or free agreement.

74 Sense Scotland said that it had concerns about section 2(2)(b)-

“From this it is quite clear that any hands-on teaching is likely to be impossible, unless there is free agreement from the person involved.”

75. Other organisations such as the Scottish Child Law Centre raised similar concerns with regard to the offences against children and suggested that there should be clear exemptions for legitimate counselling and advice work.

76. The Committee draws these concerns to the attention of the Scottish Government and asks for its response.

Response: The Government appreciates the profound difficulties involved in providing sexual health information to people who are deafblind, have sensory impairment or other physical, learning or communication difficulties. However, it is also important to consider that such individuals are likely to be especially vulnerable to sexual exploitation and abuse. It is vital that we do not weaken protection for such individuals and that the law makes absolutely clear that sexual activity without consent is criminal.

For an offence to be committed, a touch requires to be “sexual” as well as non-consensual. Whether it is “sexual” depends on the circumstances of the case. The fact that it relates to sexual matters would not in itself make the touching “sexual”. Having considered this matter, the Government is content that the way in which the offence is framed will enable the criminal justice system to distinguish between legitimate communication with a deaf/blind person for teaching purposes, which may be tactile in nature, and “sexual” touching.

The Scottish Child Law Centre, in commenting on sections 21-26 of the Bill, stated that there should be “clear exemptions for those who work with children in counselling, medical and sexual health services.”

The Government agrees. Section 39 of the Bill provides that any person who acts for the purposes of protecting a person from sexually transmitted infection, protecting that person’s physical safety, preventing the person from becoming pregnant or promoting that person’s emotional well-being by the giving of advice is not guilty of inciting, or being involved art-and-part in an offence under Part 4 or 5 of the Bill. This provision would cover any person carrying out their duties working with children in counselling, medical or sexual health services.

Rape with an object

97. After careful consideration of the evidence received and in recognition of the comparable distress such an act is likely to cause the victim, the
Committee has reached the view that there should be a separate offence of rape with an object or with another part of the body, limited to vaginal or anal penetration, and with the same penalties as rape. Such an offence already exists for England and Wales and the Committee recommends that the same offence should be created for Scotland.

Response: The Government notes the view of the Committee, and many of those giving evidence on the Bill, that there should be a separate offence of ‘rape with an object’. We can understand and indeed sympathise with the Committee’s reasons for proposing the creation of such an offence.

However, careful consideration needs to be given to the nature of the offence. The equivalent offence in English law (the Sexual Offences Act 2003) is ‘sexual assault by penetration’. Providing for the offence of ‘rape with an object’ without incorporating that offence into the definition of the offence of ‘Rape’ (at section 1 of the Bill), risks creating the impression that ‘rape with an object’ is considered a less serious form of rape. While we understand concerns that juries might be more reluctant to convict for ‘rape with an object’, because the conduct may not match their conception of what constitutes ‘rape’, there is no doubt that some penetrative assaults involving objects can be extremely violent and are perceived by their victims as constituting rape. There are therefore strong arguments in favour of using the term ‘rape’ in the definition of the offence rather than adopting the English terminology. However, if the offence is to be ‘rape’ then there are arguments in favour of including it within the main definition of ‘Rape’, rather than following the English precedent of creating a separate offence. This is an issue where the Government is very willing to bring forward an amendment at Stage 2 to ensure that it is appropriately addressed but would welcome further discussion with the Committee to establish the best way to frame that amendment.

Coercing a person into being present during a sexual activity

103 The Committee seeks clarity on whether in relation to any prosecution under section 4, on the basis that the accused acted for the purposes of obtaining sexual gratification, the prosecution would have to prove that the accused sought sexual gratification from the fact that the victim was present and not just from the sexual activity itself.

Response: The Government can confirm that this is the case.

104. The Committee also recommends that the Scottish Government consider the wording of section 4, section 17 and section 24 in order to avoid any ambiguity or the creation of any unintended consequences, for example, criminalising parents for having sexual intercourse in the presence of their infant child.

Response: The Government understands the Committee’s concerns on this matter but can confirm that parents will not be criminalised by the Bill in such instances. Section 4(2)(a), when read with s4(1), provides that it is an offence to engage in sexual activity in the presence of another person for the purpose of obtaining sexual
gratification from the presence of that other person. We therefore consider that the wording of sections 4, 17 and 24 is clear and does not require to be amended.

Consent and reasonable belief

125. The Bill is clear that an act of penetration cannot be committed negligently, but the Committee is still unclear whether a negligently formed belief in consent would of itself be sufficient to establish criminal responsibility in terms of the Bill. The Scottish Government is asked to confirm its intention.

Response: The Government’s view is that a negligently formed belief in consent is not likely to be a reasonable belief, though that would depend on the facts and circumstances of the case. The question of belief in consent is dealt with in the Bill by reference to the question of whether the accused’s belief in consent was reasonable, rather than whether it was negligently, or recklessly held. Where an accused’s belief in consent is negligently held, it is unlikely that it would be reasonable, and so the accused would be criminally liable in terms of the Bill. However, “reasonable belief” does not equate directly to negligence or recklessness and it is not possible to say in the abstract that negligently formed belief as to consent would always be unreasonable.

132 The Committee requests that the Scottish Government confirms whether the accused will still be able to claim consent existed if any of the circumstances in section 10 are present.

Response: The Government can confirm that there can be no actual consent in the circumstances in section 10. However, an accused is not prevented from claiming a reasonable belief in consent, even though such a belief may appear unlikely in the context of the circumstances in section 10.

The Bill provides that, where any of the circumstances set out at section 10(2) apply, there is no consent. However, it would still be open to the accused to argue that he had a reasonable belief that consent was present even where the circumstances set out at section 10(2) of the Bill has been proven to apply. In practice, if one of the circumstances set out in this section applies, it may be unlikely that any claim of reasonable belief in consent on the part of the accused would be credible. However, the possibility cannot be ruled out entirely. For example, in circumstances where the victim consented only because of threats of violence there would be no consent. However, if those threats of violence came from a third party, and the accused was unaware of the threats then they may be able to establish that they had a “reasonable belief” in consent.

Prior consent

146. In light of the concerns expressed by witnesses, particularly the lapse of time or the possibility of a change of circumstances between the giving of consent to sexual contact in such circumstances and the act itself, the Committee has some reservations about section 10(2)(b). The Committee
recommends that the Scottish Government give further consideration to these particular examples.

Response: The Government notes the Committee’s concerns about the possible unintended consequences of section 10(2)(b) and will consider these further prior to bringing forward amendments at Stage 2.

Historic abuse and threats of violence

151. The Committee recommends that the Scottish Government gives further consideration to the wording of this provision [10(2)(c)] in order to ensure that the stated policy intent is clearly given effect to and that the issues of reasonable and legitimate fear of violence are properly taken account of.

Response: This provision applies where the victim agrees or submits to sexual conduct because of violence, or threats of violence. There is no requirement that the violence, or threats of violence occurred at the time at which the sexual activity took place. What is required is a causal link between the ‘consent’ and the violence or threat of violence.

We consider that this section also addresses concerns about circumstances where the victim agrees or submits to sexual conduct because of the reasonable or legitimate fear of violence. In practice, such a reasonable or legitimate fear of violence is likely to be present either because the accused is making threats of violence at the time, because the accused has been violent in the past, or because the accused has made past threats of violence. As such, the complainer would be submitting to conduct because of violence or threats of violence made at an earlier time and the circumstance at section 10(2)(c) would apply.

Having considered the issues, the Government is content that the current drafting of the provision satisfactorily addresses the concerns identified.

155 In light of the evidence received, the Committee recommends that the Scottish Government considers the need to amend the Bill to include a definition of threats in paragraph 10(2)(c) of the Bill and reflect the issue of coercion raised by Enable Scotland.

Response: The Government has considered this issue and concluded that, as the word ‘threat’ has a widely understood ordinary English-language meaning, it is not necessary to define the term in the Bill. To provide a definition in legislation may narrow the meaning and would risk inadvertently creating a loophole for an accused to argue that a threat of violence that they made did not fall within the definition of the term used in the Bill.

We understand from Enable Scotland’s oral evidence that they had concerns that section 10(2)(c) did not extend to threats made to the accused other than threats of violence towards the accused or another person (the examples given by Enable Scotland were threats of violence against a pet or threats that the victim would be detained against their will). We also note their concern that those with learning
disabilities may be susceptible to threats which would not appear credible to the average person.

Having considered the matter, we consider that the issues raised by Enable Scotland are dealt with in the Bill by means of the definition of consent as ‘free agreement’. A person who agreed to sexual activity because of threats of blackmail, for example, could not be said to have freely agreed to the conduct.

Deception

158 It is not immediately clear to the Committee what, in the wording of section 10(2)(e), would support the interpretation placed on it by the Faculty of Advocates; however in light of its comments, the Committee recommends that the Scottish Government look at this wording again in order to avoid the potential of a wider interpretation than what was intended.

Response: We note the comments made by the Faculty of Advocates but do not agree with their interpretation of the Bill. The reference at section 10(2)(e) is to the “nature or purpose of the conduct” which is rather different from mistaken belief, or even deception, as to the accused’s age and we do not believe that the wording is capable of interpretation in the way the Faculty suggest.

Reasonable belief

169. Although the Committee notes this observation, it finds it difficult to see what further guidance the court could give a jury on the issue of “reasonableness” as the question of “reasonableness” will always be one of fact or circumstance. The Committee notes however that the equivalent legislative provision for England and Wales sets out that whether a belief is reasonable is to be determined having regard to all the circumstances, including any steps A has taken to ascertain whether B consents.

170. The Committee recommends that the Scottish Government gives consideration to whether similar wording, setting out clearly that regard is to be had to all the circumstances, including steps taken to establish whether consent existed, should be included on the face of this Bill.

Response: The Government agrees with the Scottish Law Commission, who noted concerns about the inclusion of the phrase “having regard to all the circumstances” in their report (at paras 3.6.9 to 3.7.8) and deliberately excluded the provision from their draft Bill.

Attempts to commit offences

175. The Committee accepts that in terms of the Criminal Procedure (Scotland) Act 1995 (and at common law) an attempt to commit an offence is itself an offence. However, the Criminal Procedure (Scotland) Act does not include any provision setting out that application of any rule of the common law or any statutory rule applicable to a full offence is available to any attempt. Even if there were such a rule, it would only apply to an attempt to commit the
offence, and would not apply to other forms of inchoate offending, such as conspiracy or incitement.

176. In these circumstances, the Committee suggests that the Scottish Government considers this matter and whether it would be prudent for the Bill to include a “for the avoidance of doubt” provision which would make it clear that these provisions will apply to incitement, conspiracy and attempt to commit the full offence.

Response: The Government notes the Committee’s concerns but takes the view that the Bill has to be read as a whole. It is not only section 1 which defines the offence of rape, but that section and all the other provisions that relate to it (e.g. the provisions on consent and reasonable belief). Since these provisions relate to rape, they must therefore relate to attempted rape, and incitement and conspiracy to commit rape. For that reason we do not consider that additional provision is required. Indeed, making specific provision might risk calling into question whether this would apply to other offences where no such provision is made.

Information and Publicity

193 In order to fully inform young people about the changes to the law which directly affect them, the Committee recommends that following enactment of the Bill, the Government should implement an age-appropriate information and publicity campaign after having consulted appropriately with this age group.

Response: The Government intends to undertake an information and publicity campaign following enactment of the Bill and that this will include age-appropriate material aimed at young people. The campaign will link into existing plans to increase drop-in services for young people across Scotland, therefore also providing direct contact with professionals on this issue.

Criminalisation of older children for consensual sexual conduct

258. In relation to the issues surrounding the operation and application of the Sex Offenders Register, the Committee noted that, currently, sheriffs and judges have only limited discretion as to whether or not to make a child convicted of a sexual offence subject to notification requirements.

259. The Committee, therefore, invites the Scottish Government to commission an expert review of the notification requirements of the Sexual Offences Act 2003 as it applies to offenders under the age of 16. Following the outcome of that review, the Committee considers that the Scottish Government should act swiftly to implement its recommendations.

Response: The Government has undertaken a brief review of the sex offender notification requirements (SONR) set out in the Bill. We continue to take the view that there are circumstances where it is appropriate that persons under the age of 18 are made subject to SONR. However, we agree that it might be disproportionate to provide that offenders under the age of 18, convicted of offences concerning
consensual sexual conduct with children aged 13-15, should be made subject to SONR.

We therefore propose to amend the Bill to provide that, where the offender is under 18 and convicted of an offence against an older child (the offences at sections 21-27 of the Bill) he or she would be made subject to SONR only where the circumstances were such that a prison sentence is imposed. A person under the age of 18 convicted of a non-consensual offence (the offences at sections 1-6 of the Bill), or an offence against a child under the age of 13 (the offences at sections 14-19 of the Bill), will be subject to SONR irrespective of the sentence imposed. While this is a departure from the approach proposed in the Commission’s draft Bill, it broadly replicates the current legal position. Subject to the views of the Committee and of the Parliament, we will bring forward amendments at Stage 2 to give effect to these proposals.

**Lord Advocate’s power to issue instructions to chief constables**

263. The Committee notes that the inclusion of reference to the Lord Advocate’s power to issue instructions to chief constables in section 27(7) simply restates the existing statutory provisions. The Committee invites the Scottish Government to provide a more comprehensive justification for the inclusion of this provision.

Response: The provision was included in the Bill so as to make clear that the Lord Advocate’s power to direct chief constables as to the reporting for consideration of the question of prosecution of offences will continue to apply in relation to offences relating to under-age sexual activity. In particular, the Lord Advocate will continue to have the power to direct chief constables as to the circumstances in which such cases should be reported to the Children’s Reporter. Without such a provision, there might be an expectation that the existing policy whereby the vast majority of offences committed by children are dealt with by the Children’s Reporter would not apply to the offence at section 27. However, provided that the Parliament as a whole is content that the provision should be removed and agrees with the Committee’s conclusion at paragraph 273 (supporting the continued use of the Children’s Hearing System to address offending behaviour in the overwhelming majority of cases) the Government would be content to bring forward amendments at Stage 2 to remove section 27(7) as we agree that, from a legal perspective, such provision is not necessary to provide the Lord Advocate with the discretion to direct Chief Constables on this matter.

**Underage sexual activity – multi-agency guidance**

267. In addition to the guidance, the Committee considers that there is a pressing need for the Scottish Government to bring forward, as expeditiously as possible, a comprehensive framework for multi-agency co-operation to provide effective support to a child or children involved in underage sexual activity.

Response: The Government agrees on the need for coordination in this area. It is important that any frameworks developed sit comfortably alongside the important
work taking place in child protection and sexual health such as Getting It Right For Every Child, the Early Years/Early Intervention Framework and the national sexual health outcomes. The Government therefore intends to consider the implementation of the draft guidance in the context of those wider issues with the objective of ensuring multi-agency co-operation in this area.

**Gender neutrality**

280. The Committee considers that in relation to the provisions of section 27 there is an objective justification to treat the genders differently. For example, in circumstances where two older children engage in consensual penetrative sex and the girl becomes pregnant, the Committee believes that it would be highly undesirable and potentially damaging to subject that girl to a criminal prosecution. The Committee agrees with the Cabinet Secretary that referral to the children’s panel would be a more appropriate response.

281 The Committee, therefore, recommends that the Scottish Government gives further consideration to the provisions of section 27 of the Bill to address this issue.

**Response:** The Government welcomes the Committee’s support for maintaining a clear age of consent of 16 and for the continuation of the current approach to enforcement and prosecution of consensual underage sex, which sees the vast majority of cases dealt with through the Children’s Hearing System to ensure that priority is accorded to the welfare of the child.

Section 27 provides that it will be an offence for older children to engage in consensual penetrative sexual conduct with each other. It makes no distinction as to gender or sexuality. The Government’s view is that there is a risk that only criminalising the conduct of boys who engage in such activity would be discriminatory and violate Articles 8 and 14 of ECHR. It is clear that a boy and girl who have engaged in consensual sexual conduct (within the meaning of section 27) will both have consented to the sexual conduct with one another. Therefore, to criminalise the actions of only one party, would be to treat a boy differently from a girl who is in a similar position, as she also consented to the act.

In the Government’s view, there is not sufficient objective justification for providing that one of the parties is guilty of an offence and the other is not, where the act is consensual as well as criminal. While the consequences for a girl, in terms of pregnancy, may be more serious than for a boy that only applies in the case of heterosexual conduct as in other instances the same risks do not arise. Similarly, if the offence is to be extended beyond penetrative sex to include oral sex then that would include a much greater proportion of cases where pregnancy is not an issue. The potential consequences of pregnancy do not therefore appear to constitute sufficient justification for discriminating against boys by providing that a girl’s consensual actions should escape criminal liability when the boy’s consensual actions are criminalised.

This is more so given that one of the aims behind section 27 is to discourage penetrative sexual activity, in order to limit the number of teenage pregnancies and
to reduce the risk of transmission of sexually transmitted infections amongst teenagers (males and females). I understand there are concerns that criminalising the actions of the girl could leave girls reluctant to seek sexual health and contraceptive advice, but the same arguments could be made in respect of the criminalisation of the actions of boys. That would argue for criminalising neither party, as originally proposed by the Scottish Law Commission, but the Government has rejected that approach.

For these reasons the Government believes that criminalising only boys who engage in consensual sexual activity (in terms of section 27) would be discriminatory. We therefore prefer the current approach, which does not discriminate on the basis of gender or sexuality.

Older children

288 The Committee shares the concerns expressed by many stakeholders at the exclusion of oral sex from the provisions of section 27. The Committee is concerned that this could send an inappropriate message to young people that society considers such activities to be acceptable and risk-free.

289. The Committee does not believe that the Scottish Government has provided sufficient justification for treating oral sex differently from other penetrative sexual conduct and recommends that the section should be amended to include oral sex within the scope of the offence provisions. In so doing, however, the Government must ensure that normal teenage consensual activities such as kissing are not made criminal.

Response: The Government had concerns that the provisions contained in the Scottish Law Commission’s draft Bill might be interpreted by young people themselves as lowering the age of consent. We therefore amended the Bill to ensure that consensual sexual intercourse between 13-15 year olds would continue to be unlawful. We had restricted the scope of the offence at section 27 to penetration of the vagina or anus, as this carries the greatest risk of adverse consequences, including sexually transmitted infection and unintended pregnancy.

However, we note the Committee’s recommendation, and the concerns of a number of those who have given evidence on the Bill. We will therefore consider this issue (including avoiding criminalising activities such as kissing) before bringing forward amendments at Stage 2.

Defences in relation to offences against older children

299. Although this defence did not raise significant objections in principle from the majority of respondents to the Committee’s call for evidence, the Sheriffs’ Association pointed out a potential unintended consequence arising from the drafting of this defence:

“The only defence available to a child under 16 (“child A”) who sexually penetrates another child (“child B”) is that child A thought that child B was over 16. The only defence available to child B who is penetrated in a
A consensual act is that child B thought that he or she was being penetrated by a person over 16. It will therefore be a defence to a charge under clause [sic] 27(1) and (4) that rather than having consensual penetrative sex with another child, the child thought that he or she was having consensual sex with an adult.

300. The Committee invites the Scottish Government to respond to the issue raised by the Sheriff’s Association

Response: The Sheriffs’ Association is correct in their reading of section 27 and the defence of mistaken belief as to the age of a child. The position reflects the provisions of the current law, at section 5 of the Criminal Law (Consolidation) (Scotland) Act 1995, whereby it is a defence for the accused to show that he reasonably believed the girl had attained the age of 16, irrespective of his own age. A similar defence is provided for in the Sexual Offences Act 2003. In all these cases, the criminal offence is engaging in sexual activity, (or in the case of the offence at s5 of the 1995 Act, sexual intercourse), with a child under the age of 16, as opposed to that of being a child under the age of 16 and engaging in sexual intercourse. We consider this approach is consistent with the policy contained in the Bill that, where a child engages in consensual sexual activity with an adult, criminal liability attaches to the actions of the adult and not the child.

307. The Committee is not content to endorse the recommendation of the Subordinate Legislation Committee in relation to this matter. The Committee considers that, in keeping with the example of the Criminal Law (Consolidation) (Scotland) Act 1995, “relevant offences” should be defined in the Bill.

Response: We accept the Committee’s recommendation and we will bring forward amendments at Stage 2 to define “relevant offences” on the face of the Bill.

324. The Committee is concerned that the proximity of age defence would effectively decriminalise a wide range of sexual activity between young adults and older children as young as 14 years of age. The Committee invites the Scottish Government to consider the scope of this defence in light of the recommendation which the Committee has made in this report regarding oral sex between older children.

Response: The Government agrees with the Scottish Law Commission’s conclusion that there is a need for a defence of ‘proximity of age’, in particular to avoid the situation where sexual activity which is legal between two older children becomes criminal when one party turns 16. The Government also agrees with the Committee’s view that the defence should not conflict with any changes made to the Bill in respect of older children. We will therefore bring forward amendments at Stage 2, if required, to reflect any changes made to the offence at section 27 to ensure that the defence would not apply to sexual activity which would be unlawful between older children.

Abuse of Positions of Trust

597
337. ACPOS proposed that the Bill should be amended to provide that an offence would be committed where there was a position of trust between the parties and the sexual activity took place as a result of a position of trust.

338. The Committee recommends that the Scottish Government considers this issue and advises the Committee of its view prior to the Stage 1 debate.

Response: We note ACPOS’ concerns, which appear to be about determining whether sexual activity in question is truly consensual. We sympathise with that objective. However, it would be very difficult to prove that apparently consensual sexual activity took place because there was a position of trust between one party and the other. On balance, we consider it better to provide that the offence is committed where a person in a defined position of trust enters into a sexual relationship with someone in their care (i.e. without a requirement to prove that the sexual activity took place because there was a position of trust).

ACPOS’ concerns also appear to arise from the general offence of ‘abuse of position of trust’ applying only in respect of children under the age of 18 (there are no such restrictions on the offence relating to mentally disordered persons). The Government’s view is that it is quite correct that the law should protect children and those with a mental disorder from potential abuse of a position of trust. However, these offences restrict the rights of both parties to form relationships and our view is that there must be a point beyond which the criminal law should not intervene in sexual relations between consenting adults. The Government’s view is that the current law on abuse of trust strikes the right balance in that respect.

The law on abuse of trust does not preclude the possibility of disciplinary action being taken in other circumstances e.g. where a doctor has a sexual relationship with a patient or a teacher who has a sexual relationship with an 18 year old pupil. Where there is evidence that a position of trust between two adults has been abused to the extent that there is no proper consent to the activity (i.e. the agreement was not free agreement) then it would be possible to bring a prosecution under Part 1 of the Bill.

Delegated powers

341. After taking evidence, the Subordinate Legislation Committee accepted the use of delegated powers in principle but asked the Scottish Government to consider further whether the power could be framed more narrowly. The Subordinate Legislation Committee concluded –

“Given the potential impact of the exercise of this power to widen the scope of the offence of the sexual abuse of trust the Committee recommends that the affirmative procedure is the appropriate level of Parliamentary scrutiny.”

342. The Committee endorses the recommendation of the Subordinate Legislation Committee and draws it to the attention of the Scottish Government.
Response: The Government notes the Justice Committee’s endorsement of the Subordinate Legislation Committee’s conclusion that affirmative procedure is the appropriate level of Parliamentary scrutiny for this issue. The Government will bring forward amendments at Stage 2 to make the power to amend the definition of positions of trust subject to affirmative procedure.

Sexual abuse of trust of a mentally disordered person

347. The Law Society drew particular attention to individuals being defined in the Bill in relation to the service they receive. In its view, any move towards self-directed support would result in the person who receives the service being the employer. This would make it difficult to regulate any relationship formed between carer and the person receiving the care. ...

348. In the view of the Committee, the issue raised by the Law Society about a person receiving care becoming an employer is one that requires further consideration. The Committee draws this matter to the Scottish Government and requests a response prior to the Stage 1 debate

Response: The Government notes the Committee’s concerns on this issue. Having considered the matter, our view is that the provisions of the Bill will regulate any relationship between someone providing a care service and a person receiving the care even where the latter is the employer. The offence is concerned with persons providing a care service and section 2(2) of the Regulation of Care (Scotland) Act 2001 provides that personal care or personal support may be provided by “any person”. The offence will therefore apply whether or not the care-giver is an ‘employee’ of the person to whom care is being provided.

362. Section 36 sets out the circumstances which give rise to a defence to a charge of sexual abuse of trust of a mentally disordered person. Subsection 36(2) provides that it shall be a defence if the parties are married, civil partners or involved in a sexual relationship. Scottish Women’s aid expressed concern –

“it is perfectly possible for the spouse, civil partner or sexual partner to exploit and abuse the other person, which can happen in relationships where the person does not have a mental disorder, as highlighted in Recommendation 6 of the 2007 consultation, which states, “The giving of consent to one sexual act does not by itself constitute consent to a different sexual act.”

363. Scottish Women’s Aid said that it would like to see something on the face of the Bill to reflect this particular recommendation and that it would welcome further discussions with the Government and the Crown.

364. The Committee recommends that the Scottish Government considers this concern and advises the Committee of its view prior to the Stage 1 debate.

Response: The Government notes and understands the Committee’s concerns on this matter, given that exploitation and abuse can and does occur in the context of
marriage or civil partnership. It is important to emphasise that this defence applies only to the offence of ‘sexual abuse of trust of a mentally disordered person’ and not to any non-consensual sexual activity. Where a person with a mental disorder is capable of consenting to sexual activity but does not consent, or where he or she is not capable of doing so, then any person engaging in sexual activity with that person would commit an offence at Part 1 of the Bill. This defence would not apply in those instances.

This defence is intended to ensure that a person with a mental disorder who is capable of consenting to sexual activity is not precluded from continuing a previously existing sexual relationship with his or her partner if their partner becomes their carer. The defence is intended to ensure that the Bill does not automatically criminalise consensual sexual activity in such circumstances without preventing prosecution where any sexual activity is non-consensual.

With regard to Scottish Women’s Aid’s comment that provision should be made that “the giving of consent to one sexual act does not by itself constitute consent to a different sexual act”, this recommendation is given effect on the face of the Bill at section 11(2).

Penalties

369. The Committee looks forward to this provision [concerning maximum penalties] being clarified by the Government in order to ensure that there is no possibility of a fine being imposed as a sole penalty for the offence of serious sexual assault or rape.

Response: The Government will bring forward an amendment at Stage 2 which will make clear that a fine cannot be imposed on an individual as the sole penalty for rape or rape of a young child.

374. In its written response, Victim Support Scotland said –

“Victims of female offenders are hence given a different legal setting within which to gain recognition and restoration compared to victims of male offenders, regardless of the circumstances in the case or the damages caused by the penetration. The same is applicable for victims who have turned 13 but not yet 16, since the offences intercourse with an older child” and “engaging in sexual activity with or towards an older child” can be raised in a lower court with a significantly lower range of penalties.”

375. The Committee is concerned that there may be an inconsistency in this provision and asks that the Scottish Government considers the position and reports its views to the Committee prior to the Stage 1 debate.

Response: The Government notes the Committee’s concerns and considers there are separate issues here with regard to offences against adults and against children.
With regard to the first point, the Bill as introduced provides that penetration other than with a penis is not defined as rape (under section 1 of the Bill) but is sexual assault (under section 2). The maximum penalty in both cases is life imprisonment. However, while rape must be tried on indictment the same does not apply to the offence of sexual assault, which covers a wide spectrum of offending which it would not always be appropriate to try on indictment. While acknowledging the validity of arguments in favour of alternative approaches the Government views the Bill as introduced is not inconsistent but makes a valid distinction between the two offences.

The Committee have of course recommended a change to this approach though the introduction of an offence of “rape with an object” and we would welcome the views of the Committee on whether that offence should only be capable of being tried on indictment and on the appropriate maximum penalty.

With regard to the second point, the Government agrees with the approach recommended by the Scottish Law Commission. The distinction in the maximum penalties for the offences of “rape of a young child” and “sexual assault on a young child” as opposed to “intercourse with an older child” and “engaging in sexual activity with or towards an older child” is, in our view, warranted.

The Bill makes the assumption that children under the age of 13 lack the capacity to consent to sexual activity, and thus that any sexual intercourse with a child under the age of 13 is by definition non-consensual and amounts to rape. The maximum penalties for offences against young children therefore equate to the maximum penalties for non-consensual sexual activity in part 1 of the Bill.

Children aged between 13 and 15 are considered to have only a limited capacity to consent to sexual activity and require to be protected. However, we consider it appropriate that, for children of this age, the law should continue to distinguish between apparently ‘consensual’ sexual activity and sexual activity to which the child clearly did not consent, with higher maximum penalties attaching to the latter. The Bill makes provision for this by enabling non-consensual sexual activity with older children to be charged under Part 1 of the Bill (and therefore subject to the same maximum penalties as offences against young children) while consensual sexual activity with an older child can only be charged under Part 4 of the Bill (and therefore subject to lower maximum penalties than non-consensual offences charged under Part 1 of the Bill).

The Government therefore considers that the range of penalties for the offences concerning sexual activity with older children (aged 13-15) are appropriate. The offences against older children are capable of being tried either summarily or on indictment and, depending on the circumstances, either might be appropriate. It would not, in our view, be appropriate to provide that a case involving a 16 year old engaging in consensual sexual intercourse with a 15 year old should be capable of being tried only on indictment. Equally the Bill provides sufficient flexibility to enable a non consensual assault on a 15 year old by a 16 year old to be tried on indictment with a maximum sentence of life imprisonment under Part 1 of the Bill.

**Continuity of the Law**
383. **In light of comments made by witnesses, the Committee recommends that the Scottish Government considers the continuity of the law on sexual offences and the consequences of section 41.**

**Response:** The Government notes the comments made on this matter and will consider whether there is a compelling case for retaining the common law for a period of time after the new statutory provisions have come into effect. It appear that this could be achieved without amending to the Bill, simply by commencing the provisions which repeal the common law at a later date.

**Gender Neutrality**

388. **The Equality Network raised a number of issues in relation to the repeal of section 13 of the Criminal Law (Consolidation) (Scotland) Act 1995 which is intended to reflect the replacement of offences in that section with gender neutral offences. In the view of the Equality Network, the repeal will leave some definitions remaining which will either require consequential updates or are deemed offensive to gay men.**

389. **The Committee notes that the Cabinet Secretary for Justice has agreed to consider the points raised in this regard and looks forward to his response prior to the Stage 1 debate.**

**Response:** The Government notes the comments made by the Equality Network regarding the provisions of section 13 of the Criminal Law (Consolidation) (Scotland) Act 1995. Our view is that those provisions would not require consequential amendment, as the definitions refer to acts and not to criminal offences. However, we appreciate that the Act’s terminology is considered outdated and offensive and will bring forward amendments at Stage 2 to address this.
EXTRACT FROM THE MINUTES OF PROCEEDINGS

Vol. 2, No. 54   Session 3

Meeting of the Parliament

Thursday 12 February 2009

Note: (DT) signifies a decision taken at Decision Time.

Sexual Offences (Scotland) Bill: The Cabinet Secretary for Justice (Kenny MacAskill) moved S3M-3308—That the Parliament agrees to the general principles of the Sexual Offences (Scotland) Bill.

After debate, the motion was agreed to (DT).

Sexual Offences (Scotland) Bill - Financial Resolution: The Cabinet Secretary for Justice (Kenny MacAskill) moved S3M-3417—That the Parliament, for the purposes of any Act of the Scottish Parliament resulting from the Sexual Offences (Scotland) Bill, agrees to any expenditure of a kind referred to in paragraph 3(b)(iii) of Rule 9.12 of the Parliament’s Standing Orders arising in consequence of the Act.

After debate, the motion was agreed to (DT).
Sexual Offences (Scotland) Bill: Stage 1

The Deputy Presiding Officer (Trish Godman): The next item of business is a debate on motion S3M-3308, in the name of Kenny MacAskill, on the Sexual Offences (Scotland) Bill.

14:56

The Cabinet Secretary for Justice (Kenny MacAskill): I begin by acknowledging the work of the Justice Committee in preparing the stage 1 report on the Sexual Offences (Scotland) Bill. I also thank the groups and individuals who gave oral and written evidence on the bill. The bill deals with difficult and legally complex matters, and I am sure that the whole Parliament acknowledges people’s contributions.

The Justice Committee’s stage 1 report is considered and balanced. I thank the committee for its agreement to the general principles of the bill and I appreciate its detailed and careful consideration of the issues. I wrote to Bill Aitken on 3 February to record our response to the report. I do not wish to repeat everything that was said in the letter, but I will say something about the main issues that were raised.

First, though, I want to set out the broader context of the bill. The previous Administration asked the Scottish Law Commission to review the law on rape and other sexual offences in Scotland and to make recommendations for reform. There is widespread agreement that existing law in this area is unclear and derives from a time when attitudes were very different from today. The bill presents an historic opportunity to reform a complex patchwork of common law and statute, replacing it with a clear, robust legal framework that reflects the values of our modern society.

The question of consent is absolutely central to the definition of sexual offences. Sexual activity without consent is criminal, and yet at present “consent” is not defined in law. It is important that we ensure that the law on consent is easily understood, not only by specialist lawyers but by everyone. That is why there has to be a definition. For the first time, the bill provides a statutory definition of consent as “free agreement”, which I think is a concept that can be easily understood by anyone. The bill makes it clear that consent may be withdrawn at any time and that consent to one instance of sexual activity does not automatically mean consent to any other.

The bill widens the definition of rape to include anal and oral rape. Such attacks are perceived by their victims as rape, and it is right that the law should recognise that. Currently, as the Lord
Advocate has remarked, Scotland has one of the narrowest definitions of rape in the world.

By equalising at 16 the age of consent for boys and girls, the bill also addresses a number of inconsistencies in law that protects children from sexually predatory behaviour. The bill will also enable us to prosecute anyone from Scotland who commits a sex crime under Scots law against children abroad.

I take this opportunity to thank the Scottish Law Commission for its detailed and considered report on reform of the law on rape and other sexual offences. The report formed the basis for the bill, and I would welcome the views of members on the provisions.

I will now outline the Government’s position on some of the key recommendations in the Justice Committee’s stage 1 report. The report recommends that the Government give consideration to the creation of a separate offence of “rape with an object”, which would be distinct from sexual assault and would cover situations in which the victim was subjected to a penetrative assault on his or her anus or vagina with an object or other body part. There can be no doubt that penetrative assaults involving objects can be extremely violent and may be perceived by their victims as constituting rape. In view of that, I recognise that there are strong arguments for distinguishing such behaviour from other forms of sexual assault and including it within the definition of the offence of rape.

However, there is a risk that if the definition does not match the public conception, and hence jury members’ conception, of what constitutes rape, juries may be reluctant to convict people of the offence of rape with an object. It might, therefore, be more appropriate to create a separate offence of “assault by penetration”, which is the approach that was taken in the Sexual Offences Act 2003 in England and Wales. I have made it clear, in my response to the Justice Committee on the matter, that I am keen to reach a consensus on the issue, and I have offered to discuss it with the committee before lodging amendments at stage 2 that reflect the consensus view on this important issue.

Turning to the question of sexual activity between children, I welcome the committee’s support for the retention of the age of consent at 16, which the Government considers to be essential. I am pleased that the committee also agrees that children below the age of consent who engage in sexual activity should, in the overwhelming majority of cases, be dealt with by the children’s hearings system, which is best placed to consider the welfare of the child, rather than be subject to criminal prosecution.

The committee has recommended that the offence concerning sexual intercourse between consenting teenagers be extended to include oral sex. Members will recall that the Scottish Law Commission proposed decriminalising all consensual sexual activity between 13 to 15-year-olds. However, we had concerns that that might be interpreted by young people as a lowering of the age of consent and a condoning of underage sex. We therefore amended the commission’s draft bill to ensure that consensual sexual intercourse between 13 to 15-year-olds would continue to be unlawful. We had restricted the scope of the offence to those activities that carry the greatest risk of adverse consequences, including sexually transmitted infection and unintended pregnancy but, in the light of the committee’s recommendation, we will consider whether the scope of the offence should be extended before lodging amendments at stage 2. Before reaching a conclusion on the matter, I would welcome the views of Parliament more widely.

The report states that the committee considers that there is objective justification for treating the genders differently with respect to the criminalisation of consensual underage sex. The committee gives the example of two children engaging in consensual penetrative sex that results in the girl’s becoming pregnant. It is stated that it would be highly undesirable and potentially damaging to subject the girl to a criminal prosecution and that referral to the children’s panel would be a more appropriate response. It is important to emphasise that the vast majority of children who commit criminal offences will continue to be dealt with by the children’s reporter rather than be prosecuted in the criminal courts. It is highly unlikely that the Crown would consider it to be in the public interest to prosecute a girl or boy—pregnant or otherwise—for engaging in consensual sexual activity.

However, the Government’s view is that there is a risk that criminalising the conduct only of boys who engage in such activity would violate articles 8 and 14 of the European convention on human rights. In our view, there is not sufficient objective justification for providing as a matter of law that one of the parties is guilty of an offence and the other is not when the act is consensual. We therefore take the view that the offence at section 27 should apply to both boys and girls.

Bill Butler (Glasgow Anniesland) (Lab): Is the Government absolutely certain that not having gender neutrality in the bill would violate articles 8 and 14 of the ECHR? The Government’s position is baldly stated in the cabinet secretary’s response to the report, but I would be grateful—as, I imagine, other members would be—for some detail on why the cabinet secretary reached that conclusion.
Kenny MacAskill: The best legal advice that we have received to date is that the ECHR requires us to be gender neutral. However, I am happy to give an undertaking to the member and to the Justice Committee to ensure that we provide a more fulsome explanation of the basis of that legal advice. We are driven by the legal advice on the matter, although we note that there are other good reasons.

The bill is not the complete solution to the justice system’s response to rape and other sexual offending. We must recognise that reform of the legislative framework alone, although it will bring much-needed clarity to the law, will not in itself be sufficient to address Scotland’s low conviction rate for rape. There are other strands of work to reform the law on rape and other sexual offences. The Crown Office and Procurator Fiscal Service conducted a review of how cases of rape and serious sexual offences are investigated and prosecuted, and published a report in 2006. The report made 50 recommendations for reform, which the Crown Office is now well on its way to implementing to improve the way in which rape is investigated and prosecuted.

Robert Brown (Glasgow) (LD): Does the cabinet secretary accept that the gist of that report relates to the issues of the under reporting of such offences, of people being frightened to report them, and of having enough evidence, rather than to the conviction rate in court, which appears to be very similar to that of other European countries?

Kenny MacAskill: Absolutely. We as a Government are clear that matters need to be addressed in relation to legislative changes, which is why the previous Administration asked the Scottish Law Commission to report, and why we are driving the issue forward. Other matters need to be addressed, such as the treatment of victims by the Crown and by police, and attitudes that are held in Scottish society need to be challenged. That is just one part of the way in which we are driving matters forward.

The Scottish ministers recognise that other matters—the law of evidence in particular—need to be addressed. We have therefore asked the commission to undertake a review of certain aspects of criminal procedure and evidence, including the use of the Moorov doctrine. The commission has indicated that it believes that the Moorov doctrine would be best considered in the context of a wider review of the requirement for corroboration. Its conclusions on those issues will be particularly important for the prosecution of rape and other sexual offences.

We as a Government recognise that we need to challenge attitudes. Too many people are prepared to blame the victim. It is shocking that a recent survey found that 25 per cent of people thought that a woman bore some responsibility for being raped if she wore revealing clothing, and 24 per cent thought that a woman can be at least partially responsible if she was drunk at the time of the attack. That is why we have provided funding to Rape Crisis Scotland for its campaign, “This is not an invitation to rape me”, which sets out to challenge myths about rape and negative attitudes towards women.

Challenging myths, assumptions and unacceptable attitudes can contribute to the culture change that is needed to underpin the legislative reforms that we are making as we seek to make Scotland a safer and stronger place.

I move,

That the Parliament agrees to the general principles of the Sexual Offences (Scotland) Bill.
was the definition of rape. The current legal definition in Scotland is that rape is the offence whereby a man inserts his penis into a woman’s vagina without her consent. It is true that the victims of other forms of sexual assault are protected by the laws that relate to sodomy and lewd and libidinous behaviour and, in some cases, by those that relate to assault to severe injury, but the committee was unanimous in its view that an extension of the present law was necessary. The offence of rape should be gender neutral and should include so-called gay rape, penetration of other orifices and wider assaults. In particular, we were convinced that action had to be taken on assaults involving an implement. I am pleased that the cabinet secretary has agreed with that viewpoint, because such assaults sometimes have long-lasting effects and cause horrendous injury. It is imperative that the Parliament and the Government respond.

The second issue that concerned us was that of consent. So-called stranger rape frequently involves violence—which is sometimes extreme—or the threat of violence. It is a terrible offence, but it is an easy one to prove, as consent is not an issue. The investigating and prosecuting authorities find things much more difficult when an alleged assault occurs between parties who are or have been involved in a relationship. In such cases, when the issue is whether consent was granted, it is immeasurably more difficult to prove that an offence has been committed. We have already departed—quite rightly, in my view—from the standards of corroboration that are normally required under Scots law.

It will be interesting to find out what emerges from the Scottish Law Commission’s report, but I detect no great political appetite for going any further on the rule of corroboration. However, it can be argued that there is a strong case for examining the operation of the Moorov doctrine to establish whether an extension is necessary. At the end of the day, we will always have to weigh up one person’s word against that of another. Although the Contempt of Court Act 1981 precludes us from finding out what is in the mind of a properly directed jury when it acquits, there can be no doubt that juries genuinely find the issue extremely difficult to determine. We will see what happens.

The framework in the bill offers a way forward. Many cases of sexual assault involve heavy drinking or the use of illegal substances. People frequently behave unwisely and they sometimes behave irresponsibly, but they are still entitled to the protection that the courts and the Parliament can offer them. The fact that a woman was drunk is not an excuse for her rape, nor is it a mitigating factor. Indeed, in many respects, it amounts to an aggravation of the offence.

The bill seeks to apply the doctrine—if I may use that term—of reasonable belief. The basis of all law is what is reasonable in the circumstances. One person’s reasonableness might be someone else’s unreasonableness, but the vast majority of people apply sensible considerations when it comes to human behaviour. I believe that the bill’s provisions enable that exercise to be carried out.

As the cabinet secretary said, the bill will certainly result in a change in the present culture. There will still be profound difficulties and no one should be under any illusion that the bill will be a cure-all, but it might well change the culture. It will certainly prompt people to think about their actions. In that respect, it must surely be no bad thing.

Part 4 of the bill, which relates to children and the more vulnerable members of society, to whom we have a special duty, caused us considerable anxiety. There was a unanimous and firm belief that the age of 16 should be retained as the age of consent. Despite what people might say of us, we live in the real world and recognise that children are maturing earlier, but there is no case for reducing the age of consent. That we should not do so came out loud and clear in the evidence.

We were concerned about the risks of certain aspects of sexual behaviour; in particular, we had concerns about oral sex, because it can increase the risk of sexually transmitted disease. Again, I am pleased that the cabinet secretary responded positively on that.

We recognise that regrettable and wrong things happen from time to time, but we must also recognise that children growing up will want to have relationships. In the vast majority of cases, their relationships are perfectly innocent and a normal part of growing up.

The committee considered the issue of legality and the possibility of prosecutions. Again, the unanimous view of committee members was that cases should be dealt with on a welfare basis, except the small handful of cases in which a degree of coercion could be demonstrated. We are conscious that, sometimes, the law should not interfere. Sometimes the law requires to get involved, but only in cases where there exists force that cannot be proven as rape, or where the behaviour of one of the parties has been coercive. We certainly did not want a 15-year-old pregnant girl, for example, to be prosecuted. That would be totally unacceptable.

The bill will help. It will introduce a degree of clarity. Quite a number of issues still require to be clarified—the cabinet secretary recognised that in his correspondence—but there is a sufficiency in the bill for the committee to be able to recommend that it should progress.
Again, I record my appreciation of my colleagues on the Justice Committee for dealing with such a delicate piece of work with subtlety and concern. That is a credit to them.

15:17

Paul Martin (Glasgow Springburn) (Lab): As we conclude our consideration of the bill at stage 1, it would, on reflection, be fair to say that all the parties that are represented on the Justice Committee have made a genuine attempt to ensure that we meet the many challenges that face modern society, particularly those relating to sexual offences. In the short time that is available to me, I will touch on a few of the key issues.

Part 4 of the bill is on children. The policy memorandum states that sections 14 to 19 aim to protect young people. I welcome that. I have no doubt that all members support the public’s view that we must ensure that we protect young children at every possible opportunity. Many provisions in part 4 of the bill will do that. We welcome the Government’s approach in that respect and its commitment to progressing the issues involved.

We also welcome the cabinet secretary’s statement on the provisions in the bill that send out a message to young people that it will be possible to prosecute those aged 13 to 15 who engage in sexual activity. In addition, I welcome his statement that that will happen in a minority of cases and that every opportunity will be sought to use services that are available through the children’s hearings system. However, we should ensure that young people are aware that engaging in underage sex presents many long-term health problems and we should seek to prevent those problems at every possible opportunity. We also need to make it clear to young people that we will support them at every possible opportunity.

Margo MacDonald (Lothians) (Ind): A short question: how does the member propose to do that?

Paul Martin: Margo MacDonald makes a good point. Sometimes we in this chamber have to show humility and say that we are not very good at consulting young people and I am sure that other committee members agree that we need to be more effective at communicating with young people. I assure Margo MacDonald that I will come back to that point later in my speech.

If the Government genuinely wants to make progress, it must ensure that it takes on board some of the views that were raised by those who gave evidence to the committee at stage 1. The Government has got it wrong in its justification for treating oral sex differently from penetrative sex and it should reconsider its position. I understand that the minister will consider that point and I look forward to having constructive discussions.

In response to Margo MacDonald’s question, I refer her to one of the committee’s recommendations, which was the need for meaningful and age-appropriate materials to be provided to young people in order to support them during the difficult adolescent period of their lives and to give them every opportunity to make positive lifestyle choices. I hope that in his summing up, the minister will give us some assurances that he will consider how we can communicate more effectively with young people and ensure that they are given such opportunities.

Section 35 creates the offence of the “Sexual abuse of trust of a mentally disordered person”.

We on the Labour benches welcome that provision. We all recognise that those who have mental health conditions can be extremely vulnerable. We should take steps to ensure that individuals who are in a position of trust are not provided with an opportunity to abuse. The Lord Advocate offered a powerful statement in her evidence to the committee:

“The exploitation of mentally disordered people’s vulnerability must be dealt with in the most draconian way and should include a deterrence element.”—[Official Report, Justice Committee, 25 November 2008; c 1438.]

The Lord Advocate’s commitment to dealing with the issue is to be welcomed and we should ensure that her point is developed in the enforcement of the legislation after the bill is passed at stage 3.

The committee considered carefully the subject of sexual assault by penetration. We received authoritative evidence from many organisations that deal with victims throughout the country, setting out the trauma endured by those who have been assaulted. The committee reached the unanimous view that there should be a separate offence of rape with an object, or with another part of the body, limited to vaginal or anal penetration. What is key is that the committee recommended unanimously that the offence should attract the same penalties as rape. We acknowledge that such a provision exists in England and Wales and we on the Labour benches call on the Scottish Government to take that recommendation forward, ensuring that we learn lessons from the challenges that England and Wales have faced in that respect.

I refer the chamber to schedule 1 to the bill, which sets out the penalties for offences. As I read schedule 1, it sets out the frightening anomaly that the rape of a child could result in a fine. I am convinced that no member in the chamber, or any sensible person in society, wants to envisage a situation in which an offender was fined for such a despicable act. The cabinet secretary has advised...
us, in his response to the committee’s stage 1 report, that he will ensure that the possibility of imposing a fine as a sole penalty for rape will be dealt with at stage 2 and that under no circumstances will the anomaly apply. I welcome that, and the mature and constructive discussion that has taken place about the matter.

I repeat that we agree with the bill’s general principles, subject to the committee’s constructive points being dealt with positively by the Scottish Government.

15:25

John Lamont (Roxburgh and Berwickshire) (Con): The bill will update the law on rape and other sexual offences. The Scottish Conservatives agree with the general principles of the bill and will vote for the motion.

The bill deals with an extremely complex area of the law. I acknowledge the Justice Committee’s hard work on the bill. I am sure that the debate will be as well informed and constructive as was our previous debate on the subject.

In the short time that is available for my speech, I will touch on several aspects of the bill. First, there is no doubt that reform of the law of rape is long overdue—indeed, academics and practitioners have criticised the Scots law on rape for many years. The non-gendered approach that will be taken towards rape is particularly to be welcomed. It is also important to modernise the law of rape. The old common law related the offence of rape to the possibility of conception. Changing the law to take a gender-neutral approach and to include other forms of sexual penetration is entirely appropriate. I welcome the cabinet secretary’s comments on that at the start of the debate.

The bill will create a new definition of consent, which has created many difficulties in the past—the McKearney case in 2004 demonstrated some of those. The bill provides a general definition of consent as free agreement and supplements that with a non-exhaustive list of factual circumstances in which free agreement is not present.

In the debate on the Scottish Law Commission’s report on rape and other sexual offences, I made the point that introducing a statutory definition of consent would not necessarily solve all the concerns and problems with regard to rape cases. For example, questions about whether the victim gave his or her true or valid consent will remain, because the line between true consent and mere submission is not always easy to draw. It has been suggested that it might be preferable to avoid using the word “consent” altogether and to focus instead on whether the accused had sexual intercourse with a person who did not have the freedom or capacity to choose in the circumstances.

The Justice Committee resisted the pressure to lower the age of consent from 16 and we support its approach. That view is supported by church groups and I am sure that members have received a number of representations along those lines. We must recognise that children are maturing earlier, but there is certainly no case for permitting full penetrative sex between people who are 15 or younger.

It is right that the law should state clearly that sex below the age of consent is wrong and that those who do not abide by the law face legal consequences. We must continue to support the use of the children’s hearings system to address offending behaviour by children in most cases. The Scottish Government’s decision to retain in the bill the option of criminal prosecution for consensual penetrative sex between older children, at the Lord Advocate’s discretion, is appropriate. We as legislators must ensure that nothing is done to water down that important principle or give the impression that the age of consent has been lowered or can be ignored.

The Scottish Government is right to seek to amend the bill’s provisions in relation to oral sex between older children who are aged between 13 and 15, to ensure that that sexual act is not legalised for that age group. The risk of sexually transmitted diseases must be borne in mind. We therefore welcome the Scottish Government’s moves to address the issue.

I will briefly consider the law of evidence. In the circumstances of a sexual offence or rape, it is inevitable that only two people might have been present—the complainant and the accused. Scots law has long recognised that difficulty and has departed from the standard of corroboration that is normal in serious criminal cases. That is entirely appropriate, but we do not support any change in the law of evidence to specify that corroboration is not required. It is necessary for an accused person to have a defence.

Hugh O'Donnell (Central Scotland) (LD): Given developments in forensic science, does the member agree that forensic science might at some point reach the stage at which it, rather than a witness, could provide the necessary corroboration?

John Lamont: I am not sure that that addresses the point that I was making. The accused person is entitled to a defence. We must bear it in mind that sexual assault rightly attracts a high-tariff sentence, so it is only fair that the principle of the presumption of innocence should stand, as should the requirement on the Crown to prove the offence beyond reasonable doubt. I am not sure that
anything further can be done to limit that important principle.

We welcome the bill, which goes a long way in clarifying the law. However, we must also be conscious that more must be done to tackle attitudes to women and men who are raped.

15:30

Robert Brown (Glasgow) (LD): I adopt most of the comments that Bill Aitken made, as convener of the Justice Committee, about the difficulties that the committee found with the bill and the Government's approach.

The bill touches on many issues that lie at the heart of human relations. I refer to the protection of children; the changes in sexual experience and attitudes in society, particularly among young people; the high rates of teenage pregnancy and sexually transmitted diseases; the relationships between men and women, and, for that matter, relationships between people of the same sex; the exercise of power and control in intimate relationships; the legacy of sexual abuse in childhood; the deterrence, prevention and punishment of rape and serious sexual assaults; and the concept of sexual autonomy.

The issues that the Justice Committee considered are delicate and difficult. We have brought them to the chamber today by way of our stage 1 report. Not least of our challenges was the fact that sex, which is central to human relations and the continuance of our race, is an entirely legal activity when carried out between consenting adults but an entirely illegal and highly reprehensible act when forced on an unwilling adult victim or a child. When children and young people experiment with sex, we enter into a murky area of huge sensitivity and complexity, great mystery and greater or lesser ignorance.

I welcome the cabinet secretary's acceptance that modern, appropriate and gender-neutral language should be used in the statute. I also welcome his acceptance of the need to get rid of outmoded offences in related legislation. I pressed him on that during our stage 1 evidence taking. His acceptance shows an important recognition of those points.

I will devote the majority of my opening speech to part 4 of the bill, which relates to children. The committee was rightly critical of the SNP Government for not carrying out any exercise to obtain the input of young people. Given that around a third of young people have sexual relations under the age of 16, and given the high rates of teenage pregnancy and sexually transmitted diseases, it is absolutely central that we have an insight into how children and young people view these matters. We need to find out what encourages them to delay or initiate their first sexual experience, what influences them in seeking or failing to seek appropriate sexual health advice, and whether the age of consent influences their attitudes or helps them to resist peer pressure.

Scotland's Commissioner for Children and Young People, and many other experienced people, said that the Government's position on the matter was unacceptable. Frankly, I was surprised and disappointed by the attitude that the cabinet secretary adopted when he was asked about the subject in committee. There can be no question but that, in failing to look for the views of young people, the SNP Government is in breach of the United Nations Convention on the Rights of the Child. I note that Government and committees have taken young people's views on many occasions, such as during the passage of the Additional Support for Learning (Scotland) Act 2004.

The committee's recommendations on the bill are proportionate and compelling. We said that the Government should implement an age-appropriate information and publicity campaign once it had consulted young people appropriately. The Government's response is not adequate: there is to be a campaign, but there is no word that it will be informed by consultation with young people. The Government is getting very experienced at U-turns and, frankly, in this instance, we would welcome one. I hope that I am not being unfair to the cabinet secretary in describing his position on the matter as mystifying and even truculent. He should think again.

Let me re-emphasise the point. Children in Scotland told the committee that "the guidance and practice" should be informed by what will actually work with children and young people, because we will know what they are thinking, instead of guessing what they might be thinking or how they might interpret our messages.”—[Official Report, Justice Committee, 4 November 2008; c 1265.]

The cabinet secretary and his officials have left themselves guessing on the matter. That is unacceptable in developing the sexual health campaign that must accompany the bill.

There are many questions that the Government should have put to children and young people. Who are the best points of contact? Should contacts be school nurses, counsellors or teachers, or should they be people who are unconnected with school? What is the role of parents? What are young people's dilemmas? In whom do they confide? Is there a role for peer-group discussion? What sort of support and information is best? How are young people particularly those in the most vulnerable groups, encouraged—rather than deterred—to seek help
and advice? How do they view the idea of a legal age of consent?

The Justice Committee is strongly of the view that the age of consent for sexual intercourse should remain 16. I agree with that. Sixteen as the age of consent is a well-known, widely supported and long-established restriction. It is an important reference point that most people feel helps young people to resist peer pressure. There are also good social, developmental and health reasons for its retention. As Dr Jonathan Sher from Children in Scotland said:

“No one argues that underage sexual intercourse is a good thing—it is not.”—[Official Report, Justice Committee, 4 November 2008, c 1264.]

In reality, however, it appears that a substantial proportion of people have sexual intercourse before the age of 16. Many more, of course, kiss, cuddle, touch and experiment, and most of that activity is entirely normal, consensual and legal. Young people have rights to privacy as well, and we emphatically do not want police investigations into much of that activity. That is why the committee strongly supported taking a welfare-based approach to addressing underage sexual activity where that is necessary to safeguard young people’s health and wellbeing.

Sex between an adult and a minor under 16 should, of course, remain illegal and should be prosecuted, subject to limited defences. Many people argue that all cases involving sexual relations between young people of 13, 14 or 15 should be dealt with by the children’s hearings system, and I have a lot of sympathy with that, as did other members of the committee. However, the committee decided that such behaviour should be examined as part of the wider examination of the age of criminal responsibility. Of course, a ground for reference to the children’s hearings system will be triggered anyway if there are thought to be welfare concerns.

A key principle of the bill is the theme of gender equality, which of course I support. However, the consequence is that the participation of girls in sexual intercourse, which is currently not a criminal activity, is made so under the bill’s proposals. I am not wildly keen on a proposal that criminalises people for the sake of a general proposition. Like the Commissioner for Children and Young People, I do not accept the Government’s position that that concern can be struck down because there is ample scope for distinguishing between the consequences for boys and the consequences for girls, not least in the prospect of an unwanted teenage pregnancy. It is true that that does not apply to same-sex relationships or to oral sex, but it still seems to me to be a questionable logic that unnecessarily criminalises young girls as a by-blown of such arguments.

The bill is important, but there are important caveats, which I hope the minister will consider further. The committee will continue to debate many issues with the Government as we move to stage 2. Nevertheless, the bill is important, necessary and non-partisan, and I urge the Parliament to support it at stage 1.

15:37

Stuart McMillan (West of Scotland) (SNP): First, I pay tribute to the Justice Committee’s clerks and adviser for all their hard work and efforts during our stage 1 consideration of the bill. I concur with the convener’s comments about the way in which the committee dealt with the sensitive issues that the bill throws up for everyone. I am sure that the committee and all members will continue to act accordingly as the bill proceeds in the weeks and months ahead.

As others have said, the bill was originated by the previous Labour and Lib Dem Scottish Executive. I pay tribute to it for doing so. I am sure that colleagues know that I do not usually praise the previous Executive. However, I give praise where it is due: its instruction to the Scottish Law Commission to examine the law relating to rape and other sexual offences was certainly a worthwhile action. When the bill is passed, as I hope it will be, Scotland will possess a piece of legislation that provides greater protection for all of society.

I congratulate the Scottish Government on continuing with the process that was set in motion by the previous Executive. I am sure that the Cabinet Secretary for Justice will be hoping that the end result of the bill will profit the nation.

I will not be able to discuss all the issues that I think are important within the time that has been allotted to me, but I will touch on a few of them. First, I have to say that listening to and reading the evidence has taken me on a personal journey. Previously, I had a personal view on one issue in particular, but our stage 1 scrutiny of the bill altered my view. I believed that anyone under 16 who participates in sexual activity should be charged automatically and that legal proceedings should follow. Whether they became pregnant or not was irrelevant. As 16 was and will remain the legal age of consent, why should those under-16s who break the law be protected? I was aware that the children’s hearings system deals with the vast majority of those cases and that the Lord Advocate can prosecute at her discretion, if appropriate. My opinion was that there were not enough prosecutions. Thankfully, my view has changed, not because I have become more liberal
or less pious, but because the evidence that was presented was extremely strong.

Paragraph 273 of the Justice Committee’s report supports the use of the children’s hearings system for the vast majority of cases, with the Lord Advocate retaining her discretion in that regard. I think that that recommendation will benefit society.

The last thing that I want to see is a number of people in our society becoming saddled with a criminal record when a more appropriate way of dealing with them would be beneficial. I also came to the conclusion that if a girl aged under 16 becomes pregnant, the last thing that she needs is to be marched into a courtroom, with all the pressures that that involves. She will need some other mechanism to assist her and the baby.

Another aspect of the bill that I welcome—as did the committee—relates to gender neutrality. Paragraph 279 of the committee report was quite clear in its support for compliance with the ECHR, while noting the important evidence from the Lord Advocate that a different path from the one in the bill could be taken if that was justified.

I am sure that committee members will debate further the Scottish Government’s response to paragraphs 280 and 281 as the bill proceeds—Bill Butler touched on that earlier. Having read the Government’s response, I am keen to hear the cabinet secretary address those paragraphs today. I was intrigued by the written response that he provided, but I stand by the recommendation

“that the Scottish Government gives further consideration to the provisions of section 27 of the Bill.”

Widening the definition of rape is an important aspect of the bill. The committee recommended that there should be a separate offence of rape with an object. I welcome the cabinet secretary’s response to the recommendation and his intention to have further discussion with the committee and to lodge amendments at stage 2. The important point for me is that an object could cause more damage to a person than a body part could. I accept that a sexual offence would have been committed, but, given the even greater physical damage, as well as the psychological damage, that would be done, I find it difficult not to believe that the strongest possible label should be given to those who perpetrate such acts.

I want to introduce a personal thought into the debate. Life imprisonment seems to be a sentence of approximately 15 years, whether for a rape or for some other act. I would like that tariff to be increased for those convicted of rape. Violating a person’s body must be the most despicable thing that one person can do to another and, as such, it deserves to be punished by means of a long prison sentence.

Having sat through all the oral evidence sessions and read the paperwork on the bill, I am in no doubt that the bill should proceed through the Parliament. I am also in no doubt about the difficulties that all members in the chamber will have to deal with concerning some of the issues that the bill raises.

I remind myself of a few key points when I think about the bill. First, I want justice to be done, and to be seen to be done, for victims of rape and other sexual offences. Secondly, I do not want to criminalise every young person who starts to experiment as they go through the growing-up process, but I do not want them to think that it is okay to indulge in underage sexual activities. Thirdly, I want young people to have sex education, via schools or health professionals. There has to be an understanding of the consequences of sexual activity: child parents, for example, sexually transmitted infections and law breaking. Fourthly, with rights come responsibilities. If adults cannot act responsibly, their right to liberty should be removed. Therefore, are the proposed sentences really high enough? Given that research from Children 1st shows that around 30 per cent of Scots have sex before the age of 16, I have to query why society is failing in its responsibilities in that regard. I agree with the Catholic Parliamentary Office that

“the sexualisation of young people in our society is a problem”.

I am sure that the bill will go some way towards achieving a better and safer Scotland. For that reason, I support it whole-heartedly.

15:44

Cathie Craigie (Cumbernauld and Kilsyth) (Lab): I thank the clerks to the Justice Committee and all the organisations that engaged with the committee as we considered the bill. Our report truly reflects the evidence that we received, and our conclusions and recommendations were agreed unanimously.

I am happy to support the general principles of the bill and I agree with the cabinet secretary about the real need to change attitudes in Scotland to rape and to women in general. I welcome his acknowledgement of the need to strengthen the law and his commitment to a collaborative and consensual approach to the sensitive issues that the bill raises.

However, I question the Government’s response to a number of areas that were raised in the committee’s report. Scotland needs a clear definition of rape, in the hope that a more realistic prosecution rate can be achieved by ensuring that sound cases are put before juries. I am constrained by time in the debate, so in the few
minutes that I have I will highlight areas about which I have outstanding concerns.

During its stage 1 consideration of the bill, the committee heard evidence about rape with an object—many members have mentioned that. It is a difficult area, but I strongly believe that a separate offence of rape with an object should be created. The bill sets out the offences of rape, which is penile penetration, and sexual assault, which includes non-consensual penetration by an object. I think that in the minds of the general public and jurors sexual assault often seems a less severe offence, which merits a less severe punishment than rape does. However, an individual who is raped with an object suffers just as much mentally and can sometimes suffer more horrendous injuries. Rape with an object is a serious crime. I welcome the cabinet secretary’s commitment to consider the matter further with the committee and I hope that the Government will lodge an amendment at stage 2 on the issue. If penetrative assault with an object is rape, we should legislate in those terms.

The committee heard vivid evidence from Louise Johnson, from Scottish Women’s Aid. She told us how the women with whom she deals want the law to differentiate between sexual assault and rape with an object. She said of penile penetration and penetration with an object:

“When someone’s personal integrity has been transgressed and abused by someone else in either of those ways, the trauma is equal.”—[Official Report, Justice Committee, 28 October 2008; c 1222.]

I ask the cabinet secretary to accept that evidence.

I am concerned that the Government’s response does not address concerns that were expressed to the committee by organisations that provide sexual health information to people who have a range of disabilities. People who work with learners who use tactile communication deserve clarification on the bill and we are duty-bound to ensure that they receive clarification. Further consideration should be given to the needs of people who have learning difficulties. Threats to harm a pet or deprive someone of a treat might seem trivial to some of us but are real and serious to some individuals. I do not accept the Government’s response on the matter and I ask the cabinet secretary to think again.

Part 4 deals with children and young people. I remain convinced that sexual activity by young people who are under 16 is of concern; I do not think that sexual activity by 13 to 16-year-olds is appropriate. From the evidence that Children 1st provided, we know that about 30 per cent of Scots have sex before they are 16. That means that sex in that age group is not the norm, although it is common. Children 1st said that its research shows that some young people’s early sexual experiences are problematic and place them at risk. That is understandable and is borne out by the vast majority of evidence.

I have given my views. It is unfortunate that the committee was not able to hear young people’s views on how this major bill will affect their lives, and it is disgraceful that young people were not consulted on the proposals. The views that the committee considered came mainly from adults, who do not always know best. An information and publicity campaign would be welcome, but I doubt that any other group in society would be consulted only after a bill on important matters that affected them had been enacted.

Scotland’s Commissioner for Children and Young People, whose role is to promote and safeguard the rights of children and young people living in Scotland, has serious concerns about the effects of the proposed legislation on young people. Her views must be taken seriously by the cabinet secretary, and I refer him and his officials to the submission that the commissioner made to members today.

How am I for time, Presiding Officer?

The Deputy Presiding Officer (Alasdair Morgan): You have another minute.

Cathie Craigie: Thank you.

The Justice Committee asked the cabinet secretary to give further consideration to the provisions in section 27. I do not believe that it is in the interests of young people who are under the age of 16 to engage in sexual activity, given the many implications for their future relationships and health. I am concerned about the omission of oral sex from section 27, given the often serious health risks.

On the criminalisation of young girls, I do not think that any of us here would wish to criminalise young people, and I strongly believe that we should be ensuring that welfare interventions, rather than criminal interventions, take place. I ask the cabinet secretary to reconsider the point about young girls and the way in which the issue of gender neutrality has been treated. There are differing views, and we could put up a strong argument for retaining the law as it is if we wanted to.

There is a difference. Young men do not become pregnant; young men do not have responsibility for another human for the rest of their lives; and young men do not get ovarian cancers and all the dangers that they bring. There is an argument for dealing with the genders differently.

The Deputy Presiding Officer: That minute is now up.
Cathie Craigie: Thank you for your indulgence, Presiding Officer.

15:51

Nigel Don (North East Scotland) (SNP): I thank the Scottish Law Commission for its original piece of work. We have talked about a great number of the details, and the bill largely sticks with the commission’s original text and most of its meaning. Although we disagree on one major point, on the criminalisation of consensual sex between older children, I am grateful to the commission for giving us a framework within which to work. It has been acknowledged that the subject is not easy to discuss, and a good framework is a very good place to start from.

I note that the bill is largely a consolidating one. Paragraph 9 of the policy memorandum points out that the bill will, largely,

“improve the clarity and consistency of the law.”

Specifically, the bill includes

“the definition of consent as ‘free agreement’”

and makes provisions about “honest belief in consent”. However, paragraph 10 of the policy memorandum says:

“despite such improvements, reform of the substantive law on rape and other sexual offences will not, on its own, be sufficient to improve Scotland’s low conviction rate for rape. That is why work is underway on a number of other fronts”.

It is important to recognise that that other work must continue. The Scottish Law Commission is examining the law of evidence, and of character evidence in particular, as well as the Moorov rule. I encourage the Scottish Law Commission to proceed with its work as fast as is reasonably possible. I am not suggesting that it is slow, but the faster we can amend the law and, in particular, the faster we can get the Moorov rule back before the courts as a working hypothesis, the better for those rare occasions when that consideration is really important, which tend to be very serious cases.

Like other members, I wish to address issues around older children. It is in that area where we seem to have disagreed with the Scottish Law Commission’s report, for one simple reason: we have inherited a law that states that boys who have underage sex are committing a criminal offence. Had we not started from that position, I am not sure that we would have finished in the present one, but that is where we started. We have not wanted to decriminalise such activity simply because that would have sent entirely the wrong message. I am not sure whether, if we started from a position where that activity was not criminal, we would want to criminalise it—that, too, would probably send the wrong message. We need to be very careful about where we are coming from when we consider what it is that we are suggesting.

We heard evidence from the British Medical Association and from Barnardo’s and other organisations that represent children that, one way or another—I take Robert Brown’s point on this—we should decriminalise. Those organisations should understand that uppermost in the minds of Justice Committee members was the point that I just made about where we started from.

The committee also made a recommendation on oral sex, and I note that the cabinet secretary’s response is that he will consider the issue, which I understand and respect. I add my personal voice to the suggestion that he should consider it positively. Some medical evidence supports the recommendation and, if we are making a law that is essentially a backdrop against which our youngsters will conduct themselves and which we know will not normally be pursued rigorously through the courts, it is important that we send the right, complete message. Putting oral sex back into that backdrop seems to be part of a consistent message about what is wise and what is not.

There has been some discussion of section 39 and the defences for people involved counselling. I know that some are concerned that section 39 might provide a defence for those who would incite underage sex. However, it is clear from the text of the bill that that is not the case. That might be one of the good reasons for retaining the criminal offence of underage sex. In the by-going, it means that inciting underage sex is a crime, and we, as a Parliament, would want to support that. There is far too much pressure on our youngsters to become sexually active. I think that people in the media take a cavalier attitude. If they reflected on the fact that incitement is a criminal offence, will remain a criminal offence and will be a gender-neutral offence, they might also reflect on what they sometimes suggest in the messages that they give our children.

Robert Brown: I am curious to know whether Nigel Don has any information about the extent to which the charge of incitement has been used by the Scottish courts in recent years.

Nigel Don: I have no evidence at all, and I suspect that there might have been no such charges. However, extending the law and making it gender neutral makes Parliament’s thinking clearer and clarifies the law of the land, and is therefore what people in the media should reflect. Perhaps that is part of the message.

We should also recognise that the law is not going to change what our youngsters do: we all know that, and we might just as well say so. If we
are to change youngsters’ attitudes to the risks that are inherent in early sexual activity, education is the key. I am quite clear that, in itself, education does not change behaviours, but educating young people is essential if we are to make any progress at all.

I leave members with the thought that we need to change the law. I could have discussed many other things, but we do not have time. Educating youngsters appropriately is the key; without that, we will achieve very little by changing the law.

The Deputy Presiding Officer: We now move to winding-up speeches, for which I can give members about a minute more than they might have been expecting. I call Robert Brown, who has seven minutes.

15:58

Robert Brown: I am somewhat surprised to be called so soon, Presiding Officer.

The Deputy Presiding Officer: All your Christmases have come at once.

Robert Brown: Indeed.

In my opening speech, I said that the bill is delicate and difficult, and the debate has been handled sensibly by those who have taken part. In opening, I focused on the issues that affect young people and, in closing, I will look at more general matters and respond to one or two points that have been made by colleagues. I also want to make a couple of points about children that I did not have time to make earlier.

The particular issue that I want to put to the cabinet secretary concerns children ending up on the sex offenders register, although he has responded to that point to a degree. The Government probably needs to go further and hold an expert review and public consultation. It is quite a complicated area, and I do not pretend to understand all the implications. I suspect that that is the case with my committee colleagues as well. I accept that there are rare cases involving minors where registration would be appropriate, but I am not entirely satisfied that the brief review to which the letter from the Government referred, which I assume has been carried out in the few weeks since the stage 1 report was published, is adequate.

I have a comment about some marginal matters. The committee expressed concern that kissing and other such behaviour should not be the subject of potential interference from the police. It is worth making the point, which the bill—rightly or wrongly—emphasises, that the Lord Advocate and procurators fiscal are the gateways to prosecution. That is right, as we have an independent prosecution system. The prosecutor has a broad public responsibility—I have some experience of that, as I was a procurator fiscal depute some years ago—which has normally been exercised sensibly. It is probably the principal barrier to trivial or unnecessary prosecution in such cases, which was a concern to the committee.

The Lord Advocate put it well when she said:

“We imbue … the Lord Advocate and her representatives … with the discretion to interpret the public interest”
in making decisions on prosecution in the light of broader social views. That is a more broadly applicable point. She gave a good example when she said:

“A case involving the scenario of a 12-year-old touching another 12-year-old would never see the light of day in the criminal courts.”—[Official Report, Justice Committee, 25 November 2008; c 1432, 1427.]

She is right to illustrate that point.

The bill began with a report by the Scottish Law Commission. Nigel Don referred to the good work that the commission did, which has largely survived in the bill. It was asked by the Scottish Executive of the time to examine the law on rape and other sexual offences and the evidential requirements for those offences. A major part of the motivation was concern about the low conviction rates for sexual offences but, in the event, the commission did not really make recommendations on the evidential matters on the basis that they should be considered as part of a review of the general law of evidence, as a number of members have mentioned.

However, I emphasise the point that I made in my intervention on the cabinet secretary, which was that the conviction rate for rape and other similar offences in Scotland is, as the Lord Advocate confirmed, pretty similar to that in other parts of the world. Indeed, in recent years, the conviction rate for rape cases that went to court has varied from 45 to 67 per cent. The issue is more to do with underreporting, having insufficient evidence to pursue cases to court in the first place and reluctance on the part of some complainers to subject themselves to the embarrassing and difficult procedures that are involved in providing the evidence on such cases. As the Lord Advocate mentioned in her evidence, the offence that is known as date rape presents particular challenges, possibly within the context of an otherwise consensual sexual relationship.

A number of members talked about adding a new offence of rape with an object. I support that. Although I accept some of the caveats about whether juries will convict on it, I also support the use of the word “rape” because juries that are properly instructed by the judge on such matters will understand exactly what is being talked about and will understand that “rape” implies the
seriousness of the offence as well as the generic description of it. That is an important aspect on which I concur with the committee’s view.

There was a lot of discussion about what constituted consent, particularly when the victim—usually a woman—is asleep, unconscious or heavily intoxicated and, therefore, cannot give immediate, active consent. Such situations have been crimes in Scots law since at least the middle of the 19th century, but defining them in statute is quite challenging. The committee asked the Government to reconsider the concept of prior consent, which seemed to be highly artificial. However, we must bear it in mind that we are dealing with a criminal charge that is not only serious but, in the case of rape, so serious that it is prosecuted in the High Court.

I do not like the concept of prior consent, but I am not prepared to say that sex with a person who is unconscious through drink is necessarily a crime in every circumstance whether committed by a stranger, partner or spouse, albeit that the victim may regard it as such. The issue is ultimately consent or the lack of it. As Professor Gerry Maher put it:

“Scots law should spell out that having sex with a person who is unconscious or asleep is rape or sexual assault, except in one defined circumstance—when they have consented to having sex in that state.”—[Official Report, Justice Committee, 18 November 2008; c 1365.]

However, not even he pinned down the matter entirely. Under our legal system, the jury—with, one hopes, a robust dose of common sense—will ultimately decide whether there was any express, implied or reasonably assumed consent in such difficult situations and will do so using its joint knowledge of life and the human condition.

Cathie Craigie was right to mention people who advise or counsel those with communication difficulties and the problems that tactile communication can present. That bears further exploration. There does not necessarily need to be an amendment to the bill on that, although I do not rule it out, but we must consider the matter carefully to ensure that we do not accidentally criminalise something that should not be criminalised.

Nigel Don, in his usual esoteric fashion, gave us a number of interesting thoughts about where we were coming from on the age of consent and the effect of the law on that. Neither I nor, I think, most members of the committee entirely accept the proposition that what the law says will not have an effect on what youngsters do. Education, however, certainly is key. Advice and information and the question whether people are deterred from doing something by its criminality are important issues with which we must deal.

Since 1999, I have learned that struggling with definitions and passing well-honed legislation is important, but what goes with the bill and the cultural changes that the bill spearheads are even more important. The bill marks much cultural change in relation to attitudes towards same-sex relationships, respect for sexual autonomy, the attitudes and actions of young people and the support given to victims and complainers. We still have a bit of work to do on the bill and the Government must reflect on what has been said on it. However, my plea to ministers is that they seek effective input, particularly from young people, to help them in their important task.

16:05
Margaret Mitchell (Central Scotland) (Con):
Like everyone who has spoken in the debate, I very much welcome the introduction of the bill, particularly the following key aspects. Part 2 contains the definition of consent as “free agreement”, which brings a clarity to the law that is absent at present under common law, despite the fact that the absence of consent is a core element of the actus reus and mens rea of rape. Under current common law, rape involves penile penetration of a woman’s vagina without consent, so it is a huge improvement that the bill extends that to include other forms of penile penetration, bringing it in line with legislation in England and Wales. The cabinet secretary’s announcement that provision will be made at stages 2 and 3 to go further and include penetration with an object in the list of forms of penetration that the bill covers is also welcome. Cathie Craigie made a particularly powerful contribution on why that should be included as rape. The introduction of rape as a sexual offence that is no longer gender specific is long overdue and rectifies the injustice that, under common law, rape is recognised as a criminal offence only when it involves male sexual intercourse with a female without consent.

Parts 4 and 5 have provisions to deal with protective offences that are, sadly, very much evident in today’s society, as a number of speakers pointed out. I am therefore pleased to see the protection that the bill will afford the vulnerable through the introduction of new protective offences that will criminalise sexual activity with someone whose capacity to consent to sexual activity is either entirely absent or not fully formed because of their age or a medical disorder. With Paul Martin and Robert Brown, I particularly welcome the introduction of the offence of sexual abuse of trust in section 31, which seeks to address that heinous betrayal, abuse and manipulation by providing that it is an offence for anyone over 18 to engage intentionally in sexual activity with someone under 18 in
respect of whom the older person is in a position of trust.

Section 32 sets out five conditions, any of which satisfies the definition of being in a position of trust. It is to be hoped that that will give more protection to children and young people and those with mental disorders who are institutionalised or vulnerable through a family relationship. I also welcome the provision that gives Scottish ministers the power to make an order under the negative resolution procedure to specify, as they materialise, other conditions that constitute a position of trust, especially in view of the fact that the submission by the Association of Chief Police Officers in Scotland highlighted that young people in accommodation provided by a local authority who are at least 18 but not yet 21 would not be covered. That group of young people is potentially vulnerable, so I hope that the ACPOS submission will be given further consideration.

Although trafficking is not covered in the bill, section 10 provides, as one of the circumstances in which conduct takes place without free consent, that there is no consent if the only expression or indication of the victim’s consent to sexual activity is from someone other than the victim. That is precisely the situation in which many trafficked women and, indeed, children find themselves.

Part 4 contains provisions that would lower the age of consent for oral sex. As several members have pointed out, that is the issue that has generated most controversy—and rightly so. Although it is true that young people are maturing earlier, there can be no case for permitting sex involving persons of 15 years or less. The Scottish Conservatives are very supportive of the committee’s stance on that issue.

In that context, I read with interest the BMA’s arguments in favour of decriminalising such activity in light of concerns that older children might otherwise be reluctant to come forward with any sexual health problems. I understand the well-intentioned reasoning behind that position, but I believe that lowering the age of consent would have the opposite effect by giving rise to a potentially far greater number of sexual health problems among young persons. With Nigel Don, I believe that education has an important role to play in that.

Finally, the prosecution of rape and of other serious offences has traditionally been dogged by myths and prejudices, which often surface in the courtroom during the giving of evidence and invariably involve the victim’s character. I sincerely hope that the statutory definition of consent as “free agreement”—together with the provision covering reasonable belief and coupled with the reasonable person test that is to be applied—will help to correct those prejudices. However, as Bill Aitken and John Lamont emphasised, any such correction must not be at the expense of an attempt to water down the presumption of innocence or the requirement for corroboration, given that the accused may be facing a high-tariff sentence for what are, without doubt, some of the most serious crimes in Scots law.

With those comments, I believe that the bill strikes the right balance. The Scottish Conservatives have much pleasure in supporting the bill at stage 1.

16:12

Richard Baker (North East Scotland) (Lab): In ensuring that Scotland’s laws on sexual offences are reformed, the Scottish Government is moving forward with broad support. We are happy to endorse the general principles of the bill.

As Stuart McMillan said, the previous Scottish Executive asked the Scottish Law Commission to examine the law relating to rape and other sexual offences and the evidential requirements for proving such offences. I welcome the fact that the commission’s recommendations have been taken forward by the Scottish Government in the bill to ensure that our sexual offence laws provide clarity and reflect the circumstances of Scotland today. I echo the comments of others about the good work that the Scottish Law Commission has done, which informs the bill that is before us.

As someone who was not a member of the Justice Committee but who was an observer of its proceedings, I congratulate the convener, deputy convener and members of the committee on their thorough scrutiny of the bill. The bill process has benefited immensely from the way in which the committee ensured that so many who have expertise on the issues played a full role in giving evidence at stage 1. That was Parliament at its best in developing legislation. Clearly, that work is reflected in an informed stage 1 report that provides constructive and sensible proposals. I believe that the Scottish Government’s response to the committee’s report is indicative of the constructive dialogue on the bill that ministers have had with the committee, which has been reflected in this afternoon’s debate.

The debate has also shown that the bill deals with difficult issues relating to what can be a challenging relationship between the law and sexual activity. The need to foresee as wide a range as possible of scenarios and cases seems to me to be at the centre of some of the discussion over terminology and definition. It is right that those matters will continue to be discussed as the bill progresses.
Of course, there is still concern about the conviction rates for rape. In her evidence to the committee, the Lord Advocate rightly pointed out:

“There is no panacea for the low conviction rates for these types of crime.”—[Official Report, Justice Committee, 25 November 2008; c 1408.]

She also said that the bill is not about improving conviction rates specifically. In its briefing for the debate, the Law Society of Scotland is right to say that the bill, in itself, will not resolve any of the apprehended difficulties in the low conviction rate for rape cases. A number of different, additional measures will indeed be needed, which is a point that the cabinet secretary made in his speech. The Law Society is right to call for further detailed research into the whole system of investigation, prosecution and consideration of verdicts. In its response to the committee, the Scottish Government has said that it will carry out further research into attrition in rape cases.

Robert Brown highlighted the problem of getting complaints of rape into court. His point is borne out by the statistics. Rape Crisis Scotland informs us that, in 2006-07, 942 rapes were reported to the police. Of those, 65 cases were prosecuted, and there were 27 convictions for rape. I do not think that anyone reflecting on those figures will feel at all comfortable. It is important that research is carried out into what lies behind such figures. A package of measures is required to address the issues.

The Lord Advocate pointed out that, under the current legal framework, juries have a narrow notion of what rape is. We are now widening the definition of rape. That must be understood. In the continuing education campaigns on these issues, to which the cabinet secretary referred, work must be done on wider issues such as women’s rights, but work must also be done so that the public understand that rape will no longer be the narrow crime that it was before the bill. I hope that ministers will not only make progress with such work but update Parliament on that progress—and on the wider work that the Government is doing, beyond the bill, to ensure that rapes are reported and effectively prosecuted.

The Scottish Government has asked the Scottish Law Commission to review aspects of the law of evidence, and I took on board the points that Conservative members have made today. Those aspects of the law will have a bearing on the issues that we are discussing today, and I echo what Nigel Don said. We look forward to discussing the Law Commission’s review.

In the debate, members have discussed the issue of consensual sexual relationships between 13 to 16-year-olds. It was clearly an area of considerable debate in the Justice Committee. We have broadly taken the position of reflecting the status quo, so that flexibility remains with the Lord Advocate. However, as Bill Aitken said, it would be expected that prosecution would remain a very exceptional circumstance. The restatement in the bill of existing statutory provisions is superfluous, but it emphasises that point.

The cabinet secretary was right, in his response to the committee, to say that he will give further consideration at stage 2 to the committee’s concerns over the exclusion of oral sex from the provisions of section 27. I share the concerns that other members have expressed.

The welfare issues that have been raised in relation to this area of the bill, particularly by many organisations working with children and young people, need to be addressed beyond the bill. It will be important to implement the committee’s recommendation that multi-agency co-operation should provide effective support to children involved in underage sexual activity. The cabinet secretary has expressed support for the recommendation.

Education campaigns will be vital. As Robert Brown and Cathie Craigie said, such campaigns should be informed by consultation with young people themselves. Such measures are particularly important with regard to the issues that Cathie Craigie has highlighted, where pregnancy is involved. Such situations have to be handled appropriately, with support provided for the prospective mother.

These issues are not easy, and they will require further consideration. However, Bill Aitken made clear the committee’s intention, and Cathie Craigie’s points require careful consideration. The intention should be given effect.

The other major area of continuing discussion is on the committee’s proposal for a separate offence of rape with an object. Rape Crisis Scotland has instead called for a separate offence of sexual assault by penetration. It is clear that the committee’s proposal comes from a desire to see effective prosecution of this serious crime. Scottish Women’s Aid has argued that this crime is different but equally severe. I know that the committee gave the issue very serious consideration before arriving at its conclusion on the most effective way to proceed in order to ensure that such offences were appropriately prosecuted. Paul Martin referred to that. I am pleased that the cabinet secretary has emphasised that he wants to achieve consensus on the issue. That is the right way in which to proceed.

Further consideration is required in a number of areas, such as prior consent, and historical abuse and threats. The committee has also stated that trafficking for sexual exploitation is not a matter for
the bill. Margaret Mitchell referred to that. However, we know how important the issues around sexual exploitation as a result of trafficking are, which have been raised at stage 1. We had a constructive members’ business debate on the issue, on a motion that was lodged by Murdo Fraser, in which the Minister for Community Safety indicated that the Scottish Government would do further work on the issue.

It is clear, from its constructive response to the committee in general, that the Scottish Government is considering all the arguments carefully with a view to producing legislation that we can all agree is designed to be as clear and effective as possible. We are glad to support that approach. We are pleased to give our support to the bill to ensure that we have the best possible legislative framework for tackling these most serious issues and crimes.

16:21

Kenny MacAskill: This has been a consensual debate. Most, if not all, debates in the chamber are more hotly contested—indeed, Thursdays, with First Minister’s question time, are usually more rumbustious, but this debate has shown the Parliament at its best. We recognise that there is a significant problem, which was flagged up by the Lord Advocate and correctly remitted to the Law Commission by the previous Administration. Now, the Government, the Justice Committee and the Parliament as a whole are considering how we can get matters right.

It is accepted—Richard Baker mentioned that the issue was raised by the Law Society—that the bill alone will not necessarily deal with some of the more shameful aspects that still exist in our society, which are driven by attitudes. Further legislative changes will be necessary; nevertheless, the bill is a start. It builds on what was done before and the fine work of the Law Commission.

Patrick Harvie (Glasgow) (Green): I wonder whether the cabinet secretary will address one of the Law Commission’s recommendations that the Government has chosen not to act on—the recommendation to decriminalise sadomasochism. I understand the Government’s desire not to create a defence that could be misused in cases of assault or domestic violence, but what other approaches have been considered, bearing in mind the rights of those who freely consent to sadomasochistic sex? For example, would it be appropriate for the Government to issue guidance specifying that prosecution would not be appropriate when consent is uncontested?

Kenny MacAskill: No, I do not think that it would be appropriate for the Government to issue guidance. Such matters are dealt with through the Crown and the Lord Advocate. The Government’s decision was based on the clear advice of a variety of organisations and, in particular, the Lord Advocate that such a measure would be misused by those who would make spurious defences after perpetrating heinous attacks on people.

We have discussed a variety of issues, including consensual sexual relationships between 13 to 15-year-olds. The Government disagreed with the Law Commission’s proposal, and I welcome the comments on the issue that have been made from all parts of the chamber. It is important that we make clear the possible health consequences of such relationships and the view that, as a society, we cannot justify or condone the actions of those who seek to have consensual sexual relationships between the ages of 13 and 16. Furthermore, anybody who seeks to have such relationships in a manner beyond consent will be most vigorously treated. Equally, we must recognise the fact that such individuals are children who, in the main, will act misguidedly. The comments that have been made by members are, therefore, welcome. When the Crown considers whether such matters should be dealt with by the children’s panel or through the courts, the Lord Advocate and other law officers will have to take account of what has been discussed and debated in Parliament.

I welcome the general acceptance around the chamber that we, as a society, must send out the message that the age of consent is not being lowered. There are good reasons for setting the age of consent at 16 to protect our youngsters. Nevertheless, in the main, when youngsters participate in sexual activity for a variety of reasons, unless there is some good reason, we should not seek to prosecute them.

Mike Rumbles (West Aberdeenshire and Kincardine) (LD): I am concerned about a possible unintended consequence of section 17:

“Causing a young child to be present during a sexual activity”.

Would that not criminalise a young couple with a baby in a one-bedroom flat?

Kenny MacAskill: Such a situation could come about, as the committee convener has commented, but nobody seeks to deal with the unintentional consequences of those circumstances. We are talking about circumstances in which there is a flagrant abuse. It is important that we put on the record the fact that Parliament seeks to deal with those who would act in an entirely inappropriate way that would be an abuse of a child, as opposed to circumstances that are regrettable but may come about. Those matters are dealt with by the sound common sense and judgment that is exercised not only by
the Lord Advocate and the Crown, but by police constables and regional procurators fiscal day to day.

Margo MacDonald: I am intrigued by the cabinet secretary’s statement that the object is to protect our young people, which is why the age of consent will be maintained at 16 years. The statistics for sexually transmitted diseases and unwanted pregnancies are much lower in continental countries, which have lower ages of consent.

Kenny MacAskill: It is accepted that we have a significant problem in Scotland, but we have to accept that although some steps are being taken through legislation, other matters require information and action through a variety of other measures, some of which are not governmental but relate to health boards and other bodies. The problems that we face such as unwanted teenage pregnancies and relationships between youngsters cannot be resolved simply by legislation.

It is clear that Parliament does not seek to lower the age of consent, but nor do we wish to criminalise youngsters who are acting in a manner that we think is inappropriate. I think that all members accept that, to protect our youngsters, we have to do better to try to change the patterns that have grown up.

With regard to the question of rape with an object, which was raised by Bill Aitken and Cathie Craigie, the Government accepts that there has to be action. We want to ensure that all members in the chamber wish that action to happen, and that it is correct. It is clear that there are some differences between the Crown and some agencies, including Rape Crisis Scotland, about what should be done. I reiterate that I am happy to sit down with the Justice Committee to ensure that we get the appropriate law.

The phrase about legislating in haste and repenting at leisure is sometimes used. We want to ensure that the committee and the Government sit down and bring in what we feel is appropriate to ensure that we deal with the matter. Nobody disputes that certain circumstances occur that are heinous and have to be punished, but we must ensure that we get the correct legal position and statutory protection.

The Government has said that it is happy to listen to the clear will of Parliament on the matter of oral sex. We have heard from members on all sides of the chamber a desire for action to be taken on that point, and I tell the committee that we will seriously consider the recommendation and seek to bring it forward.

The issue of gender neutrality that Bill Butler raised relates to the matter that was raised by Bill Aitken, Robert Brown and others: one of the purposes of the bill is to attain gender neutrality to deal with male rape and other such matters. That is understandable, but the bill does not simply address male rape; we live in a world in which we have to recognise that the ECHR exists and that we have to deal with matters in a more gender neutral way.

Cathie Craigie is correct to say that the consequences for young females are significantly different—a lot of that comes down to common sense. We are happy to share with the committee the advice that we are allowed to disclose—the clear advice that we have received is, as I said, that we require gender neutrality when we live in the world of the ECHR. That does not, however, detract from how we implement the legislation and—

Cathie Craigie: Will the member give way?

Kenny MacAskill: I am sorry, but I am in my last minute.

Paul Martin was correct to raise the issue of fines for rape—it has been, to some extent, a lacuna in the drafting of the bill. We have made it clear that we are intent on ensuring that any gap is closed. I remind Paul Martin that nobody has ever intended to impose a fine for the crime of rape; the provision was intended to deal with a wealthy person who commits a heinous crime of rape by not only imposing the criminal sentence and the period of imprisonment they merit, but taking their assets away. Not only the poor perpetrate the crime of rape; the wealthy do, too. The Government will ensure that if people have the assets, we will take those from them under the proceeds of crime legislation. If they perpetrate the crime of rape, they face a criminal and jail sentence in addition to a fine if they have the wherewithal.

We are grateful to the Parliament for the consensual way in which it has considered a bill that deals with an extremely difficult issue. Legislative change on its own will not deal with some of the significant problems that we face, such as those to do with the health of our youngsters, which Margo MacDonald mentioned, nor will it necessarily change attitudes, but legislative change is necessary and I believe that it will drive cultural change. We are on a journey. I reiterate that I will work with the Justice Committee in due course.
16:30

The Presiding Officer (Alex Fergusson): The next item of business is consideration of motion S3M-3417, in the name of John Swinney, on the financial resolution to the Sexual Offences (Scotland) Bill. I call Kenny MacAskill to move the motion.

Motion moved,

That the Parliament, for the purposes of any Act of the Scottish Parliament resulting from the Sexual Offences (Scotland) Bill, agrees to any expenditure of a kind referred to in paragraph 3(b)(iii) of Rule 9.12 of the Parliament's Standing Orders arising in consequence of the Act.— [Kenny MacAskill.]

The Presiding Officer: The question on the motion will be put at decision time.
Cabinet Secretary for Justice
Kenny MacAskill MSP

T: 0845 774 1741
E: scottish.ministers@scotland.gsi.gov.uk

Jamie Stone MSP
Convener
Subordinate Legislation Committee
The Scottish Parliament
Edinburgh
EH99 1SP

February 2009

SEXUAL OFFENCES (SCOTLAND) BILL – REPORT OF THE SUBORDINATE LEGISLATION COMMITTEE

I am grateful to you and your Committee for your consideration of the delegated powers contained in the Sexual Offences (Scotland Bill. I am writing to you to respond to the points made in your report on the Bill.

Section 29: Power to specify “relevant offences” for the purpose of Section 29(2)

The Committee considers that the use of subordinate legislation to specify “relevant offences” for the purpose of s29(2) is appropriate in order to provide flexibility to address future changes in the law.

However, the Committee recommends that the Government consider further whether the Bill can be amended to restrict the scope of the power to a power to specify offences or circumstances involving conduct of a sexual nature involving children as “relevant offences”.

The Committee recommends that the specification of “relevant offences” should be subject to affirmative procedure.

In view of the recommendation made in paragraph 301 of the Justice Committee’s Stage 1 Report, the Government now proposes to amend the Bill at Stage 2 so as to specify “relevant offences” for the purpose of section 29(2) on the face of the Bill. However, we propose to retain the secondary power to enable the amendment of the definition of “relevant offences” if it is required to react to changes in circumstances or developments in the law.

The Government is content to accept the Committee’s recommendation that this order-
making power should be subject to affirmative procedure and that it should enable only the designation of offences with a sexual element as "relevant offences". We will bring forward appropriate amendments at Stage 2.

Section 32: Power to amend the definition of what constitutes a "position of trust" in respect of the offence of sexual abuse of trust at section 31

The Committee finds the use of a delegated power acceptable in principle. However, members wish to ask the Scottish Government to consider further whether the power could be framed more narrowly in such a way that would allow for flexibility in responding quickly to any changes in the arrangements for the care and education of young people in Scotland

Given the potential impact of the exercise of this power to widen the scope of the offence of sexual abuse of trust the Committee recommends that affirmative procedure is the appropriate level of parliamentary scrutiny

The Scottish Government accepts the Committee's recommendation that the order-making power at section 32 should be subject to affirmative procedure and will bring forward amendments at Stage 2.

You will be aware that the Justice Committee's Report on the Bill considered and sought the Government's views on ACPOS' proposal for a much wider definition of a "position of trust" than that contained in the Bill. The Government has rejected the approach ACPOS proposed but we consider that this indicates that the question of how a "position of trust" should best be defined remains open to legitimate debate. The Government have therefore concluded that a power to amend the scope of the definition (which is wider than a purely procedural power to update the definition in light of changes to arrangements for the care and education of young people in Scotland and is subject to affirmative procedure) is appropriate.

However, it is intended that the ordering making power should be amended so that an order can vary or delete the conditions in s32 which constitutes a "position of trust" as well as extending them. The power will be restricted to ensure that the offence of sexual abuse of trust will not apply to sexual activity between adults (aged 18 and over). No amendment will be made to section 31(1) of the Bill.

The Government take the view that such restriction will be sufficient, in light of the fact that it will be made subject to affirmative procedure. This will provide the Parliament with the opportunity to carefully scrutinise any additional conditions which are contained in an order made under s32.

I hope this reply is helpful.

KENNY MACASKILL
March 2009

Dear Bill,

Sexual Offences (Scotland) Bill – Stage 2 Amendments

I am writing to you with details of the amendments which the Government proposes to bring forward at Stage 2, in order that we can discuss them when we meet on Tuesday. As I indicated in my letter of 31 January, replying to your Committee’s Report on Stage 1 of the Bill, my intention is to facilitate a consensual approach which will enable us to agree on the best way forward at Stage 2 in order than we can further strengthen the legislative proposals set out in the Bill.

In the main, the amendments which we propose to bring forward reflect the issues raised in your Stage 1 Report and the Government’s response to the Report. There are also a number of other amendments, principally to address the issues set out in my letter of 22 December 2008, which highlighted a number of issues which the Government had identified but which had not been addressed in evidence given to the Committee at Stage 1.

My comments below cover the key issues for discussion when we meet (as does Annex A), while other proposed amendments are set out in Annex B. Annex A shows the effect of the main amendments which we propose to various sections of the Bill, including a description of the purpose of those amendments. Annex B provides a list of the more minor and consequential amendments which we intend to lodge, with a brief description of their purpose.

I should make clear that Stage 2 amendments are still being worked on and there are therefore likely to be further amendments (and possibly minor changes to those attached), particularly for Day 2 & 3 of Stage 2. However, amendments for Day 1 are as close to final form as we can achieve at this stage and any new amendments should in the main relate to technical issues rather than issues of substance.
1 & 1A. ‘Rape with an object or other body part’

The Committee’s Stage 1 Report recommended that there should be a separate offence of rape with an object or with another part of the body (para. 97), limited to vaginal or anal penetration, and with the same penalties as rape. The Committee note that such an offence already exists for England and Wales, and the Committee recommend that the same offence should be created for Scotland.

In my response to the Committee of 31 January I indicated that I considered that this required to be given careful consideration. The equivalent offence in English law is ‘sexual assault by penetration’. Providing for an offence of ‘rape with an object’ without incorporating that offence into the definition of the offence of ‘rape’ (at section 1 of the Bill), risks creating the impression that ‘rape with an object’ is considered a less serious form of rape. In our view, therefore, if there is to be a separate offence covering sexual penetration with an object or other body part, it would more appropriately be called ‘sexual assault by penetration’. The new section at 1A in Annex A shows what such an offence would look like.

However, there is no doubt that some penetrative assaults involving objects can be extremely violent and are perceived by their victims as constituting rape. There are therefore strong arguments in favour of using the term ‘rape’ in the definition of the offence rather than adopting the English terminology. However, if the offence is to be ‘rape’ then we consider it best that it is included within the definition of a single offence of ‘rape’ rather than following the approach of creating a separate offence. This approach would result in an overlap between the offences of rape and sexual assault. The amended section 1 (item 1 in Annex A) is intended to show the Committee what the amended rape offence would look like.

In either case, the maximum penalty on conviction on indictment would be life imprisonment, as is currently the case with the existing offence of sexual assault. I welcome the views of the Committee on what their preferred approach would be. Whatever approach is adopted will be mirrored in Part 4 of the Bill.

2. Extension of sexual assault to cover emission of saliva and urine.

Section 2(2)(d) of the Bill includes the ejaculation of semen within the definition of sexual assault. Though the matter was not raised in the Justice Committee’s report, discussions with COPFS have highlighted the fact that the emission of saliva and urine can and do take place in the context of a sexual assault. As the Bill is drafted, it would be necessary for such conduct to be charged under the common law as assault under circumstances of indecency. The Government’s view is that it would be better if this were instead included in the definition of sexual assault so that a single course of conduct could be charged as ‘sexual assault’ rather than parts of it having to be charged as ‘assault under circumstances of indecency’. We therefore propose to amend section 2(2) to extend the definition of sexual assault to cover circumstances where the accused recklessly or intentionally emits urine or saliva sexually onto the victim. Item 2 in Annex A shows what the amended offence would look like.

3. Section 37A – New section modifying ‘purpose test’ for offences at sections 4-7, 17-19 & 24-26

The offences at sections 4-6, 17-19 and 24-26 require that, for the accused to be guilty of an offence, his purpose must be either to obtain sexual gratification, or to cause the victim fear, alarm or distress, or both. Concerns had been expressed that it may be difficult to prove the accused’s purpose beyond reasonable doubt. As earlier indicated in my letter to the
Committee of 22 December 2008, we therefore propose to amend the Bill so as to provide that the court may convict where, in all the circumstances of the case, it may reasonably be inferred that the accused acted either for the purpose of obtaining sexual gratification or of causing humiliation, alarm or distress. A similar approach is contained in the offence at section 57 of the Civic Government (Scotland) Act 1982 of being on premises without lawful authority with intent to commit theft. The offence provides that a person may be convicted where, in all the circumstances, it may reasonably be inferred that he intended to commit theft. Item 3 in Annex A shows what the new section would look like.

4. Section 5 - Widened definition of image of a sexual activity (equivalent amendments would be required for offences at s18 and s25)

In my letter to the Committee of 22 December 2008, I indicated to that the Government has been considering whether the offence at section 5 requires to be widened to include “sexual images” which are not images of “a sexual activity”. We intend to bring forward amendments to section 5 to extend the offence to cover images of genitals, as well as images of sexual activity. Item 4 in Annex A shows what the amended section 5 would look like. Equivalent amendments to those shown in Annex A will be made to the offences at sections 18 and 25.

5. Section 7 – Reframing of ‘sexual exposure’ to use ‘consent’ model

The offence of ‘sexual exposure’ at section 7 of the Bill is drafted differently from those at sections 4-6. As I indicated in my letter to the Committee of 22 December, we propose to bring forward an amendment which will amend the offence so as to use the same ‘consent’ model and ‘purpose test’ as the offences at sections 4-6. Item 5 in Annex A shows what the offence would look like when re-framed in terms of consent.

6. Amendment to Section 8 – Administering a substance for sexual purposes

As I outlined in my letter to the Committee of 22 December 2008, we have identified a gap in the offence at section 8 concerning administering a substance for the purpose of committing a sexual offence. The offence does not apply where the accused administers a substance for the purpose of allowing a third party to engage in sexual activity while the victim is incapacitated. We intend to bring forward an amendment to correct this. Item 6 in Annex A shows what the amended offence would look like.

7. Section 10 – Factual circumstances in which consent is not present – “prior consent”

The Justice Committee’s report asked the Scottish Government to consider further the provision at section 10(2)(b) regarding consent to sexual activity where the complainer is asleep or unconscious at the time at which sexual activity takes place (para. 146). We consider that the draft amendments at Annex A to subsection 10(2) address the concerns expressed by those who gave evidence to the Committee on the Bill by removing the explicit reference to prior consent. However, this section may be subject to further change as we are still actively considering the matter.

8. Section 27 – Sexual activity between consenting older children

The Justice Committee’s Report recommended that the provisions criminalising sexual intercourse between consenting 13-15 year olds should be amended to include oral sex within the scope of the provisions (para 289).
In view of the concerns expressed by stakeholders, and in view of the fact that oral sex carries with it the risk of sexually transmitted infections, we propose to amend the Bill so as to criminalise sexual intercourse, which is defined as penile penetration of the anus or vagina, and oral sex, which is defined in terms of oral contact with the genitals or anus. Other consensual sexual activity between 13-15 year olds would not be criminal.

It is also intended to bring forward amendments to remove the provision concerning the Lord Advocate’s power to issue instructions to chief constables on the basis that the Parliament is content that the Children’s Hearing System will continue to be used to address offending behaviour in the overwhelming majority of cases. This addresses the recommendation at para. 263 of the Committee’s Report and it is acknowledged that the Lord Advocate’s existing powers in the Police (Scotland) Act 1967 and the Criminal Procedure (Scotland) Act 1995 would enable the Lord Advocate to issue such instructions.

Item 7 in Annex A shows what the amended section 27 offence would look like.

I am aware from the Stage 1 debate that there remains some concern about the gender-neutral approach taken to this offence and questions whether it would be contrary to ECHR to criminalise boys, but not girls, for engaging in consensual sexual activity while under the age of consent. As you will be aware, the Scottish Government is strongly of the view that it would be contrary to ECHR to discriminate with respect to gender by criminalising only boys. Annex C sets out our reasons for this in more detail.

9. Section 29 – amended defences to offences concerning older children – definition of relevant offences and consequential amendments to ‘proximity of age’ defence

The Committee made a number of recommendations in its report in relation to section 29, which provides for defences to the offences concerning sexual activity with 13-15 year old children. The defence of reasonable mistaken belief as to age is restricted to those who have not previously been charged with a “relevant offence”. “Relevant offences” are not defined in the Bill as introduced, and an order-making power enables these to be specified in secondary legislation. The Committee recommended that “relevant offences” should be defined on the face of the Bill (para 307). The section has been amended so as to do this.

We propose that “relevant offences” are sexual offences committed against a child under the age of consent (for some of the Northern Irish offences, this will be 17, as the age of consent in Northern Ireland was only lowered to 16 in 2008). These include both specific child sex offences and more general sexual offences (such as rape and sexual assault) where the victim is a child. We have retained an order-making power to add or delete offences. This will be subject to affirmative procedure and is restricted to the addition or deletion of sexual offences. We also propose to amend the Bill to prevent a person in respect of whom a Risk of Sexual Harm Order is in place from using this defence.

The Government also intends to bring forward amendments to the “proximity of age” defence. These will ensure that the defence is fully gender and sexuality neutral. As the Bill is currently drafted, a 16 year-old girl engaging in sexual intercourse with a 15 year old boy would not commit an offence, by virtue of the age proximity provisions, while a 16 year old boy engaging in sexual intercourse with a 15 year old boy would commit an offence as the age proximity provisions would not apply. The defence will also be amended in light of the proposed amendments to section 27 to ensure that it would not apply in respect of oral sex.

Item 8 in Annex A shows what the amended offence at section 27 would look like.
10. Section 32 – Amended ‘position of trust’ offence

As I explained in my letter of 22 December 2008, the Government intends to bring forward amendments to the definition of ‘position of trust’ at section 32. The offence is largely based on the current offence provisions contained in the Sexual Offences (Amendment) Act 2000. However, the Scottish Law Commission’s approach differed in one key respect. As currently drafted, the Bill requires that, for a position of trust to exist, the adult must look after the child in question. The 2000 Act, by contrast, requires only that the adult must look after children under the age of 18 at the institution in question. Therefore, under the current legislation, any teacher or care worker, for example, who works in an institution commits an offence if they engage in sexual activity with any child being cared for or taught in that institution.

The Commission adopted this approach because they considered that the existing approach was too wide in scope. They commented in their report that “it would have the effect of creating a relationship of trust, for example, between a lecturer in a law school in one campus of a university and a student of medicine based in another campus even though there was no professional contact between the two.”

The Government acknowledges the point made by the Commission regarding universities, but considers that this should not apply in respect of schools, care homes, et cetera. Our proposed amendments address this by reverting to the approach contained in the 2000 Act, whilst making an exception for further and higher education institutions, where there will continue to be a requirement that the person in a position of trust looks after the child in that institution.

We also propose to amend the order-making power to amend the definition of a “position of trust” so as to make it subject to affirmative procedure and so as to enable the deletion or amending of conditions as well as their addition.

Item 9 in Annex A shows what the amended definition of “position of trust” would look like.

11. Proposed new offence of voyeurism

Unlike the Sexual Offences Act 2003, the Bill does not currently include provision for an offence of voyeurism. At present, this is prosecuted under the common law as a breach of the peace. However, given that it is a sexual offence, and those convicted are routinely placed on the sex offenders’ register, the Government considers that there is a strong case for including such an offence in the Bill.

We propose an offence of voyeurism, largely based on the equivalent offence in the 2003 Act. The offence would criminalise a person who observes another person (B) without B’s consent and without any reasonable belief that B consents, engaging in a ‘private act’ in a place or circumstances where they could reasonably expect privacy where the observation is for the purpose of obtaining sexual gratification or of causing humiliation, alarm or distress.

A ‘private act’ is defined as any of the following:
- where B’s genitals, buttock or breasts are exposed or covered only with underwear
- where B is using the lavatory; or
- where B is engaging in a sexual act of a kind not ordinarily done in public.
It is a further requirement that the 'private act' take place in a place where, in the circumstances, B could reasonably expect privacy. The expectation of privacy (and thus the offence) would not apply where B was e.g. on a naturist beach or was a 'streaker' being photographed or videoed in a public place.

The provision also contains offences which criminalise the use of equipment (such as webcams) to enable the accused, or any other person, to engage in voyeurism, the recording of a person engaging in a private act without their consent and the installation of equipment or modification of a building or other structure (e.g. installing a hidden camera or drilling a "peep hole" through a wall) for the purpose of enabling a person to engage in voyeurism.

Consideration is being given as to whether separate offences concerning children are required at Part 4, or whether, as with the provisions in the Sexual Offences Act 2003, a single offence is sufficient.

Item 10 in Annex A shows what the new offence would look like.

I hope this information is helpful to the Committee and I am happy to answer any questions that Committee Members may have on any of these proposed amendments at our meeting of 10 March.

Kenny MacAskill
Annex A

1. ‘Rape with an object’ - Option 1. Expanded definition of rape

   1. Rape

      (1) If a person (“A”)—
          (a) without another person (“B”) consenting, and
          (b) without any reasonable belief that B consents,

          does any of the things mentioned in subsection (1A), then A commits an offence, to be known as the offence of rape.

      (1A) Those things are, that A—
          (a) penetrates, with A’s penis to any extent, either intending to do so or reckless as to whether there is penetration, the vagina, anus or mouth of B,
          (b) penetrates sexually, with any other part of A’s body or anything else (other than A’s penis), to any extent, either intending to do so or reckless as to whether there is penetration, the vagina or anus of B.

      (2) For the purposes of this section, penetration is a continuing act from entry until withdrawal of whatever is intruded; but this subsection is subject to subsection (3).

      (3) In a case where penetration is initially consented to but at some point of time the consent is withdrawn, subsection (2) is to be construed as if the reference in it to a continuing act from entry were a reference to a continuing act from that point of time.

      (4) In this Act—

          “penis” includes a surgically constructed penis if it forms part of A, having been created in the course of surgical treatment, and

          “vagina” includes—

          (a) the vulva, and
          (b) a surgically constructed vagina (together with any surgically constructed vulva), if it forms part of B, having been created in the course of such treatment.
1A – Alternative option – separate offence of ‘sexual assault by penetration’

Sexual assault by penetration

(1) If a person (“A”), with any part of A’s body or anything else—

(a) without another person (“B”) consenting, and

(b) without any reasonable belief that B consents,

penetrates sexually to any extent, either intending to do so or reckless as to whether there is penetration, the vagina or anus of B then A commits an offence, to be known as the offence of sexual assault by penetration.

(2) For the purposes of this section, penetration is a continuing act from entry to withdrawal of whatever is intruded; but this subsection is subject to subsection (3).

(3) In a case where penetration is initially consented to but at some point of time the consent is withdrawn, subsection (2) is to be construed as if the reference in it to a continuing act from entry were a reference to a continuing act from that point of time.

(4) Without prejudice to the generality of subsection (1), the reference in that subsection to penetration with any part of A’s body is to be construed as including a reference to penetration with A’s penis.
2. Extension of sexual assault to cover emission of saliva and urine.

2  Sexual assault

(1) If a person (“A”)—

(a) without another person (“B”) consenting, and
(b) without any reasonable belief that B consents,

does any of the things mentioned in subsection (2), then A commits an offence, to be known as the offence of sexual assault.

(2) Those things are, that A—

(a) penetrates sexually, by any means and to any extent, either intending to do so or reckless as to whether there is penetration, the vagina, anus or mouth of B,

(b) intentionally or recklessly touches B sexually,

(c) engages in any other form of sexual activity in which A, intentionally or recklessly, has physical contact (whether bodily contact or contact by means of an implement and whether or not through clothing) with B,

(d) intentionally or recklessly ejaculates semen onto B,

(e) intentionally or recklessly emits urine or saliva onto B sexually.

(3) For the purposes of—

(a) paragraph (a) of subsection (2), penetration is sexual,

(b) paragraph (b) of that subsection, touching is sexual,

(c) paragraph (c) of that subsection, an activity is sexual,

in any case if a reasonable person would, in all the circumstances of the case, consider the penetration, or as the case may be the touching or the activity, to be sexual.

(4) For the purposes of paragraph (a) of subsection (2), penetration is a continuing act from entry until withdrawal of whatever is intruded; but this subsection is subject to subsection (5).

(5) In a case where penetration is initially consented to but at some point of time the consent is withdrawn, subsection (4) is to be construed as if the reference in it to a continuing act from entry were a reference to a continuing act from that point of time.

(6) Without prejudice to the generality of paragraph (a) of subsection (2), the reference in the paragraph to penetration by any means is to be construed as including a reference to penetration with A’s penis.

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1 This subsection will be removed by amendment to place a single definition of ‘sexual’ at the end of the Bill.
3. **Section 37A – New section modifying ‘purpose test’ for offences at sections 4-7, 17-19 & 24-26**

**Establishment of purpose for the purposes of sections 4 to (Voyeurism), 17 to 19 and 24 to 26**

(1) For the purposes of sections 4 to (Voyeurism), 17 to 19 and 24 to 26, A’s purpose was—

(a) obtaining sexual gratification, or

(b) humiliating, distressing or alarming B,

if in all the circumstances of the case it may reasonably be inferred A was doing the thing for the purpose in question.

(2) In applying subsection (1) to determine A’s purpose, it is irrelevant whether or not B was in fact humiliated, distressed or alarmed by the thing done by A
4. **Section 5 – Widened definition of image of a sexual activity (equivalent amendments would be required for offences at s18 and s25)**

5 **Coercing a person into looking at an image of a sexual activity**

   (1) If a person (“A”) intentionally and for a purpose mentioned in subsection (2) causes another person (“B”)—
       (a) without B consenting, and
       (b) without any reasonable belief that B consents,

to look at a sexual image, then A commits an offence, to be known as the offence of coercing a person into looking at a sexual image.

   (2) The purposes are—
       (a) obtaining sexual gratification,
       (b) humiliating, distressing or alarming B.

   (2A) For the purposes of subsection (1), a sexual image is an image (produced by whatever means and whether or not a moving image) of-
       (a) A engaging in a sexual activity or of a third person or imaginary person so engaging,
       (b) A’s genitals or the genitals of a third person or imaginary person.

   (3) For the purposes of subsection (1), an activity is sexual in any case if a reasonable person would, in all the circumstances of the case, consider the activity to be sexual.²

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² This sub-section will be deleted from the Bill and replaced with a single definition of “sexual” applying to the Bill as a whole.
5. **Section 7 – Reframing of ‘sexual exposure’ to use ‘consent’ model**

7 **Sexual exposure**

(1) If a person (“A”)-

(a) without another person (“B”) consenting, and

(b) without any reasonable belief that B consents,

intentionally and for a purpose mentioned in subsection (1A), exposes A’s genitals in a sexual manner to B with the intention that B will see them, then A commits an offence, to be known as the offence of sexual exposure.

(1A) The purposes are—

(a) obtaining sexual gratification,

(b) humiliating, distressing or alarming B.

(2) For the purposes of subsection (1), a manner of exposure is sexual in any case if a reasonable person would, in all the circumstances of the case, consider the manner of exposure to be sexual.³

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³ This subsection will be removed by amendment to place a single definition of ‘sexual’ at the end of the Bill.
6. Amendment to Section 8 – Administering a substance for sexual purposes

8 Administering a substance for sexual purposes

(1) If a person (“A”) intentionally administers a substance to, or causes a substance to be taken by, another person (“B”)—
   (a) without B knowing, and
   (b) without any reasonable belief that B knows,
   and does so for the purpose of stupefying or overpowering B, so as to enable any person to engage in a sexual activity which involves B, then A commits an offence, to be known as the offence of administering a substance for sexual purposes.

(2) For the purposes of subsection (1)—
   (a) an activity is sexual in any case if a reasonable person would, in all the circumstances of the case, consider the activity to be sexual⁴, and
   (b) if A, whether by act or omission, induces in B a reasonable belief that the substance administered or taken is (either or both)—
      (i) of a substantially lesser strength, or
      (ii) in a substantially lesser quantity,
   than it is, any knowledge which B has (or belief as to knowledge which B has) that it is being administered or taken is to be disregarded.

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⁴ This subsection will be removed by amendment to place a single definition of ‘sexual’ at the end of the Bill.
7. **Section 10 – Factual circumstances in which consent is not present – “Prior Consent”**

10 **Circumstances in which conduct takes place without free agreement**

(1) For the purposes of section 9, but without prejudice to the generality of that section, free agreement to conduct is absent in the circumstances set out in subsection (2).

(2) Those circumstances are—

(a) where the only indication or expression of consent by B to the conduct occurs at a time when B is -
   (i) incapable, because of the effect of alcohol or any other substance of consenting to it
   (ii) asleep, or
   (iii) unconscious

(b) where B agrees or submits to the conduct because of violence used against B or any other person, or because of threats of violence made against B or any other person,

(c) where B agrees or submits to the conduct because B is unlawfully detained by A,

(d) where B agrees or submits to the conduct because B is mistaken, as a result of deception by A, as to the nature or purpose of the conduct,

(e) where B agrees or submits to the conduct because A induces B to agree or submit to the conduct by impersonating a person known personally to B, or

(f) where the only expression or indication of agreement to the conduct is from a person other than B.

(3) References in this section to A and to B are to be construed in accordance with sections 1 to (voyeurism).
8. **Section 27 – Sexual activity between consenting older children**

27 **Older children engaging in penetrative sexual conduct with each other**

(1) If a child (“A”), being a child mentioned in subsection (2), does any of the things mentioned in subsection (3), “B” being in each case a child mentioned in subsection (2), then A commits an offence, to be known as the offence of engaging while an older child in sexual conduct with or towards another older child.

(2) The child is a child who—
   (a) has attained the age of 13 years, but
   (b) has not attained the age of 16 years.

(3) The things are that A-
   (a) penetrates sexually, with A’s penis and to any extent, either intending to do so or reckless as to whether there is penetration, the vagina, anus or mouth of B,
   (b) intentionally or recklessly touches the vagina, anus or penis of B sexually with A’s mouth.

(4) In the circumstances specified in subsection (1), if B engages by consent in the conduct in question, then B commits an offence, to be known as the offence of engaging while an older child in consensual sexual conduct with another older child.

(6) In paragraph (b) of subsection (3), the reference to A’s mouth is to be construed as including a reference to A’s tongue or teeth.

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5 The word ‘penetrative’ will be omitted in the reprinted version of the Bill.
9. **Section 29 – amended defences to offences concerning older children – definition of relevant offences and consequential amendments to ‘proximity of age defence**

29 **Defences in relation to offences against older children**

(1) It is a defence to a charge in proceedings—
   (a) against A under any of sections 21 to 27(1) that A reasonably believed that B had attained the age of 16 years,
   (b) against B under section 27(4) that B reasonably believed that A had attained the age of 16 years.

(2) But—
   (a) the defence under subsection (1)(a) is not available to A—
      (i) if A has previously been charged by the police with a relevant sexual offence,
      or
      (ii) if there is in force in respect of A a risk of sexual harm order,
   (b) the defence under subsection (1)(b) is not available to B—
      (i) if B has previously been charged by the police with a relevant sexual offence,
      or
      (ii) if there is in force in respect of B a risk of sexual harm order.

(3) It is a defence to a charge in proceedings under any of the sections mentioned in subsection (4) that at the time when the conduct to which the charge relates took place, the difference between A’s age and B’s age did not exceed 2 years.

(4) Those sections are—
   (b) section 22(2)(a), but not in so far as the charge is founded on—
      (i) penetration of B’s vagina, anus or mouth with A’s penis,
      (ii) penetration of B’s vagina or anus with A’s mouth, tongue or teeth,
   (ba) section 22(2)(b) or (c), but not in so far as the charge is founded on sexual touching or other physical activity involving
      (i) B’s vagina, anus or penis being touched sexually by A’s mouth,
      (ii) A’s vagina, anus or mouth being penetrated by B’s penis,
      (iii) A’s vagina, anus or penis being touched sexually by B’s mouth.
   (bb) section 22(2)(d)
   (c) any of sections 23 to 26.

(5) In paragraphs (a) and (b) of subsection (2)—
   (a) “a relevant offence” means an offence listed in schedule (Relevant sexual offences),
(b) “a risk of sexual harm order” means an order under section 2 of the Protection of Children and Prevention of Sexual Offences (Scotland) Act 2005 (asp 9) or section 123 of the Sexual Offences Act 2003 (c.42).

(5A) The Scottish Ministers may by order modify schedule (Relevant sexual offences) so as to add an offence against a child which involves sexual conduct or delete an offence listed there.

(6) It is not a defence to a charge in—

(a) proceedings under any of sections 21 to 27(1) against A that A believed that B had not attained the age of 13 years,

(b) proceedings under section 27(4) against B that B believed that A had not attained the age of 13 years.

SCHEDULE

(introduced by section 29(5)(a))

RELEVANT SEXUAL OFFENCES

Part 1

OFFENCES THAT MAY CURRENTLY BE COMMITTED

1. Any of the following offences under this Act—

   (a) an offence under Part I against a person under the age of 16,

   (b) an offence under Part 4 (but not an offence of engaging while an older child in sexual conduct with or towards another older child (section 27(1)) or engaging while an older child in consensual sexual conduct with another older child (section 27(4))

   (c) sexual abuse of trust (section 31) of a person under the age of 16.

2. An offence under any of the following provisions of the Protection of Children and Prevention of Sexual Offences (Scotland) Act 2005 (asp 9) against a person under the age of 16—

   (a) section 1 (meeting a person following certain preliminary contact with intention of engaging in unlawful sexual activity),

   (b) section 9 (paying a person for sexual services),

   (c) section 10 (causing or inciting provision by a person of sexual services or pornography),

   (d) section 11 (controlling a person providing sexual services or involved in pornography),

   (e) section 12 (arranging or facilitating provision by a person of sexual services or pornography).

3. An offence under any of the following provisions of the Sexual Offences Act 2003 (c.42) against a person under the age of 16—

   (a) section 1 (rape),

   (b) section 2 (assault by penetration),

   (c) section 3 (sexual assault),
(d) section 25 (sexual activity with a family member under 18),
(e) section 26 (inciting a family member under 18 to engage in sexual activity),
(f) section 47 (paying for sexual services of a person under 18).

4. An offence under any of the following provisions of that Act—
   (a) section 5 (rape of a child under 13),
   (b) section 6 (assault of a child under 13 by penetration),
   (c) section 7 (sexual assault of a child under 13),
   (d) section 8 (causing or inciting a child under 13 to engage in sexual activity),
   (e) section 9 (sexual activity with a child under 16),
   (f) section 10 (causing or inciting a child under 16 to engage in sexual activity),
   (g) section 11 (engaging in sexual activity in the presence of a child under 16),
   (h) section 12 (causing a child under 16 to watch a sexual act),
   (i) section 13 (sex offences against a child under 16 committed by children or young persons),
   (j) section 14 (arranging or facilitating commission of sex offence against a child under 16),
   (k) section 15 (meeting a child under 16 following sexual grooming etc.).

5. An offence under any of the following provisions of the Criminal Justice (Northern Ireland) Order 2003 (SI No. 1247 (N.I. 13)) against a person under the age of 17—
   (a) article 18 (rape),
   (b) article 19 (buggery),
   (c) article 20 (assault with intent to commit buggery).

6. Any of the following offences under the Criminal Law (Consolidation) (Scotland) Act 1995 (c.39)—
   (a) an offence under section 8 against a girl under the age of 16 (abduction of a woman or girl for purposes of unlawful sexual intercourse),
   (b) an offence under section 10 (person having parental responsibilities causing or encouraging sexual activity in relation to a girl under 16).

7. An offence under section 160 of the Criminal Justice Act 1988 (c.33) against a person under the age of 16 (possession of indecent photographs of a person under 18).


9. An offence under the following provisions of the Civic Government (Scotland) Act 1982 (c.45) against a person under the age of 16—
   (a) section 52 (taking and distribution of indecent images of a person under 18),
   (b) section 52A (possession of indecent images of a person under 18).

10. An offence under article 9 of the Criminal Justice (Northern Ireland) Order 1980 (SI No. 704 (N.I. 6) (inciting a girl under 16 to have incestuous sexual intercourse).
11. An offence under section 1 of the Protection of Children Act 1978 (c.37) against a person under the age of 16 (taking or distribution of indecent images of a person under 18).


13. An offence under any of the following sections of the Children and Young Persons Act (Northern Ireland) 1968 (c.34) (N.I.)—
   (a) section 21 (causing or encouraging seduction or prostitution of girl under 17),
   (b) section 22 (indecent conduct towards person under 17).

14. An attempt, conspiracy or incitement to commit an offence in Part 1 of this schedule.

15. An offence under section 293(2) of the Criminal Procedure (Scotland) Act 1995 (c.46) (aiding and abetting etc. the commission of a statutory offence) relating to an offence in paragraphs 1, 2, 6 or 9 of that Part.

**Part 2**

**OFFENCES REPLACED BY AN OFFENCE IN PART 1 OR THIS PART**

16. The following common law offences against a person under the age of 16 years—
   (a) rape,
   (b) clandestine injury to women,
   (c) sexual assault,
   (d) lewd, indecent or libidinous practice or behaviour,
   (e) sodomy.

17. Rape under the common law of Northern Ireland of a person under the age of 17.

18. An offence under section 3 of the Sexual Offences (Amendment) Act 2000 (c.44) against a person under the age of 16.

19. An offence under section 3, 5, 6 or 13(5)(c) of the Criminal Law (Consolidation) (Scotland) Act 1995.


21. An offence under section 3, 4, 5 or 10(1) of the Sexual Offences (Scotland) Act 1976 (c.67).

22. An offence under section 1 of the Indecency with Children Act 1960 (c.33).

23. An offence under section 1, 12, 14, 15 or 16 of the Sexual Offences Act 1956 (c.69) against a person under the age of 16.

24. An offence under section 5, 6 or 28 of that Act.

25. An offence under section 3 or 5 of the Criminal Law Amendment Act 1885 (48 & 49 Vict.) (c.69) against a person under the age of 16.


27. An offence under section 52, 53, 54, 61 or 62 of the Offences Against the Person Act 1861 (24 & 25 Vict.) (c.100) against a person under the age of 16.

28. An attempt, conspiracy or incitement to commit an offence in Part 2 of this schedule.
29. An offence under section 293(2) of the Criminal Procedure (Scotland) Act 1995 (c.46) (aiding and abetting etc. the commission of a statutory offence) relating to an offence in paragraphs 18, 19, 21 or [ ] of that Part.
10. **Section 32 – Amended ‘position of trust’ offence**

32 **Positions of trust**

(1) For the purposes of section 31, a person ("A") is in a position of trust in relation to another person ("B") if any of the five conditions set out below is fulfilled.

(2) The first condition is that B is detained by virtue of an order of court or under an enactment in an institution and A looks after persons under 18 in that institution.

(3) The second condition is that B is resident in a home or other place in which accommodation is provided by a local authority under section 26(1) of the Children (Scotland) Act 1995 (c.36) and A looks after persons under 18 in that place.

(4) The third condition is that B is accommodated and cared for in—
   - a hospital,
   - accommodation provided by an independent health care service,
   - accommodation provided by a care home service,
   - a residential establishment, or
   - accommodation provided by a school care accommodation service or a secure accommodation service,

and A looks after persons under 18 in that place.

(5) The fourth condition is that B is receiving education at -
   - a school and A looks after persons under 18 in that school, or
   - a further or higher education institution and A looks after B in that institution

(6) The fifth condition is that A—
   - has any parental responsibilities or parental rights in respect of B,
   - fulfils any such responsibilities or exercises any such rights under arrangement with a person who has such responsibilities or rights,
   - had any such responsibilities or rights but no longer has such responsibilities or rights, or
   - treats B as a child of A's family,

and B is a member of the same household as A.

(7) A looks after a person for the purposes of this section if A regularly cares for, teaches, trains, supervises, or is in sole charge of the person.

(8) The Scottish Ministers may by order modify this section (other than this subsection) and section 33 so as to add, delete or amend a condition.
11. Proposed new offence of voyeurism

Voyeurism

(1) A person (“A”) commits an offence, to be known as the offence of voyeurism, if A does any of the things mentioned in subsections (2) to (5).

(2) The first thing is that A—
   (a) without another person (“B”) consenting, and
   (b) without any reasonable belief that B consents,
for a purpose mentioned in subsection (6) observes B doing a private act.

(3) The second thing is that A—
   (a) without another person (“B”) consenting, and
   (b) without any reasonable belief that B consents,
operates equipment with the intention of enabling A or another person (“C”), for a purpose mentioned in subsection (7), to observe B doing a private act.

(4) The third thing is that A—
   (a) without another person (“B”) consenting, and
   (b) without any reasonable belief that B consents,
records B doing a private act with the intention that A or another person (“C”), for a purpose mentioned in subsection (7), will look at an image of B doing the act.

(5) The fourth thing is that A—
   (a) installs equipment, or
   (b) constructs or adapts a structure or part of a structure with the intention of enabling
   A or another person to do an act referred to in subsection (2), (3) or (4).

(6) The purposes referred to in subsection (2) are—
   (a) obtaining sexual gratification,
   (b) humiliating, distressing or alarming B.

(7) The purposes referred to in subsections (3) and (4) are—
   (a) obtaining sexual gratification (whether for A or C),
   (b) humiliating, distressing or alarming B.

Interpretation of section (voyeurism)

(1) For the purposes of section (voyeurism), a person is doing a private act if the person is in a place which in the circumstances would reasonably be expected to provide privacy, and—
   (a) the person’s genitals, buttocks or breasts are exposed or covered only with underwear,
   (b) the person is using a lavatory, or
   (c) the person is doing a sexual act that is not of a kind ordinarily done in public.
(2) For the purposes of section (voyeurism)(3), operating equipment includes enabling or securing its activation by another person without that person’s knowledge.

(3) In section (voyeurism)(5), “structure” includes a tent, vehicle or vessel or other temporary or movable structure.
Annex B – Minor and Technical Amendments

Listed below are the main minor and technical amendments to the Bill not dealt with in Annex A. It should be noted that consequential amendments dependent on the approach taken to the definition of rape and sexual assault are not listed here. Some consequential amendments relating to the creation of an offence of voyeurism are also absent.

NB – The amendment numbers in this list are not definitive and will change before amendments are lodged. Numbers are included solely to make it easier to identify separate amendments.

New Section after Section 30 – Special provision as regard failure to establish age: section 27 and similar circumstances

Purpose: To extend to the section 27 offence (older children engaging in sexual activity with each other) the provisions concerning circumstances where it is not possible to establish the age of the child.

66 After section 30, insert—

Special provision as regards failure to establish age: section 27 and similar circumstances

(1) If in a trial where A is charged with an offence under section 27(1) (engaging while an older child in sexual conduct with or towards another older child), there is a failure to establish beyond reasonable doubt that A was a child who had not attained the age of 16 years at the relevant time (but the court or, in the case of a trial of an indictment, the jury is satisfied it is established beyond reasonable doubt that A had attained the age of 13 years at that time), A is to be deemed for the purposes of the proceedings to be such a child.

(2) If in a trial where A is charged with an offence under section 27(1) there is a failure to establish beyond reasonable doubt that B was a child who had attained the age of 13 years at the relevant time (but the court or, in the case of a trial of an indictment, the jury is satisfied it is established beyond reasonable doubt that B had not attained the age of 16 years at that time), B is to be deemed for the purposes of the proceedings to be such a child.

(3) If in a trial where B is charged with an offence under section 27(4) (engaging while an older child in consensual sexual conduct with another older child), there is a failure to establish beyond reasonable doubt that B was a child who had not attained the age of 16 years at the relevant time (but the court or, in the case of a trial of an indictment, the jury is satisfied it is established beyond reasonable doubt that B had attained the age of 13 years at that time), B is to be deemed for the purposes of the proceedings to be such a child.

(4) If in a trial where B is charged with an offence under section 27(4) there is a failure to establish beyond reasonable doubt that A was a child who had attained the age of 13 years at the relevant time (but the court or, in the case of a trial of an indictment, the jury is satisfied it is established beyond reasonable doubt that A had not attained the age of 16 years at that time), A is to be deemed for the purposes of the proceedings to be such a child.
(5) Subsection (6) applies to a trial where A is charged—
   (a) with an offence under section 14 (rape of a young child) or 15(2)(a) (sexual
       assault of a young child by penetration),
   (b) (in so far as the charge is founded on A intentionally or recklessly touching the
       vagina, anus or penis of B sexually with A’s mouth) with an offence under section
       15(2)(b) or (c) (sexual assault of a young child by sexual touching or other sexual
       activity).

(6) If in the trial there is a failure to establish beyond reasonable doubt that B was a child
     who had not attained the age of 13 years at the relevant time, but the court (or, in the
     case of a trial of an indictment, the jury) is satisfied—
     (a) in every other respect that A committed the offence charged, and
     (b) that it is established beyond reasonable doubt that B was a child who had not
         attained the age of 16 years at that time,

A may be acquitted of the charge but found guilty of an offence against B under section
27(1).

(7) Subsection (8) applies to a trial where A is charged—
   (a) with an offence under section 21 (having intercourse with an older child) or
       22(2)(a) (engaging in penetrative sexual activity with or towards an older child),
   (b) (in so far as the charge is founded on A intentionally or recklessly touching the
       vagina, anus or penis of B sexually with A’s mouth) with an offence under section
       22(2)(b) or (c) (engaging in sexual activity with or towards an older child
       involving sexual touching or other sexual activity).

(8) If in the trial there is a failure to establish beyond reasonable doubt that A was a person
     who had attained the age of 16 years at the relevant time, but the court (or, in the case
     of a trial of an indictment, the jury) is satisfied—
     (a) in every other respect that A committed the offence charged, and
     (b) that it is established beyond reasonable doubt that A was a person who had
         attained the age of 13 years at that time,

A may be acquitted of the charge but found guilty of an offence against B under section
27(1).

(9) [Section 30(7) applies for the purposes of this section as it applies for the purposes of
     that section.]

(10) In this section references to the relevant time are to be construed as references to when
     the conduct to which the proceedings relate occurred.>

Section 33 – Amendments consequential to amendments to definition of “positions of trust” (item 10 in Annex A)

Purpose: As above.

77 In section 33, page 17, leave out lines 7 to 10 and insert—

<“further or higher education institution” means a body listed in schedule 2 to the
Further and Higher Education (Scotland) Act 2005 (asp 6),>
Section 37 and Schedule 1 – Penalties for rape and sexual assault

Purpose: This amendment implements the recommendation at paragraph 369 of the Committee’s Report and ensures that a fine cannot be imposed as a sole penalty for a person convicted of rape or rape of a young child. It further provides that a fine cannot be imposed as a sole penalty for sexual assault or sexual assault on a young child where it is tried on indictment.

Section 38 – Removal of requirement for COPFS to serve notice in respect of alternative verdicts (and consequential amendments to section 30)

Purpose: This amendment removes the requirement for COPFS to give notice of the possibility of conviction for an alternative offence for section 38(1) to have effect, as per the Cabinet Secretary for Justice’s letter of 22 December 2008.

Sections 42-43 – References to ‘conduct’ and ‘acts’

Purpose: These are technical amendments to ensure consistency.
Section 43 – Amendment to make Order-making powers at s29 and s32 subject to affirmative procedure

Purpose: As per heading.

In section 43, page 22, line 40 leave out <conduct> and insert <an act>

Section 46 – Amendment to make Order-making powers at s29 and s32 subject to affirmative procedure

Purpose: As per heading.

In section 46, page 25, line 4, after <under> insert <section 29(5A)>

In section 46, page 25, line 4, after <under> insert <or section 32(8), or
( ) an order under>

Section 47 – Single definition of “sexual” (consequential amendments removing the definition where it occurs elsewhere in the Bill also listed here)

Purpose: This is a technical amendment to replace the multiple and similar definitions of the term "sexual" which occur throughout the Bill with a single definition.

In section 47, page 25, line 10, at end insert—

<( ) For the purposes of this Act—
( a) penetration, touching, or any other activity,
( b) a communication,
( c) a manner of exposure, or
( d) a relationship,

is sexual if a reasonable person would, in all the circumstances of the case, consider it to be sexual.>

In section 2, page 2, line 16, leave out subsection (3)
In section 3, page 2, line 37, leave out subsection (2)
In section 4, page 3, line 13, leave out subsection (3)
In section 5, page 3, line 34, leave out subsection (3)
In section 6, page 4, line 26, leave out subsection (5)
In section 7, page 4, line 34, leave out subsection (2)
In section 8, page 5, leave out lines 12 and 13
In section 15, page 7, line 21, leave out subsection (3)
In section 16, page 7, line 34, leave out subsection (2)
In section 17, page 8, line 13, leave out subsection (3)
In section 18, page 8, line 31, leave out subsection (3)
In section 19, page 9, line 20, leave out subsection (5)
In section 22, page 10, line 12, leave out subsection (3)
In section 23, page 10, line 29, leave out subsection (2)
Schedule 4 - `Consequential amendments to section 13 of the Criminal Law (Consolidation) (Scotland) Act 1995

Purpose: This amendment implements the recommendation at paragraph 389 of the Committee’s Report, and amends the definition of a “homosexual act” at section 13 of the 1995 Act,

122 In schedule 4, page 35, line 26, at end insert—

\(<(  ) \) In section 13 (homosexual offences)—

\(<(  ) \) in subsection (4), for “sodomy or an act of gross indecency or shameless indecency” substitute “an act of engaging in sexual activity”,

\[(b) after subsection (4) insert—\]

\“(4A) For the purposes of subsection (4), an activity is sexual in any case if a reasonable person would, in all the circumstances of the case, consider it to be sexual.”.\]>

Schedule 4 – Amendments to sex offender notification requirements

Purpose: As outlined in the Government’s response to the Committee’s Stage 1 report, we considered it disproportionate for sex offender notification requirements to apply in all circumstances where the offender is under 18. This amendment gives effect to the changes detailed in our response.

123 In schedule 4, page 40, line 30, after <exposure) insert <if—

(a) the offender is or has been sentenced in respect of the offence to a term of imprisonment, or

(a) the offender was 18 or over and the victim was under 18>

124 In schedule 4, page 41, line 6 after <child) insert <if the offender—

(a) was 18 or over, or

(b) is or has been sentenced in respect of the offence to a term of imprisonment

125 In schedule 4, page 41, line 8 after <child) insert <if the offender—
(a) was 18 or over, or  
(b) is or has been sentenced in respect of the offence to a term of imprisonment

126 In schedule 4, page 41, line 10 after <activity)> insert <if the offender—  
(a) was 18 or over, or  
(b) is or has been sentenced in respect of the offence to a term of imprisonment>

127 In schedule 4, page 41, line 12 after <activity)> insert <if the offender—  
(a) was 18 or over, or  
(b) is or has been sentenced in respect of the offence to a term of imprisonment>

128 In schedule 4, page 41, line 14 after <activity)> insert <if the offender—  
(a) was 18 or over, or  
(b) is or has been sentenced in respect of the offence to a term of imprisonment>

129 In schedule 4, page 41, line 16 after <child)> insert <if the offender—  
(a) was 18 or over, or  
(b) is or has been sentenced in respect of the offence to a term of imprisonment>

130 In schedule 4, page 41, line 18 after <communication)> insert <if the offender—  
(a) was 18 or over, or  
(b) is or has been sentenced in respect of the offence to a term of imprisonment>

131 In schedule 4, page 41, line 20, after <child)> insert <if the offender is sentenced in respect of the offence to a term of imprisonment>

132 In schedule 4, page 41, line 22, after <child)> insert <if the offender is sentenced in respect of the offence to a term of imprisonment>

Schedule 5 – List of Repeals – Repeal of reference to “shameless indecency”

Purpose: Technical amendment to remove reference to the offence of “shameless indecency” in Schedule 3 to the Sexual Offences Act 2003.

133 In schedule 5, page 43, column 2, line 28, at end insert—  
   <In Schedule 3, paragraph 42.>
Annex C – Section 27 – Gender Neutrality and ECHR

Criminalisation of consensual sexual intercourse between older children

1. The policy justification for the criminalisation of consensual sexual intercourse between older children is that it is important to have a definitive age in law at which young people are deemed to have capacity to consent to sexual intercourse. That age is currently 16 in Scotland and throughout the rest of the UK. The Scottish Government is concerned that the SLC’s proposals could be perceived as reducing this to 13 in Scotland and are therefore concerned about the potential for damaging consequences for young people. Retaining 16 as the age at which the law recognises that young people have sexual autonomy is consistent with existing legal provision. Decriminalising sexual intercourse between teenagers under the age of 16 may make it more difficult for young people to resist peer pressure to engage in sexual intercourse and therefore risks more and earlier sexual activity amongst young people in Scotland. This is in line with the Scottish Government’s policy of encouraging young people to delay sexual activity. Young people’s sexual health is not an area in which risks should be taken and there is a strong case for guarding against the possibility of rises in teenage pregnancies and sexually transmitted infections with associated long-term consequences. The Scottish Government considers that the legal age at which a young person can consent to sexual activity is important in signalling society’s view on sexual activity and did not feel that it was an area which should be altered without very careful regard to the potential consequences in terms of harm to young people.

Extension of current domestic law to older girls

2. The policy justification for extending this offence to girls under 16 is that the Scottish Government considers that the way in which the law currently acts to criminalise only boys (where the activity is consensual and both are of similar age) is discriminatory and incompatible with ECHR obligations.

ECHR

3. Article 14 of the ECHR states that:

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

Article 14 does not constitute a stand alone right. Rather it is a principle to be applied in conjunction with the other substantive rights; in other words, it is only in relation to the way in which Convention rights are secured and respected in domestic law that a question of violation of Article 14 may arise. Accordingly a measure need only come within the “ambit” of a Convention right to raise possible Article 14 issues and the substantive right itself need not be violated. Contracting states must
therefore ensure that the way a substantive right is guaranteed is not discriminatory, even when the protection afforded to that right exceeds Convention requirements.

5. The Scottish Government contends that the current domestic law, which criminalises older boys and not older girls for consensual sexual intercourse, is discriminatory. In order to determine the question of discrimination, Lord Steyn set out the following considerations in *R (S) v Chief Constable of South Yorkshire Police*:

1. Do the facts fall within the ambit of one or more of the Convention Rights?
2. Was there a difference in treatment in respect of that right between the complainant and others put forward for comparison?
3. If so, was the difference in treatment on one or more of the proscribed grounds under article 14?
4. Were those others in an analogous situation?
5. Was the difference in treatment objectively justifiable in the sense that it had a legitimate aim and bore a reasonable relationship of proportionality to that aim?

**Current domestic law and compatibility with ECHR**

6. Applying these questions to the current domestic law, the first question to be asked is whether there is any substantive right involved, such that it is necessary to consider whether the way in which this right is being respected merits consideration of Article 14.

7. Article 8 of the ECHR concerns the right to private and family life. It incorporates extensive protection of personal autonomy, including the conduct and development of relationships with others and sexual autonomy.\(^1\) Given this wide scope, it is clear that any domestic law which seeks to regulate sexual relations between older children engages Article 8 and, therefore, must be justifiable as non-discriminatory in terms of Article 14.

8. In applying the second question to the current domestic law, there is a clear difference in treatment between boys who engage in consensual sexual activity and girls who engage in consensual sexual activity. The Scottish Government considers that the current domestic law treats an older boy substantively differently and less favourably than an older girl in the case of consensual sexual activity.

9. In response to the third question, this difference of treatment is on one of the proscribed grounds under article 14 - sex. The European Court of Human Rights has frequently expressed the view that there must be very weighty reasons put forward by a member state for a difference in treatment based exclusively on the ground of sex.\(^2\)

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\(^1\) *Niemetz v Germany* (1992) 16 EHRR 97 and *Dudgeon v United Kingdom* (1981) 4 EHRR 149.

\(^2\) This principle underpins much of the Court’s jurisprudence – *Burghartz v Switzerland* (1994) A 280-B, *Karlheinz Schmidt v Germany* (1994) A 291-B – both cases involved legislation with a difference in treatment based exclusively on the ground of sex which was held to be incompatible with Article 14.
10. In considering the fourth question, the Scottish Government contends that an older male child who engages in consensual sexual activity is in an analogous situation to an older female child who engages in consensual sexual activity.

11. With regard to the fifth question, the Scottish Government does not consider that there is an “objective and reasonable justification” for this difference in treatment. The legitimate aim pursued by the government is to impose a legal age of consent. The Scottish Government considers that it is difficult to justify why the criminalisation of older boys only meets this legitimate aim. Both an older boy and an older girl are responsible for breaking the law when they engage in consensual sexual activity. The Scottish Government believes that the extension of the current domestic law to older girls pursues the legitimate aim of maintaining the age of consent at 16. It is considered that extending the current criminal law to older girls will have a deterrent effect and help to discourage older children engaging in sexual intercourse.

12. It has been claimed that the reason for the difference in treatment is because the girl is more vulnerable than the boy e.g. by becoming pregnant. Whilst this is a great concern, the Scottish Government contend that such arguments cannot justify a difference in treatment in the legislative provisions. Furthermore, the Scottish Government considers both older girls and older boys to be vulnerable when they engage in sexual activity. For example, older boys are just as susceptible to older girls to catching Sexually Transmitted Diseases.

13. The Scottish Government considers that it is disproportionate, therefore, to impose a criminal offence on the older boy only for engaging in this activity.

14. It is for these reasons that the Scottish Government contends that it would be discriminatory to maintain the current domestic law which penalises boys only. By contrast, the Scottish Government considers the provisions contained in section 27 of the bill concerning older children engaging in consensual sexual activity to be non-discriminatory.

Section 27 and compatibility with ECHR

15. Applying Lord Steyn’s questions to Section 27, again, the case of older children engaging in consensual sexual activity falls within the scope of Article 8 and therefore must be non-discriminatory. Unlike the current law, there is no difference in treatment as the proposed section 27 applies equally to male and female adults who engage in consensual sexual intercourse.

16. The extension of the criminal law to older girls who engage in consensual sexual intercourse pursues a legitimate aim of maintaining the age of consent at 16. The Scottish Government consider that it is objective and reasonable to treat older girls and older boys who engage in consensual sexual intercourse in the same way.

17. Furthermore, it is essential that older girls can be prosecuted in situations where an older girl coerces an older boy into engaging in sexual activity. Section 27 allows the older girl to be prosecuted in such a situation.
18. Section 27 does not impose blanket imposition of the offence. Discretion to prosecute will be exercised. It will not always be in the public interest to prosecute older children engaging in sexual activity. An example of this may be when the older girl is pregnant.

19. The discretion does not mean, however, that there will be a blanket disapplication of this law in relation to consensual sexual activity between older children. Section 27 will allow for prosecutions of either an older boy or an older girl, or both, to be prosecuted for engaging in sexual activity if the facts and circumstances of the case support that prosecution (for example, for any non-consensual or predatory sexual behaviour).

20. The Scottish Government therefore deems section 27 of the bill to be non-discriminatory.

Conclusions

- The Scottish Government considers that it would be discriminatory to maintain the current domestic law which penalises older boys only for engaging in consensual sexual intercourse.

- The Scottish Government considers that a difference in treatment on the ground of sex in the imposition of a criminal penalty cannot be justified.

- The Scottish Government does not consider that there is an objective and reasonable justification for the current domestic law.

- The Scottish Government considers that any differential treatment of older children on the grounds of sex is not proportionate.

- The Scottish Government considers that the legitimate aim of maintaining the age of consent at 16 is best pursued by applying the current domestic law to both older girls and older boys who engage in consensual sexual intercourse.

- The Scottish Government considers that section 27 applies in a non-discriminatory manner. It treats older boys and older girls who consent in consensual sexual intercourse equally.

- The prosecutor’s discretion will ensure that older boys and older girls will not prosecuted for engaging in consensual sexual activity when it is not in the public interest to do so.

- The discretion is not a blanket disapplication of the law. In some cases, it will be appropriate to prosecute either an older boy or an older girl for engaging in consensual sexual intercourse. Section 27 allows makes suitable provision for this.
SEXUAL OFFENCES (SCOTLAND) BILL: Bill Aitken MSP moved S3M-3589—

That the Justice Committee considers the Sexual Offences (Scotland) Bill at Stage 2 in the following order: sections 1 to 8, section 13, sections 9 to 12, sections 14 to 37, schedule 1, section 38, schedule 2, sections 39 to 42, schedule 3, sections 43 to 48, schedules 4 and 5, section 49 and the long title.

The motion was agreed to.
1st Marshalled List of Amendments for Stage 2

The Bill will be considered in the following order—

Sections 1 to 8  Section 13
Sections 9 to 12  Sections 14 to 37
Schedule 1  Section 38
Schedule 2  Sections 39 to 42
Schedule 3  Sections 43 to 48
Schedules 4 and 5  Section 49

Long Title

Amendments marked * are new (including manuscript amendments) or have been altered.

Section 1

Fergus Ewing

1 In section 1, page 1, line 19, leave out <an artificial> and insert <a surgically constructed>

Fergus Ewing

2 In section 1, page 1, line 23, leave out <an artificial> and insert <a surgically constructed>

Fergus Ewing

3 In section 1, page 1, line 23, leave out second <artificial> and insert <surgically constructed>

After section 1

Fergus Ewing

4 After section 1, insert—

Sexual assault by penetration

(1) If a person (“A”), with any part of A’s body or anything else—

(a) without another person (“B”) consenting, and

(b) without any reasonable belief that B consents,

penetrates sexually to any extent, either intending to do so or reckless as to whether there is penetration, the vagina or anus of B then A commits an offence, to be known as the offence of sexual assault by penetration.

(2) For the purposes of this section, penetration is a continuing act from entry to withdrawal of whatever is intruded; but this subsection is subject to subsection (3).
(3) In a case where penetration is initially consented to but at some point of time the consent is withdrawn, subsection (2) is to be construed as if the reference in it to a continuing act from entry were a reference to a continuing act from that point of time.

(4) Without prejudice to the generality of subsection (1), the reference in that subsection to penetration with any part of A’s body is to be construed as including a reference to penetration with A’s penis.

Section 2

Fergus Ewing

5 In section 2, page 2, line 15, at end insert—

<(  ) intentionally or recklessly emits urine or saliva onto B sexually>

Section 3

Fergus Ewing

6 In section 2, page 2, line 16, leave out subsection (3)

Section 4

Fergus Ewing

7 In section 3, page 2, line 37, leave out subsection (2)

Section 5

Fergus Ewing

8 In section 4, page 3, line 13, leave out subsection (3)

Fergus Ewing

9 In section 5, page 3, line 27, leave out from <an> to second <engaging> in line 28 and insert <a sexual image>

Fergus Ewing

10 In section 5, page 3, line 30, leave out <an image of a sexual activity> and insert <a sexual image>

Fergus Ewing

11 In section 5, page 3, line 33, at end insert—

<(  ) For the purposes of subsection (1), a sexual image is an image (produced by whatever means and whether or not a moving image) of—

(a) A engaging in a sexual activity or of a third person or imaginary person so engaging.

2
(b) A’s genitals or the genitals of a third person or imaginary person.

Fergus Ewing

12 In section 5, page 3, line 34, leave out subsection (3)

Section 6

Fergus Ewing

13 In section 6, page 4, line 26, leave out subsection (5)

Section 7

Fergus Ewing

14 In section 7, page 4, line 29, after <(“A”)> insert—
   <(  ) without another person (“B”) consenting, and
   (  ) without any reasonable belief that B consents,>

Fergus Ewing

15 In section 7, page 4, line 29, after <intentionally> insert <and for a purpose mentioned in subsection (1A),>

Fergus Ewing

16 In section 7, page 4, line 29, leave out <another person (“B”)> and insert <B>

Fergus Ewing

17 In section 7, page 4, line 30, leave out from <and> to end of line 32

Fergus Ewing

18 In section 7, page 4, line 33, at end insert—
   <(1A) The purposes are—
   (a) obtaining sexual gratification,
   (b) humiliating, distressing or alarming B.>

Fergus Ewing

19 In section 7, page 4, line 34, leave out subsection (2)

Fergus Ewing

20 In section 7, page 4, line 37, leave out subsections (3) and (4)
After section 7

Fergus Ewing

21 After section 7, insert—

<Voyeurism

(1) A person (“A”) commits an offence, to be known as the offence of voyeurism, if A does any of the things mentioned in subsections (2) to (5).

(2) The first thing is that A—

(a) without another person (“B”) consenting, and

(b) without any reasonable belief that B consents,

for a purpose mentioned in subsection (6) observes B doing a private act.

(3) The second thing is that A—

(a) without another person (“B”) consenting, and

(b) without any reasonable belief that B consents,

operates equipment with the intention of enabling A or another person (“C”), for a purpose mentioned in subsection (7), to observe B doing a private act.

(4) The third thing is that A—

(a) without another person (“B”) consenting, and

(b) without any reasonable belief that B consents,

records B doing a private act with the intention that A or another person (“C”), for a purpose mentioned in subsection (7), will look at an image of B doing the act.

(5) The fourth thing is that A—

(a) installs equipment, or

(b) constructs or adapts a structure or part of a structure with the intention of enabling A or another person to do an act referred to in subsection (2), (3) or (4).

(6) The purposes referred to in subsection (2) are—

(a) obtaining sexual gratification,

(b) humiliating, distressing or alarming B.

(7) The purposes referred to in subsections (3) and (4) are—

(a) obtaining sexual gratification (whether for A or C),

(b) humiliating, distressing or alarming B.>

Fergus Ewing

22 After section 7, insert—

<Interpretation of section (Voyeurism)

(1) For the purposes of section (Voyeurism), a person is doing a private act if the person is in a place which in the circumstances would reasonably be expected to provide privacy, and—
(a) the person’s genitals, buttocks or breasts are exposed or covered only with underwear,
(b) the person is using a lavatory, or
(c) the person is doing a sexual act that is not of a kind ordinarily done in public.

(2) For the purposes of section (Voyeurism)(3), operating equipment includes enabling or securing its activation by another person without that person’s knowledge.

(3) In section (Voyeurism)(5), “structure” includes a tent, vehicle or vessel or other temporary or movable structure.

Section 8

Fergus Ewing
23 In section 8, page 5, line 8, leave out <A> and insert <any person>

Fergus Ewing
24 In section 8, page 5, leave out lines 12 and 13

Section 13

Fergus Ewing
25 In section 13, page 6, line 27, leave out <6> and insert <(Voyeurism)>

Section 10

Fergus Ewing
26 In section 10, page 6, line 9, leave out <6> and insert <(Voyeurism)>

Section 11

Fergus Ewing
27 In section 11, page 6, line 11, leave out <6> and insert <(Voyeurism)>

Section 15

Fergus Ewing
28 In section 15, page 7, line 21, leave out subsection (3)

Section 16

Fergus Ewing
29 In section 16, page 7, line 34, leave out subsection (2)
Section 17

Fergus Ewing

30 In section 17, page 8, line 13, leave out subsection (3)

Section 18

Fergus Ewing

31 In section 18, page 8, line 24, leave out from <an> to <engaging> in line 26 and insert <a sexual image>

Fergus Ewing

32 In section 18, page 8, line 27, leave out <an image of a sexual activity> and insert <a sexual image>

Fergus Ewing

33 In section 18, page 8, line 30, at end insert—
   <( ) For the purposes of subsection (1), a sexual image is an image (produced by whatever means and whether or not a moving image) of—
   (a) A engaging in a sexual activity or of a third person or imaginary person so engaging,
   (b) A’s genitals or the genitals of a third person or imaginary person.>

Fergus Ewing

34 In section 18, page 8, line 31, leave out subsection (3)

Section 19

Fergus Ewing

35 In section 19, page 9, line 20, leave out subsection (5)

Section 22

Fergus Ewing

36 In section 22, page 10, line 12, leave out subsection (3)

Section 23

Fergus Ewing

37 In section 23, page 10, line 29, leave out subsection (2)
Section 24

Fergus Ewing

38 In section 24, page 11, line 8, leave outsubsection (3)

Section 25

Fergus Ewing

39 In section 25, page 11, line 23, leave out from <an> to second <engaging> in line 24 and insert <a sexual image>

Fergus Ewing

40 In section 25, page 11, line 26, leave out <an image of a sexual activity> and insert <a sexual image>

Fergus Ewing

41 In section 25, page 11, line 29, at end insert—

<(  ) For the purposes of subsection (1), a sexual image is an image (produced by whatever means and whether or not a moving image) of—

(a) A engaging in a sexual activity or of a third person or imaginary person so engaging,

(b) A’s genitals or the genitals of a third person or imaginary person.>

Fergus Ewing

42 In section 25, page 11, line 30, leave out subsection (3)

Section 26

Fergus Ewing

43 In section 26, page 12, line 22, leave out subsection (5)

Section 28

Fergus Ewing

44 In section 28, page 13, line 9, leave out subsection (2)

Section 31

Fergus Ewing

45 In section 31, page 16, line 10, leave out subsection (2)
Section 34

Fergus Ewing

46 In section 34, page 17, line 35, leave out subsection (4)

Section 35

Fergus Ewing

47 In section 35, page 18, line 16, leave out subsection (3)

Section 36

Fergus Ewing

48 In section 36, page 19, line 8, leave out subsection (3)

Section 37

Fergus Ewing

49 In section 37, page 19, line 16, at end insert—

<( ) Where a person is convicted on indictment of rape, (Sexual assault by penetration), sexual assault, rape of a young child or sexual assault on a young child, a penalty of imprisonment without a fine may be imposed, but not a penalty of a fine alone; and the power of the court in section 199(2)(b) of the Criminal Procedure Scotland) Act 1995 (c.20) (to substitute a fine for imprisonment) is not available.>

Schedule 1

Fergus Ewing

50 In schedule 1, page 26, line 7, column 4, leave out from <or> to end of line 8 and insert <and a fine>

Fergus Ewing

51 In schedule 1, page 26, line 8, at end insert—

<Sexual assault (Sexual assault by penetration) Life imprisonment and a fine>

Fergus Ewing

52 In schedule 1, page 26, line 9, column 4, leave out from <or> to end of line 10 and insert <and a fine>
Fergus Ewing
53 In schedule 1, page 26, line 22, column 1, leave out <an image of a sexual activity> and insert <a sexual image>

Fergus Ewing
54 In schedule 1, page 26, line 36, at end insert—
<Voyeurism Section (Voyeurism) Imprisonment for a term not exceeding 12 months or a fine not exceeding the statutory maximum (or both) Imprisonment for a term not exceeding 5 years or a fine (or both)>

Fergus Ewing
55 In schedule 1, page 27, line 4, column 4, leave out from <or> to end of line 5 and insert <and a fine>

Fergus Ewing
56 In schedule 1, page 27, line 6, column 4, leave out from <or> to end of line 7 and insert <and a fine>

Fergus Ewing
57 In schedule 1, page 27, line 19, column 1, leave out <an image of a sexual activity> and insert <a sexual image>

Fergus Ewing
58 In schedule 1, page 28, line 9, column 1, leave out <an image of a sexual activity> and insert <a sexual image>

Before section 38

Fergus Ewing
59 Before section 38, insert—

Establishment of purpose for the purposes of sections 4 to (Voyeurism), 17 to 19 and 24 to 26

(1) For the purposes of sections 4 to (Voyeurism), 17 to 19 and 24 to 26, A’s purpose was—

(a) obtaining sexual gratification, or

(b) humiliating, distressing or alarming B,

if in all the circumstances of the case it may reasonably be inferred A was doing the thing for the purpose in question.

(2) In applying subsection (1) to determine A’s purpose, it is irrelevant whether or not B was in fact humiliated, distressed or alarmed by the thing done by A.>
Fergus Ewing

60  In schedule 2, page 29, line 13, column 3, leave out <an image of a sexual activity> and insert <a sexual image>

Fergus Ewing

61  In schedule 2, page 29, line 20, column 3, leave out <an image of a sexual activity> and insert <a sexual image>

Fergus Ewing

62  In schedule 2, page 30, line 6, column 1, leave out <an image of a sexual activity> and insert <a sexual image>

Fergus Ewing

63  In schedule 2, page 30, line 15, column 3, leave out <an image of a sexual activity> and insert <a sexual image>

Fergus Ewing

64  In schedule 2, page 30, line 22, column 3, leave out <an image of a sexual activity> and insert <a sexual image>

Fergus Ewing

65  In schedule 2, page 31, line 6, column 3, leave out <an image of a sexual activity> and insert <a sexual image>

Fergus Ewing

66  In schedule 2, page 31, line 14, column 3, leave out <an image of a sexual activity> and insert <a sexual image>

Fergus Ewing

67  In schedule 2, page 31, line 20, column 1, leave out <an image of a sexual activity> and insert <a sexual image>

Fergus Ewing

68  In schedule 2, page 31, line 29, column 3, leave out <an image of a sexual activity> and insert <a sexual image>

Fergus Ewing

69  In schedule 2, page 31, line 36, column 3, leave out <an image of a sexual activity> and insert <a sexual image>
Fergus Ewing
70 In schedule 2, page 32, line 9, column 3, leave out <an image of a sexual activity> and insert <a sexual image>

Fergus Ewing
71 In schedule 2, page 32, line 16, column 3, leave out <an image of a sexual activity> and insert <a sexual image>

Fergus Ewing
72 In schedule 2, page 32, line 23, column 1, leave out <an image of a sexual activity> and insert <a sexual image>

Fergus Ewing
73 In schedule 2, page 32, line 31, column 3, leave out <an image of a sexual activity> and insert <a sexual image>

Fergus Ewing
74 In schedule 2, page 33, line 8, column 3, leave out <an image of a sexual activity> and insert <a sexual image>

Section 47

Fergus Ewing
75 In section 47, page 25, line 10, at end insert—
<( ) For the purposes of this Act—
(a) penetration, touching, or any other activity,
(b) a communication,
(c) a manner of exposure, or
(d) a relationship,
is sexual if a reasonable person would, in all the circumstances of the case, consider it to be sexual.>
# Sexual Offences (Scotland) Bill

## 1st Groupings of Amendments for Stage 2

This document provides procedural information which will assist in preparing for and following proceedings on the above Bill. The information provided is as follows:

- the list of groupings (that is, the order in which amendments will be debated). Any procedural points relevant to each group are noted;

- the text of amendments to be debated on the first day of Stage 2 consideration, set out in the order in which they will be debated. **THIS LIST DOES NOT REPLACE THE MARSHALLED LIST, WHICH SETS OUT THE AMENDMENTS IN THE ORDER IN WHICH THEY WILL BE DISPOSED OF.**

### Groupings of amendments

**Surgically constructed genitals**

1, 2, 3

**Sexual assault: penetration**

4

**Sexual assault: emission of saliva**

5

**Definition of sexual**

6, 7, 8, 12, 13, 19, 24, 28, 29, 30, 34, 35, 36, 37, 38, 42, 43, 44, 45, 46, 47, 48, 75

**Coercing a person into looking at a sexual image**

9, 10, 11, 31, 32, 33, 39, 40, 41, 53, 57, 58, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74

**Sexual exposure, voyeurism and purpose required for offence to be committed**

14, 15, 16, 17, 18, 20, 21, 22, 25, 26, 27, 54

**Administering a substance for sexual purposes**

23

**Penalty on indictment for rape, sexual assault by penetration, sexual assault, rape of a young child or sexual assault on a young child**

49, 50, 51, 52, 55, 56

**Establishment of purpose: sexual gratification, causing humiliation or distress**

59
Present:
Bill Aitken (Convener)  Robert Brown
Bill Butler (Deputy Convener)  Angela Constance
Cathie Craigie  Nigel Don
Paul Martin  Stewart Maxwell

**Sexual Offences (Scotland) Bill:** The Committee considered the Bill at Stage 2 (Day 1).

The following amendments were agreed to without division: 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24 and 25.

Sections 1, 2, 3, 4, 5, 6, 7, 8 and 13 were agreed to as amended.

The Committee ended consideration of the Bill for the day, section 13 having been agreed to.
On resuming—

Sexual Offences (Scotland) Bill: Stage 2

The Convener: Item 7 is the first day of stage 2 proceedings on the Sexual Offences (Scotland) Bill. The committee will consider amendments to sections 1 to 8 inclusive and section 13 but will not proceed beyond that point. Members should have their copies of the bill, the marshalled list and the groupings of amendments.

I welcome the Minister for Community Safety, Fergus Ewing, who is spending the entire morning with us, and his officials Gery McLaughlin, Patrick Down, Caroline Lyon and Diane Barbirou.

Section 1—Rape

The Convener: Amendment 1, in the name of the minister, is grouped with amendments 2 and 3.

Fergus Ewing: Before we start today’s substantive business, I put on record my thanks and those of the Cabinet Secretary for Justice for the constructive approach that committee members have taken to the bill. That is greatly appreciated and it has helped us significantly with the complex and difficult issues in the bill. As you are aware, the Government has taken full account of the committee’s views in lodging amendments at stage 2, and we are grateful to you for your advice and assistance on the best and most appropriate ways in which to strengthen the bill.

Amendments 1 to 3 relate to the recommendation in paragraph 66 of the committee’s stage 1 report. The concern was that the use of the term “artificial” to describe genitalia created in the course of surgery such as gender reassignment surgery is inappropriate, as the term is more generally used to refer to prosthetic parts. The committee’s report asked the Government to consider the issue and lodge appropriate amendments to the bill. Our response to the report confirmed that we would do that.

We agree that the terminology that is currently used in the bill is inappropriate. The intention of the amendments is to have the bill refer to “surgically constructed” genitalia rather than prosthetic parts. Amendments 1 to 3 therefore amend section 1 to replace the term “artificial” with the term “surgically constructed”.

I move amendment 1.

Amendment 1 agreed to.

Amendments 2 and 3 moved—[Fergus Ewing]—and agreed to.

Section 1, as amended, agreed to.
After section 1

The Convener: Amendment 4, in the name of the minister, is in a group on its own.

Fergus Ewing: Amendment 4 provides for a new offence of sexual assault by penetration. It is a response to the committee’s stage 1 report, which recommended that the bill be amended to create “a separate offence of rape with an object or with another part of the body, limited to vaginal or anal penetration”.

As the Government’s response to the report made clear, we understand and sympathise with the reasons behind the committee’s recommendation. In her evidence to the committee, the Lord Advocate stated that some of the most horrific and violent attacks involve the victim being penetrated with an object. Such attacks are not currently defined in law, despite being perceived by many victims to be as serious as rape. As the cabinet secretary said in response to the Justice Committee’s report, the Government’s view is that it would be inadvisable to provide for a separate offence of rape with an object without incorporating that offence within the definition of the offence of rape.

As the committee is aware, the Government considered amending the bill to incorporate such conduct within the offence of rape in section 1. However, there were concerns that such a definition of rape might not match the wider public’s perception of what constitutes the crime of rape. Juries might be reluctant to convict an accused of rape if the assault does not match their understanding of the offence.

Having considered the matter at some length, the Government has concluded that the committee’s recommendation is best addressed by the creation of a new offence of sexual assault by penetration, triable only on indictment and carrying the same maximum penalties as rape.

In closing, I thank the committee for its advice and assistance, which have been invaluable in helping us to reach our conclusion.

I move amendment 4.

Cathie Craigie (Cumbernauld and Kilsyth) (Lab): There is something that I would like the minister to clarify when he sums up. It concerns subsection (4) of the new section that is proposed by amendment 4, which says:

“Without prejudice to the generality of subsection (1), the reference in that subsection to penetration with any part of A’s body is to be construed as including a reference to penetration with A’s penis.”

Section 2 also deals with that. Will the minister clarify the subsection and explain why repetition is required when section 1 already defines rape quite clearly?

Fergus Ewing: That seems a very reasonable question. Convener, do you wish me to answer it?

The Convener: Not at the moment, but you may deal with it when you sum up.

Fergus Ewing: I will.

Bill Butler: In that summing up, will the minister also say for the record what advantage the Government sees in taking the course of amendment 4 rather than including an offence of rape with an object? I take his point that the same penalties will apply, but does the Government feel that its chosen course will provide more flexibility and will assist juries?

Robert Brown: I have a question on the penalty and the method of prosecution. The minister said that the offence would be chargeable only on indictment—meaning, I think, only in the High Court. Will another amendment be required to make that clear?

The Convener: As there seem to be no further questions, I invite the minister to wind up.

Fergus Ewing: I will start with Cathie Craigie’s point. Amendment 4 creates a new offence of sexual assault by penetration, and Cathie Craigie asked me to clarify how it will operate and why it is necessary. The new offence is committed when a person sexually penetrates with any part of his or her body, or with anything else, the vagina or anus of another person without their consent and without any reasonable belief that they consent. As Cathie Craigie rightly points out, there is an overlap with the offence of rape, as subsection (4) of the new section that is introduced by amendment 4 provides that penetration includes penetration with the accused’s penis.

It is not intended that rape will be prosecuted under the new section that is introduced by amendment 4, but rather that, when the victim is not sure what he or she was penetrated with, for example because they were blindfolded in the course of the attack, a prosecution can be brought under the new section. The new section ensures that, in that specific fact situation, when a victim is uncertain what the object of penetration was, we would not fail to prove a very serious crime because of a fault of draftsmanship. That is an important fact situation in which the new section could be used and in which, were there only the offence of rape, someone might avoid conviction.

We agree with Bill Butler’s suggestion that the Government’s approach will allow more flexibility, particularly to prosecutors. I think that it will also assist juries; we certainly hope that it will do so.
On Robert Brown’s point, amendment 51 deals with penalties. I do not think that I said that the trying of this offence on indictment means that it would necessarily be heard in the High Court; it could be heard in the sheriff court. I guess that it is up to the Lord Advocate to decide in which court a case will be brought, but plainly the nature of this offence is most serious.

The Convener: I am anxious that this very important matter should be canvassed as widely as possible and I can see that Cathie Craigie still has some concerns. In the circumstances, if she wants to raise another point, I am happy for her to do that, and I am sure that the minister will do his best to answer it.

Cathie Craigie: I understand the point that the minister makes about the victim not being sure about what they were penetrated with—the Lord Advocate also made that point when she gave evidence to the committee. My concern is that the accused’s legal representatives might try to have a lesser charge brought, because I would see the new offence as a lesser charge than a charge of rape. They might try to have the charge considered as sexual assault by penetration. For the record, can you give the Government’s view on that and perhaps rule it out?

Fergus Ewing: I certainly hope that we can rule it out and I feel that we should be able to rule it out. It is plainly for the Crown to decide which charge should be brought in any particular fact circumstances. However, as the Lord Advocate said in her evidence to the committee, some of the most horrific and violent instances have involved penetration by an object. It will be readily understood and appreciated by all juries that such a crime could, in some circumstances, be even more heinous and appalling than rape itself. Without going into too much graphic detail, one thinks of broken glass and some other horrendous scenarios, which no doubt the Lord Advocate has had to deal with in the courtroom.

I reassure Cathie Craigie that the new offence that is introduced by amendment 4 is a most serious one. Each case falls on its particular circumstances and facts. It will be up to the Crown to decide how to proceed and, indeed, whether to proceed with both charges, in an either/or or both scenario; it will depend on the facts of each case. Where, for example, there is some dubiety on the part of the victim about what object he or she was penetrated with, there might well be merit in proceeding with a charge of rape and a charge of sexual assault by penetration to see where the evidence falls. In many instances of rape, there are serious and difficult evidential challenges for the prosecution, because such incidents tend to take place in private circumstances such as in homes or other locations where there is no third-party evidence available.

I give Cathie Craigie the reassurance that she seeks. We are at one with the committee and we agree that the offence of sexual assault by penetration is most serious and ranks alongside rape.

Amendment 4 agreed to.

Section 2—Sexual assault

11:00

The Convener: Amendment 5, in the name of the minister, is in a group on its own.

Fergus Ewing: Amendment 5 extends the definition of sexual assault to include other offending behaviour, namely spitting and urination. The offence of sexual assault under section 2 currently covers a range of non-consensual conduct, including the ejaculation of semen on to the victim.

Discussion with the Crown Office have highlighted that the emission of urine and saliva can also be constituent elements of a sexual assault. If that conduct is not covered by the bill, it would have to be charged under common law as assault aggravated by indecency separately from the offence of sexual assault under the bill. The Government’s view is that such conduct should be included in the definition of sexual assault. That will enable a single incident that features such conduct, as well as other elements of sexual assault, to be charged as an offence under the bill. That would avoid the need for it to be charged separately as common-law assault.

We therefore propose to extend the definition of sexual assault to cover circumstances in which the accused intentionally or recklessly emits urine or saliva on to the victim. Not all such conduct is necessarily sexual in nature. Where it is not, the intention is that it will continue to be dealt with under the common law of assault.

Amendment 5 includes a requirement that the emission of saliva or urine must be sexual. That will ensure that only conduct of a sexual nature is charged as sexual assault.

I move amendment 5.

The Convener: I think that we deal with the question of the nature of the conduct by referring to the assumption that would be made by a reasonable person.

Fergus Ewing: That is correct.

Amendment 5 agreed to.
The Convener: Amendment 6, in the name of the minister, is grouped with amendments 7, 8, 12, 13, 19, 24, 28 to 30, 34 to 38, 42 to 48 and 75.

Fergus Ewing: The amendments in the group are technical amendments, which replace the 22 separate definitions of “sexual” with a single definition, which defines the term wherever it is used in the bill.

Amendment 75 provides that, for the purposes of the bill, a communication, penetration, touching or any other activity, a manner of exposure, or a relationship is sexual if, in all the circumstances, a reasonable person would consider it to be sexual.

The other amendments in the group are consequential amendments that reflect the changed names of the offences.

I move amendment 6.

Amendment 6 agreed to.

Section 2, as amended, agreed to.

Section 3—Sexual coercion

Amendment 7 moved—[Fergus Ewing]—and agreed to.

Section 3, as amended, agreed to.

Section 4—Coercing a person into being present during a sexual activity

Amendment 8 moved—[Fergus Ewing]—and agreed to.

Section 4, as amended, agreed to.

Section 5—Coercing a person into looking at an image of a sexual activity

The Convener: Amendment 9, in the name of the minister, is grouped with amendments 10, 11, 31 to 33, 39 to 41, 53, 57, 58 and 60 to 74.

Fergus Ewing: Amendments 9 to 11, 31 to 33 and 39 to 41 amend the definition of “an image of a sexual activity” in the offences under sections 5, 18 and 25. As the bill is currently drafted, it is not clear that those offences would criminalise the sending of images of a person’s genitals without consent, or a reasonable belief in consent, as the images would not constitute “an image of a sexual activity”.

Given that such images have just as much potential to be used to cause humiliation, alarm or distress, or to be sent by persons who seek sexual gratification, we propose to amend the offences so that they refer to “a sexual image”, which we have defined as either an image of a person “engaging in a sexual activity” or an image of a person’s genitals.

In view of the changed definition, we propose to change the names of the offences so that they refer to “a sexual image” instead of “an image of a sexual activity”.

The other amendments in the group are consequential amendments that reflect the changed names of the offences.

I move amendment 9.

Amendment 9 agreed to.

Amendments 10 to 12 moved—[Fergus Ewing]—and agreed to.

Section 5, as amended, agreed to.

Section 6—Communicating indecently etc

Amendment 13 moved—[Fergus Ewing]—and agreed to.

Section 6, as amended, agreed to.

Section 7—Sexual exposure

The Convener: Amendment 14, in the name of the minister, is grouped with amendments 15 to 18, 20 to 22, 25 to 27 and 54.

Fergus Ewing: Amendments 14 to 18 amend the offence of sexual exposure at section 7 to bring it into line with the offences at sections 4 to 6. The effect would be to require that, for an offence to be committed, the accused must expose his or her genitals in a sexual manner to another person without consent, and without any reasonable belief in consent, for the purpose of obtaining sexual gratification or for the purpose of causing humiliation, alarm or distress.

As drafted, the offence of sexual exposure in section 7 is framed differently from the offences at sections 4 to 6. No reference is made to consent; the offence is framed in terms of intent to cause alarm or distress. Given that the offence achieves much the same effect as the other offences in the bill, we believe that it should be drafted in the same terms. Amendments 14 to 18 will have that effect.

Amendment 20 amends the offence of sexual exposure in section 7 and removes the defence that the conduct “was done in the course of a performance of a play”.

That defence is no longer required, given that the amended offence provides that A is guilty of the offence only if it can be proved that B did not consent to the exposure and that A had no reasonable belief that B had consented. The fact that B is at the play could give rise to a reasonable assumption in A’s mind that B knows what the play is about and that B is there through choice.
Amendment 21 provides for a new offence of voyeurism. The bill as drafted does not include provision for such an offence. At present, the offence would be prosecuted under the common law as a breach of the peace. However, given that it is clearly a sexual offence, and given that those who are convicted of it are routinely placed on the sex offenders register, our view is that the bill should provide for an offence of voyeurism.

Amendment 21 makes it an offence for a person to observe, for the purpose of obtaining sexual gratification or of humiliating, distressing or alarming the victim, another person without their consent or without any reasonable belief that they consent as they engage in a private act, as defined in amendment 22, in a place or in circumstances in which they could reasonably expect privacy. The provision is similar to the offence of voyeurism in England and Wales under the Sexual Offences Act 2003.

Amendment 21 also makes it an offence to operate equipment such as a webcam, enabling the accused or a third person to observe the victim engaging in a private act, for the purpose of obtaining sexual gratification either for the accused or for a third party or of humiliating, distressing or alarming the victim without the victim’s consent and without any reasonable belief that the victim consents.

It will also be an offence for the accused to record the victim with the intention of enabling the accused or a third person to look at an image of the victim engaging in a private act without the victim’s consent and without any reasonable belief that the victim consents for the purpose of obtaining sexual gratification for the accused or a third party or of humiliating, distressing or alarming the victim.

Finally, a person will commit an offence if he or she installs equipment such as a video camera or constructs or adapts—for example, by drilling a peephole—a structure or part of a structure with the intention of enabling him or herself or a third party to carry out any of the three actions described above for the purpose of sexual gratification for either the accused or a third party or of humiliating, distressing or alarming the victim.

Amendment 22 defines terms used in voyeurism offences. Under the amendment, a person is engaged in a private act if they are in a place in which the circumstances are such that there is a reasonable expectation of privacy and

"the person’s genitals, buttocks or breasts are exposed or covered only with underwear, ... the person is using a lavatory, or ... the person is doing a sexual act that is not of a kind ordinarily done in public."

The proposed section also provides a definition of a structure for the purpose of the offence of modifying or constructing a structure to engage in voyeurism.

Amendments 25, 6 and 7 make consequential amendments to the bill as a result of the introduction of the new offence, and amendment 54 provides for the maximum penalties for the new offence.

I move amendment 14.

The Convener: The amendments raise three issues, the first of which relates to difficulties that might arise in stage performances. Having listened to the minister, I am persuaded that it would be highly unlikely that a person who had not consented to the act involved would have been present while it was carried out. That should remove any problems for the performing arts community.

The second issue is the addition of the offence of voyeurism. It is indeed correct that for many years such matters have been dealt with under the catch-all charge of breach of the peace. However, in the vast majority of such cases, part of the disposal has been that the offender be put on the sex offenders register. Thirdly, I am interested to see that the offence now covers the art-and-part involvement of the person who drills a hole in the knowledge that photographic equipment will be installed.

Robert Brown: With regard to the new provisions relating to stage performances, has the minister, or his officials, had any contact with people in the theatrical community to ensure that any circumstances that we cannot immediately envisage do not give rise to problems?

Fergus Ewing: We have not had any such contact. I suppose that one reason for that is, as the convener indicated, actors willingly take part in performances. The offence involves a lack of consent but, prima facie, performances of plays involve the willing participation of actors. I suppose that there are relative degrees of willingness to take part in a play, which might depend on how much someone is paid to do so, but no one is forced to play roles such as Ophelia or Hamlet—they give their consent. Therefore, it had not occurred to us to seek third-party support for our position or corroboration of our argument, but it seems, prima facie, to be solid.

11:15

Robert Brown: My point was that the exposure would be not just to other stage actors—it would be to the play’s audience, which is slightly wider than the minister suggested.

Fergus Ewing: We have proceeded on the basis that people who are in an audience wish to see the play, so they consent to be in the
audience. We did not envisage that that would be a problem within the confines of the bill. Audience members are free to leave, as I have sometimes done, although not necessarily for the reason that we are discussing.

The Convener: We are intrigued about the performances of Hamlet that the minister may have attended, but we will leave that hanging to the wall.

Stewart Maxwell (West of Scotland) (SNP): My question is on the same area that Robert Brown asked about. I am clear about the issue as it relates to members of the cast, and to the audience when a play is advertised as being of an adult nature and all the actors stick to the script, but what would happen if an actor did something that was unscripted? Would they still be able to use the defence that their action was part of the play? That question is about a situation in which there is a clear script and someone goes off script.

My other question is about more free-flowing or ad lib performances. At what point would certain action constitute an offence as opposed to being part of the performance?

Fergus Ewing: I understand that the concern that was expressed by those who are involved in thespian circles was not about the performance of a play but related to “reasonable belief.” Stewart Maxwell postulates a situation in which an event takes place on a stage that is not part of the script. I find it difficult to see how someone who deliberately departed from the script to engage in a sexual offence could have any legitimate defence. Any defence would be exercised on the basis that there was a reasonable belief that consent was given, but there could be no such reasonable belief if the person in question departed from the script or the tenor of the performance to commit a sexual offence, because it would not be reasonable to assume that anyone else consented to such behaviour.

Stewart Maxwell: I assumed that that would be the case with a scripted performance, but my second question was about unscripted performances of a more free-flowing or ad lib nature. Has any thought been given to whether a defence would be available to actors in such performances?

Fergus Ewing: I guess that it would depend on the nature and extent of the behaviour that was committed, but I cannot see how anyone could avoid being convicted in circumstances in which they were taking part in an artistic performance that had no script, no plan, no nothing and they committed a sexual offence. In such circumstances, I really do not think that they would find it easy to establish that they had a reasonable belief that the other parties consented.

Robert Brown: I seem to recall that, some years ago, a great furore was caused when a nude person was wheeled across the stage in a wheelbarrow during a performance in the Edinburgh festival. Would something like that—which was clearly designed to shock in the circumstances of the time—be counted as a criminal offence? I am dubious whether people today would consider that such an event should constitute a criminal offence, regardless of whether a defence was available under the legislation.

Fergus Ewing: The issue is consent, and what amounts to a reasonable belief of consent. Some performances are advertised as being of an adult nature—although I think that the word “adult” is widely recognised as a euphemism for material of a particularly unpleasant, graphic or pornographic nature. Where performances are advertised in such a way, there might be a reasonable belief that those who take part in such performances—whether you would call them art is another matter—do so in the knowledge that they are taking part in a play or a supposed work of art that is of an explicit and adult nature. In such a case, one could infer that the people who were taking part had given their consent.

I am pleased to say that I did not see the play that involved some sort of wheelbarrow event. My comments might address Robert Brown’s concerns or they might not; I do not know.

Nigel Don: Amendment 22 defines a private act. Is that definition derived from elsewhere in the legal canon, or has it been made up for the purposes of the bill?

Fergus Ewing: I am advised that it is similar to the definition that is employed in the 2003 act in England and Wales. It is similar, but not identical.

Nigel Don: The definition causes me no particular problems, but I wondered where it came from.

The Convener: The matter is important, as some new material had been injected on this subject, so we explored it in somewhat greater depth than I would have been relaxed about permitting in normal circumstances.

Do you have anything to say in conclusion, minister?

Fergus Ewing: No. I fully appreciate the questions that were put by members, even though they were, perhaps, way beyond the fringe.

The Convener: That remark is hardly worthy of comment.

Amendment 14 agreed to.
11:26
Meeting continued in private until 11:45.

Amendments 15 to 20 moved—[Fergus Ewing]—and agreed to.

Section 7, as amended, agreed to.

After section 7

Amendments 21 and 22 moved—[Fergus Ewing]—and agreed to.

Section 8—Administering a substance for sexual purposes

The Convener: Amendment 23, in the name of the minister, is in a group on its own.

Fergus Ewing: Amendment 23 addresses a gap in the offence concerning administering a substance for the purpose of committing a sexual offence.

Section 8 applies where the accused administers a substance to a person for the purpose of stupefying or overpowering that person in order that the accused can engage in sexual activity with him or her. The gap arises from the fact that the offence does not currently apply where the accused administers a substance for the purpose of allowing a third party or parties to engage in sexual activity while the victim is incapacitated. Amendment 23 ensures that an offence will also be committed where the accused administers a substance to a person to enable someone other than the accused to engage in sexual activity with that person.

I move amendment 23.

The Convener: Do members have any questions about or comments on an amendment that appears to plug a fairly important gap? Do you have anything further to add, Mr Ewing?

Fergus Ewing: No.

Amendment 23 agreed to.

Amendment 24 moved—[Fergus Ewing]—and agreed to.

Section 8, as amended, agreed to.

Section 13—Capacity to consent

Amendment 25 moved—[Fergus Ewing]—and agreed to.

Section 13, as amended, agreed to.

The Convener: That concludes consideration of amendments to sections 1 to 8 and section 13. Next week, we will consider amendments to sections 9 to 12 and sections 14 to 30.

I thank Mr Ewing and his officials for their attendance.
The Bill will be considered in the following order—

Sections 1 to 8  
Sections 9 to 12  
Schedule 1  
Schedule 2  
Schedule 3  
Schedules 4 and 5  
Long Title  
Section 13  
Sections 14 to 37  
Section 38  
Sections 39 to 42  
Sections 43 to 48  
Section 49

Amendments marked * are new (including manuscript amendments) or have been altered.

**Section 10**

**Kenny MacAskill**

76 In section 10, page 5, leave out lines 33 to 35

**Robert Brown**

132* In section 10, page 5, line 38, at end insert <or because a fear that violence or other harm may be inflicted upon B or any other person has otherwise been induced in B,>

**Fergus Ewing**

26 In section 10, page 6, line 9, leave out <6> and insert <(Voyeurism)>  

**After section 10**

**Kenny MacAskill**

77 After section 10, insert  
<Consent: capacity while asleep or unconscious>

(1) This section applies in relation to sections 1 to (Voyeurism).

(2) A person is incapable, while asleep or unconscious, of consenting to any conduct.

**Section 11**

**Fergus Ewing**

27 In section 11, page 6, line 11, leave out <6> and insert <(Voyeurism)>
After section 14

Kenny MacAskill

78 After section 14, insert—

<Sexual assault on a young child by penetration

(1) If a person (“A”), with any part of A’s body or anything else, penetrates sexually to any extent, either intending to do so or reckless as to whether there is penetration, the vagina or anus of a child (“B”) who has not attained the age of 13 years, then A commits an offence, to be known as the offence of sexual assault on a young child by penetration.

(2) Without prejudice to the generality of subsection (1), the reference in that subsection to penetration with any part of A’s body is to be construed as including a reference to penetration with A’s penis.>

Section 15

Kenny MacAskill

79 In section 15, page 7, line 20, at end insert—

< ( ) intentionally or recklessly emits urine or saliva onto B sexually>

Fergus Ewing

28 In section 15, page 7, line 21, leave out subsection (3)

Section 16

Fergus Ewing

29 In section 16, page 7, line 34, leave out subsection (2)

Section 17

Fergus Ewing

30 In section 17, page 8, line 13, leave out subsection (3)

Section 18

Fergus Ewing

31 In section 18, page 8, line 24, leave out from <an> to <engaging> in line 26 and insert <a sexual image>

Fergus Ewing

32 In section 18, page 8, line 27, leave out <an image of a sexual activity> and insert <a sexual image>
In section 18, page 8, line 30, at end insert—

<( ) For the purposes of subsection (1), a sexual image is an image (produced by whatever means and whether or not a moving image) of—

(a) A engaging in a sexual activity or of a third person or imaginary person so engaging,

(b) A’s genitals or the genitals of a third person or imaginary person.>

In section 18, page 8, line 31, leave out subsection (3)

In section 19, page 9, line 20, leave out subsection (5)

Sexual exposure to a young child

(1) If a person (“A”) intentionally and for a purpose mentioned in subsection (2) exposes A’s genitals in a sexual manner to a child (“B”) who has not attained the age of 13 years, with the intention that B will see them, then A commits an offence, to be known as the offence of sexual exposure to a young child.

(2) The purposes are—

(a) obtaining sexual gratification,

(b) humiliating, distressing or alarming B.>

Voyeurism towards a young child

(1) If a person (“A”) does any of the things mentioned in subsections (2) to (5) in relation to a child (“B”) who has not attained the age of 13 years, then A commits an offence, to be known as the offence of voyeurism towards a young child.

(2) The first thing is that A, for a purpose mentioned in subsection (6), observes B doing a private act.
(3) The second thing is that A operates equipment with the intention of enabling A or another person (“C”), for a purpose mentioned in subsection (7), to observe B doing a private act.

(4) The third thing is that A records B doing a private act with the intention that A or another person (“C”), for a purpose mentioned in subsection (7), will look at an image of B doing the act.

(5) The fourth thing is that A—
   (a) installs equipment, or
   (b) constructs or adapts a structure or part of a structure with the intention of enabling A or another person to do an act referred to in subsection (2), (3) or (4).

(6) The purposes referred to in subsection (2) are—
   (a) obtaining sexual gratification,
   (b) humiliating, distressing or alarming B.

(7) The purposes referred to in subsections (3) and (4) are—
   (a) obtaining sexual gratification (whether for A or C),
   (b) humiliating, distressing or alarming B.

(8) Section (Interpretation of section (Voyeurism)) applies for the purposes of this section as it applies for the purposes of section (Voyeurism) (the references in that section to section (Voyeurism)(3) and (5) being construed as references to subsections (3) and (5) of this section).>

After section 21

Kenny MacAskill

82 After section 21, insert—

<Engaging in penetrative sexual activity with or towards an older child

(1) If a person (“A”), who has attained the age of 16 years, with any part of A’s body or anything else penetrates sexually to any extent, either intending to do so or reckless as to whether there is penetration, the vagina or anus of a child (“B”) who—
   (a) has attained the age of 13 years (or under section 30(1) is deemed to have attained) the age of 13 years, but
   (b) has not attained the age of 16 years,
then A commits an offence, to be known as the offence of engaging in penetrative sexual activity with or towards an older child.

(2) Without prejudice to the generality of subsection (1), the reference in that paragraph to penetration with any part of A’s body is to be construed as including a reference to penetration with A’s penis.>

Section 22

Kenny MacAskill

83 In section 22, page 10, line 11, at end insert—
<(  ) intentionally or recklessly emits urine or saliva onto B sexually>

Fergus Ewing  
36 In section 22, page 10, line 12, leave out subsection (3)

Section 23

Fergus Ewing  
37 In section 23, page 10, line 29, leave out subsection (2)

Section 24

Fergus Ewing  
38 In section 24, page 11, line 8, leave out subsection (3)

Section 25

Fergus Ewing  
39 In section 25, page 11, line 23, leave out from <an> to second <engaging> in line 24 and insert <a sexual image>

Fergus Ewing  
40 In section 25, page 11, line 26, leave out <an image of a sexual activity> and insert <a sexual image>

Fergus Ewing  
41 In section 25, page 11, line 29, at end insert—

<(  ) For the purposes of subsection (1), a sexual image is an image (produced by whatever means and whether or not a moving image) of—

(a) A engaging in a sexual activity or of a third person or imaginary person so engaging,

(b) A’s genitals or the genitals of a third person or imaginary person.> 

Fergus Ewing  
42 In section 25, page 11, line 30, leave out subsection (3)

Section 26

Fergus Ewing  
43 In section 26, page 12, line 22, leave out subsection (5)
After section 26

Kenny MacAskill
84 After section 26, insert—

<Sexual exposure to an older child

(1) If a person (“A”), who has attained the age of 16 years, intentionally and for a purpose mentioned in subsection (2) exposes A’s genitals in a sexual manner to a child (“B”) who—

(a) has attained the age of 13 years, but
(b) has not attained the age of 16 years,

with the intention that B will see them, then A commits an offence, to be known as the offence of sexual exposure to an older child.

(2) The purposes are—

(a) obtaining sexual gratification,
(b) humiliating, distressing or alarming B.>

Kenny MacAskill
85 After section 26, insert—

<Voyeurism towards an older child

Voyeurism towards an older child

(1) If a person (“A”), who has attained the age of 16 years, does any of the things mentioned in subsections (2) to (5) in relation to a child (“B”) who—

(a) has attained the age of 13 years, but
(b) has not attained the age of 16 years,

then A commits an offence, to be known as the offence of voyeurism towards an older child.

(2) The first thing is that A, for a purpose mentioned in subsection (6), observes B doing a private act.

(3) The second thing is that A operates equipment with the intention of enabling A or another person (“C”), for a purpose mentioned in subsection (7), to observe B doing a private act.

(4) The third thing is that A records B doing a private act with the intention that A or another person (“C”), for a purpose mentioned in subsection (7), will look at an image of B doing the act.

(5) The fourth thing is that A—

(a) installs equipment, or
(b) constructs or adapts a structure or part of a structure with the intention of enabling A or another person to do an act referred to in subsection (2), (3) or (4).

(6) The purposes referred to in subsection (2) are—

(a) obtaining sexual gratification,
(b) humiliating, distressing or alarming B.

(7) The purposes referred to in subsections (3) and (4) are—
(a) obtaining sexual gratification (whether for A or C),
(b) humiliating, distressing or alarming B.

(8) Section (Interpretation of section (Voyeurism)) applies for the purposes of this section as it applies for the purposes of section (Voyeurism) (the references in that section to section (Voyeurism)(3) and (5) being construed as references to subsections (3) and (5) of this section).>
Section 28

Fergus Ewing

In section 28, page 13, line 9, leave out subsection (2)

Kenny MacAskill

In section 28, page 13, line 16, at end insert—

<(  ) A person is incapable, while asleep or unconscious, of consenting to any conduct.>

Section 29

Kenny MacAskill

In section 29, page 13, line 30, after <relevant> insert <sexual>

Kenny MacAskill

In section 29, page 13, line 30, at end insert <or

(ii) if there is in force in respect of A a risk of sexual harm order,>

Kenny MacAskill

In section 29, page 13, line 32, after <relevant> insert <sexual>

Kenny MacAskill

In section 29, page 13, line 32, at end insert <, or

(ii) if there is in force in respect of B a risk of sexual harm order>

Kenny MacAskill

In section 29, page 13, leave out line 37

Kenny MacAskill

In section 29, page 13, line 38, leave out <22> and insert <22(2)(a), but not>

Kenny MacAskill

In section 29, page 13, line 39, leave out from beginning to <by> and insert <penetration of B’s vagina, anus or mouth with A’s penis,

(  ) penetration of B’s vagina or anus with>

Kenny MacAskill

In section 29, page 14, leave out line 1 and insert—

<(  ) section 22(2)(b) or (c), but not in so far as the charge is founded on sexual touching or other physical activity involving—>
(i) B’s vagina, anus or penis being touched sexually by A’s mouth,
(ii) A’s vagina, anus or mouth being penetrated by B’s penis,
(iii) A’s vagina, anus or penis being touched sexually by B’s mouth,

Kenny MacAskill

105 In section 29, page 14, line 2, leave out <26> and insert <(Voyeurism towards an older child)>

Kenny MacAskill

106 In section 29, page 14, line 3, leave out from <such> to end of line 5 and insert <an offence listed in schedule (Relevant sexual offences),

( ) “a risk of sexual harm order” means an order under section 2 of the Protection of Children and Prevention of Sexual Offences (Scotland) Act 2005 (asp 9) or section 123 of the Sexual Offences Act 2003 (c.42)>

Kenny MacAskill

107 In section 29, page 14, line 5, at end insert—

<(5A) The Scottish Ministers may by order modify schedule (Relevant sexual offences) so as to add an offence against a child which involves sexual conduct or delete an offence listed there.>

Before schedule 1

Kenny MacAskill

108 Before schedule 1, insert—

<SCHEDULE
(introduced by section 29(5)(a))
RELEVANT SEXUAL OFFENCES
PART 1
OFFENCES THAT MAY CURRENTLY BE COMMITTED

1 Any of the following offences under this Act—
(a) an offence under Part 1 against a person under the age of 16,
(b) an offence under Part 4 (but not an offence of engaging while an older child in sexual conduct with or towards another older child (section 27(1)) or engaging while an older child in consensual sexual conduct with another older child (section 27(4)),
(c) sexual abuse of trust (section 31) of a person under the age of 16.

2 An offence under any of the following provisions of the Protection of Children and Prevention of Sexual Offences (Scotland) Act 2005 (asp 9) against a person under the age of 16—
(a) section 1 (meeting a person following certain preliminary contact with intention of engaging in unlawful sexual activity),
(b) section 9 (paying a person for sexual services),
(c) section 10 (causing or inciting provision by a person of sexual services or pornography),
(d) section 11 (controlling a person providing sexual services or involved in pornography),
(e) section 12 (arranging or facilitating provision by a person of sexual services or pornography).

3 An offence under—

(a) any of the following provisions of the Sexual Offences Act 2003 (c.42) against a person under the age of 16—
   (i) section 1 (rape),
   (ii) section 2 (assault by penetration),
   (iii) section 3 (sexual assault),
   (iv) section 25 (sexual activity with a family member under 18),
   (v) section 26 (inciting a family member under 18 to engage in sexual activity),
(b) section 47 (paying for sexual services of a person under 18) of that Act—
   (i) in its application to England and Wales, against a person under the age of 16,
   (ii) in its application to Northern Ireland, against a person under the age of 17.

4 An offence under any of the following provisions of that Act—

(a) section 5 (rape of a child under 13),
(b) section 6 (assault of a child under 13 by penetration),
(c) section 7 (sexual assault of a child under 13),
(d) section 8 (causing or inciting a child under 13 to engage in sexual activity),
(e) section 9 (sexual activity with a child under 16),
(f) section 10 (causing or inciting a child under 16 to engage in sexual activity),
(g) section 11 (engaging in sexual activity in the presence of a child under 16),
(h) section 12 (causing a child under 16 to watch a sexual act),
(i) section 13 (sex offences against a child under 16 committed by children or young persons),
(j) section 14 (arranging or facilitating commission of a sex offence against a child under 16),
(k) section 15 (meeting a child under 16 following sexual grooming etc.)—
   (i) in its application to England and Wales, against a person under the age of 16,
   (ii) in its application to Northern Ireland, against a person under the age of 17.
An offence under any of the following provisions of the Criminal Justice (Northern Ireland) Order 2003 (SI No. 1247 (N.I. 13)) against a person under the age of 17—
(a) article 18 (rape),
(b) article 19 (buggery),
(c) article 20 (assault with intent to commit buggery),
(d) article 21 (indecent assault on a male).

Any of the following offences under the Criminal Law (Consolidation) (Scotland) Act 1995 (c.39)—
(a) an offence under section 8 against a girl under the age of 16 (abduction of a woman or girl for purposes of unlawful sexual intercourse),
(b) an offence under section 10 (person having parental responsibilities causing or encouraging sexual activity in relation to a girl under 16).

An offence under section 160 of the Criminal Justice Act 1988 (c.33) against a person under the age of 16 (possession of indecent photographs of a person under 18).

An offence under article 15 of the Criminal Justice (Evidence, Etc.) (Northern Ireland) Order 1988 (SI No. 1847 (N.I. 17)) (possession of indecent photographs of a person under 16).

An offence under the following provisions of the Civic Government (Scotland) Act 1982 (c.45) against a person under the age of 16—
(a) section 52 (taking and distribution of indecent images of a person under 18),
(b) section 52A (possession of indecent images of a person under 18).

An offence under article 9 of the Criminal Justice (Northern Ireland) Order 1980 (SI No. 704 (N.I. 6) (inciting a girl under 16 to have incestuous sexual intercourse).

An offence under section 1 of the Protection of Children Act 1978 (c.37) against a person under the age of 16 (taking or distribution of indecent images of a person under 18).

An offence under article 3 of the Protection of Children (Northern Ireland) Order 1978 (SI 1978 No. 1047 (N.I. 17)) (taking or distribution of indecent images of a person under 16).

An offence under any of the following sections of the Children and Young Persons Act (Northern Ireland) 1968 (c.34) (N.I.)—
(a) section 21 (causing or encouraging seduction or prostitution of girl under 17),
(b) section 22 (indecent conduct towards person under 17).

An attempt, conspiracy or incitement to commit an offence in Part 1 of this schedule.

An offence under section 293(2) of the Criminal Procedure (Scotland) Act 1995 (c.46) (aiding and abetting etc. the commission of a statutory offence) relating to an offence in paragraphs 1, 2, 6 or 9 of that Part.

**PART 2**

**OFFENCES REPLACED BY AN OFFENCE IN PART 1 OR THIS PART**

The following common law offences against a person under the age of 16 years—
(a) rape,
(b) clandestine injury to women,
(c) sexual assault,
(d) lewd, indecent or libidinous practice or behaviour,
(e) sodomy.

17  Rape under the common law of Northern Ireland of a person under the age of 17.
18  An offence under section 3 of the Sexual Offences (Amendment) Act 2000 (c.44)
    against a person under the age of 16.
19  An offence under section 3, 5, 6 or 13(5)(c) of the Criminal Law (Consolidation)
    (Scotland) Act 1995.
20  An offence under section 54 of the Criminal Law Act 1977 (c.45).
21  An offence under section 3, 4, 5 or 10(1) of the Sexual Offences (Scotland) Act 1976
    (c.67).
22  An offence under section 1 of the Indecency with Children Act 1960 (c.33).
23  An offence under section 1, 12, 14, 15 or 16 of the Sexual Offences Act 1956 (c.69)
    against a person under the age of 16.
24  An offence under section 5, 6 or 28 of that Act.
25  An offence under section 3 or 5 of the Criminal Law Amendment Act 1885 (48 & 49
    Vict.) (c.69) against a person under the age of 16.
26  An offence under section 6 of that Act.
27  An offence under section 52, 53, 54, 61 or 62 of the Offences Against the Person Act
    1861 (24 & 25 Vict.) (c.100) against a person under the age of 16.
28  An attempt, conspiracy or incitement to commit an offence in Part 2 of this schedule.
29  An offence under section 293(2) of the Criminal Procedure (Scotland) Act 1995 (c.46)
    (aiding and abetting etc. the commission of a statutory offence) relating to an offence
    in paragraphs 18, 19, 21 of that Part.>

Section 30

Kenny MacAskill

109  Leave out section 30 and insert—

<Special provision as regards failure to establish whether child has or has not
attained certain ages

(1) Deeming provision 1 applies to a trial where—
   (a) A is charged with an offence under any of sections 21 to 26 or 27(1),
   (b) there is a failure to establish beyond reasonable doubt that B was a child who had
       attained the age of 13 years at the relevant time, and
   (c) the court or, in the case of a trial of an indictment, the jury is satisfied it is
       established beyond reasonable doubt that B had not attained the age of 16 years at
       the time.

(2) Deeming provision 2 applies to a trial where—
   (a) B is charged with an offence under section 27(4),
(b) there is a failure to establish beyond reasonable doubt that A was a child who had
attained the age of 13 years at the relevant time, and
(c) the court or, in the case of a trial of an indictment, the jury is satisfied it is
established beyond reasonable doubt that A had not attained the age of 16 years at
the time.

(3) Deeming provision 3 applies to a trial where—
(a) A is charged with an offence under section 27(1),
(b) there is a failure to establish beyond reasonable doubt that A was a child who had
not attained the age of 16 years at the relevant time, and
(c) the court or, in the case of a trial of an indictment, the jury is satisfied it is
established beyond reasonable doubt that A had attained the age of 13 years at the
time.

(4) Deeming provision 4 applies to a trial where—
(a) B is charged with an offence under section 27(4),
(b) there is a failure to establish beyond reasonable doubt that B was a child who had
not attained the age of 16 years at the relevant time, and
(c) the court or, in the case of a trial of an indictment, the jury is satisfied it is
established beyond reasonable doubt that B had attained the age of 13 years at the
time.

(5) In this section and section (Special provision as regards age: deeming provisions), the
“relevant time” is when the conduct to which the proceedings relate occurred.

After section 30

Kenny MacAskill

110 After section 30, insert—

<Special provision as regards age: deeming provisions

The deeming provisions are—

Deeming provision 1 B is to be deemed for the purposes of the proceedings to be a
person who has attained the age of 13 years at the relevant
time.

Deeming provision 2 A is to be deemed for the purposes of the proceedings to be
a person who has attained the age of 13 years at the relevant
time.

Deeming provision 3 A is to be deemed for the purposes of the proceedings to be
a child who has not attained the age of 16 years at the
relevant time.

Deeming provision 4 B is to be deemed for the purposes of the proceedings to be a
person who has not attained the age of 16 years at the
relevant time.>

Robert Brown

133 After section 30, insert—
<Information and publicity>
The Scottish Ministers must, prior to the commencement of this Part—

(a) consult in an appropriate manner with children and young people under the age of 18 about their attitudes to this Part,

(b) undertake an information and publicity campaign about this Part.>

Section 31

Fergus Ewing
45 In section 31, page 16, line 10, leave out subsection (2)

Section 34

Fergus Ewing
46 In section 34, page 17, line 35, leave out subsection (4)

Section 35

Fergus Ewing
47 In section 35, page 18, line 16, leave out subsection (3)

Section 36

Fergus Ewing
48 In section 36, page 19, line 8, leave out subsection (3)

Section 37

Kenny MacAskill
111 In section 37, page 19, line 16, at end insert—

<(  ) Where a person is convicted on indictment of rape, sexual assault by penetration, sexual assault, rape of a young child, sexual assault on a young child by penetration, or sexual assault on a young child, a penalty of imprisonment without a fine may be imposed, but not a penalty of a fine alone; and the power of the court in section 199(2)(b) of the Criminal Procedure Scotland) Act 1995 (c.20) (to substitute a fine for imprisonment) is not available.>

Schedule 1

Fergus Ewing
50 In schedule 1, page 26, line 7, column 4, leave out from <or> to end of line 8 and insert <and a fine>
In schedule 1, page 26, line 8, at end insert—

<Sexual Section (Sexual assault by penetration) assault by penetration) Life imprisonment and a fine>

In schedule 1, page 26, line 9, column 4, leave out from <or> to end of line 10 and insert <and a fine>

In schedule 1, page 26, line 22, column 1, leave out <an image of a sexual activity> and insert <a sexual image>

In schedule 1, page 26, line 36, at end insert—

<Voyeurism Section (Voyeurism) Imprisonment for a term not exceeding 12 months or a fine not exceeding the statutory maximum (or both) Imprisonment for a term not exceeding 5 years or a fine (or both)>

In schedule 1, page 27, line 4, column 4, leave out from <or> to end of line 5 and insert <and a fine>

In schedule 1, page 27, line 5, at end insert—

<Sexual Section (Sexual assault on a young child by penetration) assault on a young child by penetration) Life imprisonment and a fine>

In schedule 1, page 27, line 6, column 4, leave out from <or> to end of line 7 and insert <and a fine>

In schedule 1, page 27, line 19, column 1, leave out <an image of a sexual activity> and insert <a sexual image>
<Sexual Section (Sexual exposure to a young child)> Imprisonment for a term not exceeding 12 months or a fine not exceeding the statutory maximum (or both)

Kenny MacAskill

114 In schedule 1, page 27, line 25, at end insert—

<Voyeurism Section (Voyeurism towards a young child)> Imprisonment for a term not exceeding 12 months or a fine not exceeding the statutory maximum (or both)

Kenny MacAskill

115 In schedule 1, page 27, line 33, at end insert—

<Engaging in Section (Engaging in penetrative sexual activity with or towards an older child)> Imprisonment for a term not exceeding 12 months or a fine not exceeding the statutory maximum (or both)

Fergus Ewing

58 In schedule 1, page 28, line 9, column 1, leave out <an image of a sexual activity> and insert <a sexual image>

Kenny MacAskill

116 In schedule 1, page 28, line 19, at end insert—

<Sexual Section (Sexual exposure to an older child)> Imprisonment for a term not exceeding 12 months or a fine not exceeding the statutory maximum (or both)

Kenny MacAskill

117 In schedule 1, page 28, line 19, at end insert—

<Voyeurism Section (Voyeurism towards an older child)> Imprisonment for a term not exceeding 12 months or a fine not exceeding the statutory maximum (or both)

Kenny MacAskill

118 In schedule 1, page 28, line 22, column 1, leave out <penetrative>

Kenny MacAskill

119 In schedule 1, page 28, line 29, column 1, leave out <penetrative>
Before section 38

Kenny MacAskill

120 Before section 38, insert—

<Establishment of purpose for the purposes of sections 4 to (Voyeurism), 17 to (Voyeurism towards a young child) and 24 to (Voyeurism towards an older child)

(1) For the purposes of sections 4 to (Voyeurism), 17 to (Voyeurism towards a young child) and 24 to (Voyeurism towards an older child), A’s purpose was—

(a) obtaining sexual gratification, or
(b) humiliating, distressing or alarming B,

if in all the circumstances of the case it may reasonably be inferred A was doing the thing for the purpose in question.

(2) In applying subsection (1) to determine A’s purpose, it is irrelevant whether or not B was in fact humiliated, distressed or alarmed by the thing done by A.>

Section 38

Kenny MacAskill

121 In section 38, page 19, line 32, at end insert—

<(  ) Where either of conditions 1 or 2 apply in a trial, the court or jury may acquit the accused of the charge but find the accused guilty of the alternative older child offence (the accused then being liable to be punished accordingly).

(  ) Condition 1 is that—

(a) A is charged with an offence under sections 14 to 19, and
(b) but for a failure to establish beyond reasonable doubt that B had attained the age of 13 years at the relevant time, a court or jury would, by virtue of subsection (1), find that A committed an offence (“the alternative older child offence”) of—

(i) having intercourse with an older child,
(ii) engaging in sexual activity with or towards an older child,
(iii) causing an older child to participate in a sexual activity,
(iv) causing an older child to be present during a sexual activity,
(v) causing an older child to look at a sexual image,
(vi) communicating indecently with an older child,
(vii) causing an older child to see or hear an indecent communication,
(viii) engaging while an older child in sexual conduct with or towards another older child,
(ix) engaging while an older child in consensual sexual conduct with another older child.

(  ) Condition 2 is that—

(a) A is charged with an offence under section 21 or 22, and
(b) but for a failure to establish beyond reasonable doubt that A had not attained the age of 16 years at the relevant time, a court or jury would, by virtue of subsection (1), find that A committed an offence (“the alternative older child offence”) of—

(i) engaging while an older child in sexual conduct with or towards another older child,

(ii) engaging while an older child in consensual sexual conduct with another older child.

( ) In this section, the “relevant time” is when the conduct to which the proceedings relate occurred.

Schedule 2

Fergus Ewing
60 In schedule 2, page 29, line 13, column 3, leave out <an image of a sexual activity> and insert <a sexual image>

Fergus Ewing
61 In schedule 2, page 29, line 20, column 3, leave out <an image of a sexual activity> and insert <a sexual image>

Fergus Ewing
62 In schedule 2, page 30, line 6, column 1, leave out <an image of a sexual activity> and insert <a sexual image>

Fergus Ewing
63 In schedule 2, page 30, line 15, column 3, leave out <an image of a sexual activity> and insert <a sexual image>

Fergus Ewing
64 In schedule 2, page 30, line 22, column 3, leave out <an image of a sexual activity> and insert <a sexual image>

Kenny MacAskill
122 In schedule 2, page 30, line 25, column 3, at end insert—

<Having intercourse with an older child
Engaging in sexual activity with or towards an older child
Engaging while an older child in sexual conduct with or towards another older child>

Kenny MacAskill
123 In schedule 2, page 30, line 28, column 3, at beginning insert—

<Engaging in sexual activity with or towards an older child
Engaging while an older child in sexual conduct with or towards another older child
Engaging while an older child in consensual sexual conduct with another older child

Fergus Ewing

65 In schedule 2, page 31, line 6, column 3, leave out <an image of a sexual activity> and insert <a sexual image>

Kenny MacAskill

124 In schedule 2, page 31, line 10, column 3, at end insert—

<Causing an older child to participate in a sexual activity
Causing an older child to be present during a sexual activity
Causing an older child to look at a sexual image
Communicating indecently with an older child
Causing an older child to see or hear an indecent communication>

Fergus Ewing

66 In schedule 2, page 31, line 14, column 3, leave out <an image of a sexual activity> and insert <a sexual image>

Kenny MacAskill

125 In schedule 2, page 31, line 18, column 3, at end insert—

<Causing an older child to participate in a sexual activity
Causing an older child to be present during a sexual activity
Causing an older child to look at a sexual image
Communicating indecently with an older child
Causing an older child to see or hear an indecent communication>

Fergus Ewing

67 In schedule 2, page 31, line 20, column 1, leave out <an image of a sexual activity> and insert <a sexual image>

Kenny MacAskill

126 In schedule 2, page 31, line 25, column 3, at end insert—

<Causing an older child to participate in a sexual activity
Causing an older child to be present during a sexual activity
Causing an older child to look at a sexual image
Communicating indecently with an older child
Causing an older child to see or hear an indecent communication

Fergus Ewing

68 In schedule 2, page 31, line 29, column 3, leave out <an image of a sexual activity> and insert <a sexual image>

Kenny MacAskill

127 In schedule 2, page 31, line 31, column 3, at end insert—

<Causing an older child to participate in a sexual activity
Causing an older child to be present during a sexual activity
Causing an older child to look at a sexual image
Communicating indecently with an older child
Causing an older child to see or hear an indecent communication

Fergus Ewing

69 In schedule 2, page 31, line 36, column 3, leave out <an image of a sexual activity> and insert <a sexual image>

Kenny MacAskill

128 In schedule 2, page 31, line 37, column 3, at end insert—

<Causing an older child to participate in a sexual activity
Causing an older child to be present during a sexual activity
Causing an older child to look at a sexual image
Communicating indecently with an older child
Causing an older child to see or hear an indecent communication

Kenny MacAskill

129 In schedule 2, page 32, line 4, column 3, at end insert—

<Engaging while an older child in sexual conduct with or towards another older child>

Kenny MacAskill

130 In schedule 2, page 32, line 6, at end insert—
<Engaging in sexual activity with or towards an older child> Section 22 Engaging while an older child in sexual conduct with or towards another older child

Engaging while an older child in consensual sexual conduct with another older child>

Fergus Ewing

70 In schedule 2, page 32, line 9, column 3, leave out <an image of a sexual activity> and insert <a sexual image>

Fergus Ewing

71 In schedule 2, page 32, line 16, column 3, leave out <an image of a sexual activity> and insert <a sexual image>

Fergus Ewing

72 In schedule 2, page 32, line 23, column 1, leave out <an image of a sexual activity> and insert <a sexual image>

Fergus Ewing

73 In schedule 2, page 32, line 31, column 3, leave out <an image of a sexual activity> and insert <a sexual image>

Fergus Ewing

74 In schedule 2, page 33, line 8, column 3, leave out <an image of a sexual activity> and insert <a sexual image>

Section 46

Kenny MacAskill

131 In section 46, page 25, line 4, after <under> insert <section 29(5A)>

Section 47

Fergus Ewing

75 In section 47, page 25, line 10, at end insert—

<(  ) For the purposes of this Act—
(a) penetration, touching, or any other activity,
(b) a communication,
(c) a manner of exposure, or
(d) a relationship,
is sexual if a reasonable person would, in all the circumstances of the case, consider it to be sexual.>
Schedule 4

Robert Brown

In schedule 4, page 40, line 15, leave out from beginning to <2003> and insert—

<( )> The Sexual Offences Act 2003 is amended as follows.

( ) After section 80 (persons becoming subject to notification requirements) there is inserted—

“80A  Power to modify this Part and Schedule 3

(1) The Scottish Ministers may by order amend this Part or paragraphs 36 to 60 of Schedule 3 for the purpose of modifying the application of this Part in relation to persons who are aged under 16 at the time of committing an offence specified in one of those paragraphs.

(2) Before making an order under subsection (1) the Scottish Ministers must consult such persons as they consider appropriate.”.

( ) In section 138(2) (orders and regulations) after the word “21,” there is inserted “80A,”.

( ) In Schedule 3>
Sexual Offences (Scotland) Bill

2nd Groupings of Amendments for Stage 2

This document provides procedural information which will assist in preparing for and following proceedings on the above Bill. The information provided is as follows:

- the list of groupings (that is, the order in which amendments will be debated). Any procedural points relevant to each group are noted;
- a list of any amendments already debated;
- the text of amendments to be debated on the second day of Stage 2 consideration, set out in the order in which they will be debated. THIS LIST DOES NOT REPLACE THE MARSHALLED LIST, WHICH SETS OUT THE AMENDMENTS IN THE ORDER IN WHICH THEY WILL BE DISPOSED OF.

Groupings of amendments

Consent: capacity while asleep or unconscious
76, 77, 96

Consent: fear of violence or other harm
132

Sexual assault on children: penetration
78, 82, 115

Sexual assault on children: emission of urine or saliva
79, 83

Sexual exposure to children and voyeurism towards children
80, 81, 84, 85, 105, 113, 114, 116, 117

Older children engaging in sexual conduct with each other: oral sex and instructions as to prosecution
86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 118, 119

Defence under section 29(1) of reasonable belief as to age: when not available
97, 98, 99, 100, 106, 107, 108, 131

Defence under section 29(3) of proximity of age: when not available
101, 102, 103, 104

Special provision as regards failure to establish age of child
109, 110

Children: requirement to undertake an information and publicity campaign
133
Penalty on indictment for certain offences
111, 50, 51, 52, 55, 112, 56

Establishment of purpose: sexual gratification, causing humiliation or distress
120

Power to convict for offence other than that charged
121, 122, 123, 124, 125, 126, 127, 128, 129, 130

Persons under 16 years of age: power to modify notification requirements
134

Amendments already debated

Definition of sexual
With 6 – 28, 29, 30, 34, 35, 36, 37, 38, 42, 43, 44, 45, 46, 47, 48, 75

Coercing a person into looking at a sexual image
With 9 – 31, 32, 33, 39, 40, 41, 53, 57, 58, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74

Sexual exposure and voyeurism
With 14 – 26, 27, 54
Sexual Offences (Scotland) Bill: The Committee considered the Bill at Stage 2 (Day 2).

The following amendments were agreed to (without division): 76, 26, 77, 27, 78, 79, 28, 29, 30, 31, 32, 33, 34, 35, 80, 81, 82, 83, 36, 37, 38, 39, 40, 41, 42, 43, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 44, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108 and 109.

Amendment 132 was moved and, with the agreement of the Committee, withdrawn.

Sections 9, 12, 14, 20 and 21 were agreed to without amendment.

Sections 10, 11, 15, 16, 17, 18, 19, 22, 23, 24, 25, 26, 27, 28, 29 and 30 were agreed to as amended.

The Committee ended consideration of the Bill for the day, section 30 having been agreed to.
10:31

On resuming—

Sexual Offences (Scotland) Bill: Stage 2

The Convener: This is the second day of stage 2 proceedings on the Sexual Offences (Scotland) Bill. The committee will consider sections 9 to 12 inclusive and sections 14 to 30 inclusive. We will not proceed beyond section 30 today. I welcome the Cabinet Secretary for Justice, Kenny MacAskill, and the relevant officials.

Members should have before them a copy of the bill, the marshalled list and the groupings of amendments for today’s consideration.

Section 9 agreed to.

Section 10—Circumstances in which conduct takes place without free agreement

The Convener: Amendment 76, in the name of the minister, is grouped with amendments 77 and 96.

The Cabinet Secretary for Justice (Kenny MacAskill): Amendments 76, 77 and 96 are a response to the concerns that were expressed at paragraph 146 of the committee’s stage 1 report, regarding the reference to prior consent in section 10(2)(b). As the committee is aware, the Government agrees with the concerns that have been expressed about that.

In our response to the committee’s report, we confirmed that we would consider how best to deal with the issue. The committee is also aware that we considered whether an amendment to section 10(2) was sufficient to address the committee’s concerns on the matter. On further reflection, we have concluded that the matter is better dealt with by removing the provisions that relate to sleep and unconsciousness from section 10(2), and dealing with them in a separate section.

Amendment 76 deletes section 10(2)(b); amendment 77 inserts a new section to address the issue. Amendment 96 is a technical amendment to section 28, and is consequential to amendment 77.

The new section that amendment 77 introduces replicates our understanding of the current law by providing that someone who is asleep or unconscious cannot give consent while in that state. The new section provides that consent cannot be given in such circumstances, although it does not, in terms, exclude the possibility of a reasonable belief in consent, nor does it place any specific restrictions on how such a reasonable belief may arise.
In practice, it would be for the court to decide whether any claim of reasonable belief in consent on the part of the accused would be credible in a case in which such circumstances had arisen. It is highly unlikely that a court would regard a belief that the victim gave consent while he or she was incapable of giving such consent to be a reasonable belief. We believe that that will mean that cases in which an accused has engaged in sexual activity with the victim while he or she was asleep or unconscious can be dealt with by the courts, as at present, thereby addressing the concerns that were expressed about the drafting of section 10(2)(b).

In summary, the three amendments address the concerns that were expressed about the matter at stage 1, which were referred to in the committee’s report. I commend the amendments to the committee, and I urge members to support them.

I move amendment 76.

The Convener: I confirm that the issue to which the amendments relate was raised in the committee’s stage 1 report and caused us some concerns. I think that the problem has been remedied.

Amendment 76 agreed to.

The Convener: Amendment 132, in the name of Robert Brown, is in a group on its own.

Robert Brown (Glasgow) (LD): Amendment 132 relates to the recommendation in paragraph 155 of the committee’s stage 1 report, which was made in response to representations by Enable Scotland and others. At issue is whether the phrasing of the bill in respect of threats of violence is sufficiently broad to take account of people whose situation is different from that of the average person—for example, people who have learning difficulties. Enable Scotland argues that such people

“might be much more suggestible to threats than others”.

The underlying intention of the amendment is to ensure that section 10 covers not just threats of violence but behaviour such as credible coercion. I am aware that the Government has considered the issue, but I would like it to confirm its position on the record. Enable Scotland and others have raised a valid issue and, despite the Government’s good intentions, I am not entirely satisfied that the current wording of the section addresses the fears that they have expressed.

I move amendment 132.

Kenny MacAskill: I am grateful to Mr Brown for his explanation and appreciate his intentions in lodging the amendment. Although I have every sympathy with those intentions, we have serious concerns about amendment 132. We consider that it will not be effective and that it risks undermining to some extent the operation of section 10(2).

The bill provides that, where any of the circumstances that are set out in section 10(2) apply, there is no free agreement and, therefore, no consent. Currently, section 10(2)(c) provides that there is no free agreement where a victim submits to sexual conduct because of violence or threats of violence made against them or “or any other person”. Amendment 132 would extend section 10(2)(c) to include situations in which a victim submits to sexual conduct

“because a fear that violence or other harm may be inflicted upon”

them has been induced in them by other means.

The effect of the amendment would be substantial, principally due to the vague nature of the term “other harm”, which conceivably includes very minor harm. It is also not clear how a fear of violence could be induced by a means other than violence or threats of violence. Currently, such circumstances are dealt with in the bill by means of the definition of consent as free agreement. For example, it would be open to the court to conclude that a person who agreed to sexual activity because of threats of blackmail had not freely agreed to the conduct. However, that conclusion would be reached only in the light of the full facts and circumstances of the case. Amending the bill to include such wider and vague circumstances in section 10(2)(c) would lead to the automatic conclusion that there was no free agreement, regardless of the facts and circumstances of the case. The Government’s view is that that would be inappropriate.

Although it may still be open to the accused to argue that he or she had a reasonable belief in consent, even where one of the circumstances that are set out in section 10(2) has been proven to apply, the provision that there is no free agreement and, therefore, no consent in such circumstances is a strong one. The Government’s view is that it would not be appropriate to apply the provision in such an undefined and potentially wide range of circumstances. Currently, where one of the circumstances that are set out in section 10(2) applies, it seems unlikely that a claim of reasonable belief in consent on behalf of the accused would be credible in anything other than exceptional cases. To widen the circumstances that are set out in section 10(2)(c) to include vague but potentially common circumstances would risk such an outcome being the rule, rather the exception, potentially weakening the provisions in relation to the other circumstances that are covered in section 10(2).

The Government’s view is that amendment 132 extends the circumstances that are covered by
Robert Brown: I am grateful for the cabinet secretary’s explanation; it is helpful to have those remarks on the record. I will study his comments at greater length after the meeting, with a view to considering whether the issue should be addressed at stage 3, but I am inclined to think that I am satisfied with the explanation. For the moment, I do not intend to press the amendment.

The Convener: I think that we have consensus ad idem.

Amendment 132, by agreement, withdrawn.

Amendment 26 moved—[Kenny MacAskill]—and agreed to.

Section 10, as amended, agreed to.

After section 10

Amendment 77 moved—[Kenny MacAskill]—and agreed to.

Section 11—Consent: scope and withdrawal

Amendment 27 moved—[Kenny MacAskill]—and agreed to.

Section 11, as amended, agreed to.

Section 12 agreed to.

Section 14 agreed to.

After section 14

The Convener: Amendment 78, in the name of the minister, is grouped with amendments 82 and 115.

Kenny MacAskill: Amendments 78 and 82 create new offences of sexual assault on a young child by penetration and of engaging in penetrative sexual activity with or towards an older child. The amendments bring the provisions in part 4 of the bill, which deal with children, in line with the amended provisions in part 1, which the committee approved last week and which provide for separate offences concerning penetrative sexual activity. As with the other offences in part 4, there is no reference to consent, and therefore no requirement to prove that the child did not consent for an offence to be prosecuted under part 4.

I move amendment 78.

Amendment 78 agreed to.

Section 15—Sexual assault on a young child

The Convener: Amendment 79, in the name of the minister, is grouped with amendment 83.

Kenny MacAskill: Amendment 79 extends the definition of sexual assault on a young child to include other offending behaviour—spitting and urination—when such conduct is sexual. That will bring the definition of the offence of sexual assault on a young child into line with the offence of sexual assault in part 1.

Amendment 83 makes an equivalent change to the offence of engaging in sexual activity with an older child.

I move amendment 79.

Amendment 79 agreed to.

Amendment 28 moved—[Kenny MacAskill]—and agreed to.

Section 15, as amended, agreed to.

Section 16—Causing a young child to participate in a sexual activity

Amendment 29 moved—[Kenny MacAskill]—and agreed to.

Section 16, as amended, agreed to.

Section 17—Causing a young child to be present during a sexual activity

Amendment 30 moved—[Kenny MacAskill]—and agreed to.

Section 17, as amended, agreed to.

Section 18—Causing a young child to look at an image of a sexual activity

Amendments 31 to 34 moved—[Kenny MacAskill]—and agreed to.

Section 18, as amended, agreed to.

Section 19—Communicating indecently with a young child etc

Amendment 35 moved—[Kenny MacAskill]—and agreed to.

Section 19, as amended, agreed to.

After section 19

10:45

The Convener: Amendment 80, in the name of the minister, is grouped with amendments 81, 84, 85, 105, 113, 114, 116 and 117.

Kenny MacAskill: Amendment 80 provides for a new offence in part 4 of sexual exposure to a young child, and amendment 84 provides for an
equivalent offence of sexual exposure to an older child. The new offences are required because the offence of sexual exposure in section 7 has been amended so as to require that the person to whom the accused sexually exposed his or her genitals did not consent to the exposure.

The approach in the bill is that young children have no capacity to consent to sexual activity and older children have only a limited capacity to do so. As such, part 4 contains protective offences concerning sexual conduct involving children that are modelled on the offences in part 1 but with the consent element removed. The offence of sexual exposure to a young child can be committed by a person of any age; the offence of sexual exposure to an older child can be committed only by a person who has attained the age of 16 years. However, if such conduct takes place without consent, an offender who is under 16 could be prosecuted under the provision in part 1. It will therefore not be an offence for an older child to expose his or her genitals to another older child, provided that such exposure is consensual.

Amendment 81 provides for a new offence in part 4 concerning voyeurism towards a young child, and amendment 85 creates an equivalent offence concerning voyeurism towards an older child. Those offences are modelled on the offence of voyeurism in part 1 but with the consent element removed, for the same reasons as I explained in relation to sexual exposure. As with the offence of sexual exposure to an older child, the offence of voyeurism towards an older child can be committed only by a person who has attained the age of 16 years. That ensures that the bill will not inadvertently criminalise an older child who consensually observes another older child engaging in a private act. If an older child engages in what would conventionally be considered to be voyeurism—spying on another older child without their knowledge or consent—that could be prosecuted under part 1.

Amendment 105 will make a consequential amendment to section 29. Amendments 113, 114, 116 and 117 provide for the maximum penalties for the new offences.

I move amendment 80.

Amendment 80 agreed to.

Amendment 81 moved—[Kenny MacAskill]—and agreed to.

Sections 20 and 21 agreed to.

After section 21

Amendment 82 moved—[Kenny MacAskill]—and agreed to.
Amendment 95 will remove the provisions concerning the Lord Advocate’s power to issue instructions to chief constables. We agree that that power is not necessary, as the Lord Advocate’s existing powers are sufficient to enable her to issue such instructions. As the committee is aware, we included the provision in the bill to make it clear that the Lord Advocate’s power to direct chief constables on which offences should be reported to the procurator fiscal so that a prosecution can be considered will continue to apply to offences that relate to underage sexual activity. In particular, the Lord Advocate will continue to have the power to direct chief constables on the circumstances in which such cases should be reported to the children’s reporter.

In the light of the committee’s recommendation, and given that it is clear that the Parliament is content that the vast majority of offences that are alleged to have been committed by children, including the offence in question, will continue to be dealt with by the children’s panel, we are content that the provision is not necessary. Amendment 95 will remove it from the bill.

I move amendment 86.

The Convener: Amendment 86 deals with material that was contained in the committee’s report. Members have no comments. Do you feel the need to wind up, minister?

Kenny MacAskill: No, that is not necessary.

Amendment 86 agreed to.

Amendments 87 to 95 moved—[Kenny MacAskill]—and agreed to.

Section 27, as amended, agreed to.

Section 28—Penetration and consent for the purposes of section 27

Amendments 44 and 96 moved—[Kenny MacAskill]—and agreed to.

Section 28, as amended, agreed to.

Section 29—Defences in relation to offences against older children

The Convener: Amendment 97, in the name of the minister, is grouped with amendments 98 to 100, 106 to 108 and 131.

Kenny MacAskill: The amendments in this group make a number of changes to the provisions that restrict the use of the defence of reasonable mistaken belief as to age. Section 29(1) provides that the defence is not available to a person who has previously been charged by the police with a relevant offence.

The Justice Committee recommended that relevant offences should be defined in the bill other than through the use of an order-making power. Amendment 108 seeks to introduce a new schedule that lists sexual offences that may be committed against a child who is under the age of consent, which include specific child sex offences and more general sexual offences, such as rape and sexual assault when the victim is a child. Amendments 97 and 99 are consequential on the insertion of the new schedule.

Amendments 98, 100 and 106 provide that the defence shall not be available to a person in respect of whom a risk of sexual harm order is in place. A risk of sexual harm order can be imposed on a person by a sheriff if he is satisfied that the person has on at least two occasions engaged in sexually explicit conduct or communication with a child or children and, as a result, there is reasonable cause to believe that the order is necessary to protect a child or children from harm arising out of future acts by that person. The Crown recommended making specific provision for that, as it is possible that a risk of sexual harm order could be imposed on a person who has never been charged with a relevant sexual offence against a child.

Amendment 107 introduces an order-making power to amend the new schedule, so that a relevant sexual offence can be added to or removed from it. It also provides that the power to add new offences shall be restricted to offences against children involving sexual conduct. Amendment 131 provides that any order shall be subject to the affirmative resolution procedure. We have lodged those amendments to address the recommendations made by the Subordinate Legislation Committee.

I move amendment 97.

The Convener: Again, those matters came up in the committee’s report and consideration.

Amendment 97 agreed to.

Amendments 98 to 100 moved—[Kenny MacAskill]—and agreed to.

The Convener: Amendment 101, in the name of the minister, is grouped with amendments 102 to 104.

Kenny MacAskill: These amendments amend the provisions in section 29 concerning the defence of proximity of age. The defence applies to certain offences concerning sexual activity with 13 to 15-year-old children and applies when the accused is not more than two calendar years older than the child. In its report, the committee asked the Government to reconsider the scope of the
defence in the light of its recommendation concerning oral sex between older children. The amendments restrict the scope of the defence of proximity of age, so that it will not apply in respect of any activity that would constitute an offence under section 27 when both parties are aged 13 to 15. That is to say that the defence does not apply in respect of sexual intercourse or oral sex.

I move amendment 101.

The Convener: There are no comments from members and there is no requirement for the minister to wind up—that is an unusual circumstance in your case, Mr MacAskill.

Amendment 101 agreed to.

Amendments 102 to 107 moved—[Kenny MacAskill]—and agreed to.

Section 29, as amended, agreed to.

Before schedule 1

Amendment 108 moved—[Kenny MacAskill]—and agreed to.

Section 30—Special provision as regards failure to establish whether child has or has not attained age of 13 years

The Convener: Amendment 109, in the name of the minister, is grouped with amendment 110.

Kenny MacAskill: Amendments 109 and 110 are technical amendments that are intended to address gaps in the provisions in section 30 concerning circumstances in which there has been a failure to establish whether a child has attained a certain age. As the bill is currently drafted, those provisions do not address circumstances in which the accused has been charged under section 27 and it has not been possible to establish the age of either the accused or the other party. The amendments address that gap.

The opportunity has also been taken to separate out more clearly the two sets of circumstances that section 30 deals with. Section 30 is now solely concerned with deeming the age of a child victim or the accused when doubt as to his or her age may open up the possibility of the accused being convicted of a more serious offence. The second set of circumstances dealt with in section 30—namely the cases in which doubt as to the accused’s or victim’s age might give rise to a conviction of a less serious offence—are now to be dealt with in section 38, by virtue of amendments in the group entitled “Power to convict for offence other than that charged”, which address that issue.

I move amendment 109.

Amendment 109 agreed to.

Section 30, as amended, agreed to.

The Convener: That concludes consideration of amendments to sections 9 to 12 and sections 14 to 30. At next week’s meeting, the committee will consider amendments from section 31 to the end of the bill. I thank the cabinet secretary and committee members for such an expeditious process this morning.

Meeting closed at 11:00.
3rd Marshalled List of Amendments for Stage 2

The Bill will be considered in the following order—

Sections 1 to 8  Section 13
Sections 9 to 12  Sections 14 to 37
Schedule 1  Section 38
Schedule 2  Sections 39 to 42
Schedule 3  Sections 43 to 48
Schedules 4 and 5  Section 49
Long Title

Amendments marked * are new (including manuscript amendments) or have been altered.

After section 30

Kenny MacAskill

110 After section 30, insert—

<Special provision as regards age: deeming provisions

The deeming provisions are—

Deeming provision 1  B is to be deemed for the purposes of the proceedings to be a person who has attained the age of 13 years at the relevant time.

Deeming provision 2  A is to be deemed for the purposes of the proceedings to be a person who has attained the age of 13 years at the relevant time.

Deeming provision 3  A is to be deemed for the purposes of the proceedings to be a child who has not attained the age of 16 years at the relevant time.

Deeming provision 4  B is to be deemed for the purposes of the proceedings to be a person who has not attained the age of 16 years at the relevant time.>

Robert Brown

133 After section 30, insert—

<Information and publicity

The Scottish Ministers must, prior to the commencement of this Part—

(a) consult in an appropriate manner with children and young people under the age of 18 about their attitudes to this Part,

(b) undertake an information and publicity campaign about this Part.>
Section 31

Fergus Ewing

45 In section 31, page 16, line 10, leave out subsection (2)

Section 32

Fergus Ewing

135 In section 32, page 16, line 14, leave out from <, or> to <Ministers,> in line 15

Fergus Ewing

136 In section 32, page 16, line 17, leave out <B> and insert <persons under 18>

Fergus Ewing

137 In section 32, page 16, line 20, leave out <B> and insert <persons under 18>

Fergus Ewing

138 In section 32, page 16, line 28, leave out <B> and insert <persons under 18>

Fergus Ewing

139 In section 32, page 16, line 29, leave out from <an> to end of line 30 and insert—
   (a) a school and A looks after persons under 18 in that school, or
   (b) a further or higher education institution and A looks after B in that institution.

Fergus Ewing

140 In section 32, page 17, line 1, leave out <B> and insert <a person>

Fergus Ewing

141 In section 32, page 17, line 1, after <for,> insert <teaches,>

Fergus Ewing

142 In section 32, page 17, line 2, leave out <B> and insert <the person>

Fergus Ewing

143 In section 32, page 17, line 2, at end insert—
   (8) The Scottish Ministers may by order modify this section (other than this subsection) and
   section 33 so as to add, delete or amend a condition.
Section 33

Fergus Ewing

144 In section 33, page 17, leave out lines 7 to 10 and insert—

<“further or higher education institution” means a body listed in schedule 2 to the Further and Higher Education (Scotland) Act 2005 (asp 6).>

Fergus Ewing

145 In section 33, page 17, line 20, at end insert—

<“school” has the same meaning as in the Education (Scotland) Act 1980 (c.44).>

Section 34

Fergus Ewing

46 In section 34, page 17, line 35, leave out subsection (4)

Section 35

Fergus Ewing

47 In section 35, page 18, line 16, leave out subsection (3)

Section 36

Fergus Ewing

48 In section 36, page 19, line 8, leave out subsection (3)

Section 37

Kenny MacAskill

111 In section 37, page 19, line 16, at end insert—

<( ) Where a person is convicted on indictment of rape, (Sexual assault by penetration), sexual assault, rape of a young child, (Sexual assault on a young child by penetration), or sexual assault on a young child, a penalty of imprisonment without a fine may be imposed, but not a penalty of a fine alone; and the power of the court in section 199(2)(b) of the Criminal Procedure Scotland) Act 1995 (c.20) (to substitute a fine for imprisonment) is not available.>

Schedule 1

Fergus Ewing

50 In schedule 1, page 26, line 7, column 4, leave out from <or> to end of line 8 and insert <and a fine>
Fergus Ewing

51 In schedule 1, page 26, line 8, at end insert—

<Sexual Section (Sexual assault by penetration) Life imprisonment and a fine>

Fergus Ewing

52 In schedule 1, page 26, line 9, column 4, leave out from <or> to end of line 10 and insert <and a fine>

Fergus Ewing

53 In schedule 1, page 26, line 22, column 1, leave out <an image of a sexual activity> and insert <a sexual image>

Fergus Ewing

54 In schedule 1, page 26, line 36, at end insert—

<Voyeurism Section (Voyeurism) Imprisonment for a term not exceeding 12 months or a fine not exceeding the statutory maximum (or both) Imprisonment for a term not exceeding 5 years or a fine (or both)>

Fergus Ewing

55 In schedule 1, page 27, line 4, column 4, leave out from <or> to end of line 5 and insert <and a fine>

Kenny MacAskill

112 In schedule 1, page 27, line 5, at end insert—

<Sexual Section (Sexual assault on a young child by penetration) Life imprisonment and a fine>

Fergus Ewing

56 In schedule 1, page 27, line 6, column 4, leave out from <or> to end of line 7 and insert <and a fine>

Fergus Ewing

57 In schedule 1, page 27, line 19, column 1, leave out <an image of a sexual activity> and insert <a sexual image>

Kenny MacAskill

113 In schedule 1, page 27, line 25, at end insert—
Kenny MacAskill

114 In schedule 1, page 27, line 25, at end insert—

<table>
<thead>
<tr>
<th>Section (Sexual</th>
<th>Imprisonment for a term not exceeding 12 months or a fine not exceeding the statutory maximum (or both)</th>
</tr>
</thead>
<tbody>
<tr>
<td>to a young child</td>
<td>Imprisonment for a term not exceeding 10 years or a fine (or both)</td>
</tr>
</tbody>
</table>

Kenny MacAskill

115 In schedule 1, page 27, line 33, at end insert—

<table>
<thead>
<tr>
<th>Section (Voyeurism</th>
<th>Imprisonment for a term not exceeding 12 months or a fine not exceeding the statutory maximum (or both)</th>
</tr>
</thead>
<tbody>
<tr>
<td>towards a young child</td>
<td>Imprisonment for a term not exceeding 10 years or a fine (or both)</td>
</tr>
</tbody>
</table>

Kenny MacAskill

116 In schedule 1, page 28, line 19, at end insert—

<table>
<thead>
<tr>
<th>Section (Engaging in penetrative sexual activity</th>
<th>Imprisonment for a term not exceeding 12 months or a fine not exceeding the statutory maximum (or both)</th>
</tr>
</thead>
<tbody>
<tr>
<td>with or towards an older child</td>
<td>Imprisonment for a term not exceeding 5 years or a fine (or both)</td>
</tr>
</tbody>
</table>

Kenny MacAskill

117 In schedule 1, page 28, line 19, at end insert—

<table>
<thead>
<tr>
<th>Section (Sexual exposure to an older child)</th>
<th>Imprisonment for a term not exceeding 12 months or a fine not exceeding the statutory maximum (or both)</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Imprisonment for a term not exceeding 5 years or a fine (or both)</td>
</tr>
</tbody>
</table>

Kenny MacAskill

118 In schedule 1, page 28, line 22, column 1, leave out <penetrative>

Kenny MacAskill

119 In schedule 1, page 28, line 29, column 1, leave out <penetrative>
Before section 38

Kenny MacAskill

Before section 38, insert—

<Establishment of purpose for the purposes of sections 4 to (Voyeurism), 17 to (Voyeurism towards a young child) and 24 to (Voyeurism towards an older child)

(1) For the purposes of sections 4 to (Voyeurism), 17 to (Voyeurism towards a young child) and 24 to (Voyeurism towards an older child), A’s purpose was—

(a) obtaining sexual gratification, or

(b) humiliating, distressing or alarming B,

if in all the circumstances of the case it may reasonably be inferred A was doing the thing for the purpose in question.

(2) In applying subsection (1) to determine A’s purpose, it is irrelevant whether or not B was in fact humiliated, distressed or alarmed by the thing done by A.>

Patrick Harvie

Consensual acts carried out for sexual gratification

(1) It is not the crime of assault for a person who is aged 16 years or over (“A”) to attack another person who is aged 16 years or over (“B”) where—

(a) the attack is carried out for, or primarily for, the purpose of providing sexual gratification to A and B or either of them,

(b) A and B agree as to the purpose of the attack,

(c) B consents to the attack being carried out, and

(d) the attack is unlikely to result in serious injury to B (whether or not it does in fact result in such injury).

(2) For the purposes of subsection (1)(d), an attack is unlikely to result in serious injury in any case if a reasonable person would, in all the circumstances of the case, consider that the attack would be unlikely to result in serious injury.

(3) This section—

(a) applies to attacks which take place before the date on which this section comes into force as well as to those which take place on or after that date, but

(b) does not affect convictions for assault before the date on which this section comes into force.

Section 38

Fergus Ewing

In section 38, page 19, line 30, leave out from <provided> to <fulfilled,>
Where either of conditions 1 or 2 apply in a trial, the court or jury may acquit the accused of the charge but find the accused guilty of the alternative older child offence (the accused then being liable to be punished accordingly).

Condition 1 is that—

(a) A is charged with an offence under sections 14 to 19, and
(b) but for a failure to establish beyond reasonable doubt that B had attained the age of 13 years at the relevant time, a court or jury would, by virtue of subsection (1), find that A committed an offence (“the alternative older child offence”) of—

(i) having intercourse with an older child,
(ii) engaging in sexual activity with or towards an older child,
(iii) causing an older child to participate in a sexual activity,
(iv) causing an older child to be present during a sexual activity,
(v) causing an older child to look at a sexual image,
(vi) communicating indecently with an older child,
(vii) causing an older child to see or hear an indecent communication,
(viii) engaging while an older child in sexual conduct with or towards another older child,
(ix) engaging while an older child in consensual sexual conduct with another older child.

Condition 2 is that—

(a) A is charged with an offence under section 21 or 22, and
(b) but for a failure to establish beyond reasonable doubt that A had not attained the age of 16 years at the relevant time, a court or jury would, by virtue of subsection (1), find that A committed an offence (“the alternative older child offence”) of—

(i) engaging while an older child in sexual conduct with or towards another older child,
(ii) engaging while an older child in consensual sexual conduct with another older child.

In this section, the “relevant time” is when the conduct to which the proceedings relate occurred.

Fergus Ewing

In section 38, page 19, line 33, leave out subsections (2) to (4)

Schedule 2

Fergus Ewing

In schedule 2, page 29, line 13, column 3, leave out <an image of a sexual activity> and insert <a sexual image>
Fergus Ewing
61 In schedule 2, page 29, line 20, column 3, leave out <an image of a sexual activity> and insert <a sexual image>

Fergus Ewing
62 In schedule 2, page 30, line 6, column 1, leave out <an image of a sexual activity> and insert <a sexual image>

Fergus Ewing
63 In schedule 2, page 30, line 15, column 3, leave out <an image of a sexual activity> and insert <a sexual image>

Fergus Ewing
64 In schedule 2, page 30, line 22, column 3, leave out <an image of a sexual activity> and insert <a sexual image>

Kenny MacAskill
148 In schedule 2, page 30, line 24, at end insert—
<Sexual Exposure Section 7 Public indecency at common law
Breach of the peace at common law>

Kenny MacAskill
122 In schedule 2, page 30, line 25, column 3, at end insert—
<Having intercourse with an older child
Engaging in sexual activity with or towards an older child
Engaging while an older child in sexual conduct with or towards another older child>

Kenny MacAskill
123 In schedule 2, page 30, line 28, column 3, at beginning insert—
<Engaging in sexual activity with or towards an older child
Engaging while an older child in sexual conduct with or towards another older child
Engaging while an older child in consensual sexual conduct with another older child>

Fergus Ewing
65 In schedule 2, page 31, line 6, column 3, leave out <an image of a sexual activity> and insert <a sexual image>
Kenny MacAskill

124 In schedule 2, page 31, line 10, column 3, at end insert—

<Causing an older child to participate in a sexual activity
Causing an older child to be present during a sexual activity
Causing an older child to look at a sexual image
Communicating indecently with an older child
Causing an older child to see or hear an indecent communication>

Fergus Ewing

66 In schedule 2, page 31, line 14, column 3, leave out <an image of a sexual activity> and insert <a sexual image>

Kenny MacAskill

125 In schedule 2, page 31, line 18, column 3, at end insert—

<Causing an older child to participate in a sexual activity
Causing an older child to be present during a sexual activity
Causing an older child to look at a sexual image
Communicating indecently with an older child
Causing an older child to see or hear an indecent communication>

Fergus Ewing

67 In schedule 2, page 31, line 20, column 1, leave out <an image of a sexual activity> and insert <a sexual image>

Kenny MacAskill

126 In schedule 2, page 31, line 25, column 3, at end insert—

<Causing an older child to participate in a sexual activity
Causing an older child to be present during a sexual activity
Causing an older child to look at a sexual image
Communicating indecently with an older child
Causing an older child to see or hear an indecent communication>

Fergus Ewing

68 In schedule 2, page 31, line 29, column 3, leave out <an image of a sexual activity> and insert <a sexual image>
Kenny MacAskill

127 In schedule 2, page 31, line 31, column 3, at end insert—

<Causing an older child to participate in a sexual activity
Causing an older child to be present during a sexual activity
Causing an older child to look at a sexual image
Communicating indecently with an older child
Causing an older child to see or hear an indecent communication>

Fergus Ewing

69 In schedule 2, page 31, line 36, column 3, leave out <an image of a sexual activity> and insert <a sexual image>

Kenny MacAskill

128 In schedule 2, page 31, line 37, column 3, at end insert—

<Causing an older child to participate in a sexual activity
Causing an older child to be present during a sexual activity
Causing an older child to look at a sexual image
Communicating indecently with an older child
Causing an older child to see or hear an indecent communication>

Kenny MacAskill

129 In schedule 2, page 32, line 4, column 3, at end insert—

<Engaging while an older child in sexual conduct with or towards another older child>

Kenny MacAskill

130 In schedule 2, page 32, line 6, at end insert—

<Engaging in sexual activity with or towards an older child
Section 22 Engaging while an older child in sexual conduct with or towards another older child
Engaging while an older child in consensual sexual conduct with another older child>

Fergus Ewing

70 In schedule 2, page 32, line 9, column 3, leave out <an image of a sexual activity> and insert <a sexual image>
Fergus Ewing

71 In schedule 2, page 32, line 16, column 3, leave out <an image of a sexual activity> and insert <a sexual image>

Fergus Ewing

72 In schedule 2, page 32, line 23, column 1, leave out <an image of a sexual activity> and insert <a sexual image>

Fergus Ewing

73 In schedule 2, page 32, line 31, column 3, leave out <an image of a sexual activity> and insert <a sexual image>

Fergus Ewing

74 In schedule 2, page 33, line 8, column 3, leave out <an image of a sexual activity> and insert <a sexual image>

Section 42

Fergus Ewing

149 In section 42, page 22, line 25, leave out <act mentioned in subsection (1)> and insert <relevant conduct>

Section 43

Fergus Ewing

150 In section 43, page 22, line 40, leave out <conduct> and insert <an act>

Section 46

Kenny MacAskill

131 In section 46, page 25, line 4, after <under> insert <section 29(5A)>

Kenny MacAskill

151 In section 46, page 25, line 4, after <under> insert <or section 32(8), or ( ) an order under>

Section 47

Fergus Ewing

75 In section 47, page 25, line 10, at end insert—

< ( ) For the purposes of this Act—

(a) penetration, touching, or any other activity,
(b) a communication,
(c) a manner of exposure, or
(d) a relationship,

is sexual if a reasonable person would, in all the circumstances of the case, consider it to be sexual.>

**Schedule 4**

**Kenny MacAskill**

152 In schedule 4, page 35, line 26, at end insert—

<( ) In section 13 (homosexual offences)—

(a) in subsection (4), for “sodomy or an act of gross indecency or shameless indecency” substitute “an act of engaging in sexual activity”,

(b) after subsection (4) insert—

“(4A) For the purposes of subsection (4), an activity is sexual in any case if a reasonable person would, in all the circumstances of the case, consider it to be sexual.”.>

**Robert Brown**

152A As an amendment to amendment 152, line 8, at end insert—

<( ) in subsection (9), after the word “who” where it occurs for the second time there is inserted “, for the purpose of male prostitution,”,

( ) in the section title of that section, for the words “Homosexual offences” there is substituted “Offences relating to male prostitution”.>

**Robert Brown**

134 In schedule 4, page 40, line 15, leave out from beginning to <2003> and insert—

<( ) The Sexual Offences Act 2003 is amended as follows.

( ) After section 80 (persons becoming subject to notification requirements) there is inserted—

“**80A Power to modify this Part and Schedule 3**

(1) The Scottish Ministers may by order amend this Part or paragraphs 36 to 60 of Schedule 3 for the purpose of modifying the application of this Part in relation to persons who are aged under 16 at the time of committing an offence specified in one of those paragraphs.

(2) Before making an order under subsection (1) the Scottish Ministers must consult such persons as they consider appropriate.”.

( ) In section 138(2) (orders and regulations) after the word “21,” there is inserted “80A,”.

( ) In Schedule 3>
Kenny MacAskill

153 In schedule 4, page 40, line 20, at end insert—

<59DA An offence under section (Sexual assault by penetration) of that Act (Sexual assault by penetration).>

Kenny MacAskill

154 In schedule 4, page 40, line 30, at end insert <if—

(a) the offender is or has been sentenced in respect of the offence to a term of imprisonment, or

(b) the offender was 18 or over and the victim was under 18.>

Kenny MacAskill

155 In schedule 4, page 40, line 30, at end insert—

<59LA An offence under section (Voyeurism) of that Act (voyeurism).>

Kenny MacAskill

156 In schedule 4, page 40, line 33, at end insert—

<59NA An offence under section (Sexual assault on a young child by penetration) of that Act (sexual assault on a young child by penetration).>

Kenny MacAskill

157 In schedule 4, page 41, line 4, at end insert—

<59UA An offence under section (Sexual exposure to a young child) of that Act (sexual exposure to a young child).

59UB An offence under section (Voyeurism towards a young child) of that Act (voyeurism towards a young child).>

Kenny MacAskill

158 In schedule 4, page 41, line 6, at end insert <if the offender—

(a) was 18 or over, or

(b) is or has been sentenced in respect of the offence to a term of imprisonment.>

Kenny MacAskill

159 In schedule 4, page 41, line 6, at end insert—

<59VA An offence under section (Engaging in penetrative sexual activity with or towards an older child) of that Act (engaging in penetrative sexual activity with or towards an older child) if the offender—

(a) was 18 or over, or

(b) is or has been sentenced in respect of the offence to a term of imprisonment.>
In schedule 4, page 41, line 8, at end insert <if the offender—
   (a) was 18 or over, or
   (b) is or has been sentenced in respect of the offence to a term of
       imprisonment.>

In schedule 4, page 41, line 10, at end insert <if the offender—
   (a) was 18 or over, or
   (b) is or has been sentenced in respect of the offence to a term of
       imprisonment.>

In schedule 4, page 41, line 12, at end insert <if the offender—
   (a) was 18 or over, or
   (b) is or has been sentenced in respect of the offence to a term of
       imprisonment.>

In schedule 4, page 41, line 14, at end insert <if the offender—
   (a) was 18 or over, or
   (b) is or has been sentenced in respect of the offence to a term of
       imprisonment.>

In schedule 4, page 41, line 16, at end insert <if the offender—
   (a) was 18 or over, or
   (b) is or has been sentenced in respect of the offence to a term of
       imprisonment.>

In schedule 4, page 41, line 18, at end insert—
<59ZBA An offence under section (Sexual exposure to an older child) of that Act
   (sexual exposure to an older child) if the offender—
(a) was 18 or over, or
(b) is or has been sentenced in respect of the offence to a term of imprisonment.

59ZBB An offence under section (Voyeurism towards an older child) of that Act (voyeurism towards an older child) if the offender—
(a) was 18 or over, or
(b) is or has been sentenced in respect of the offence to a term of imprisonment.

Kenny MacAskill

167 In schedule 4, page 41, line 20, at end insert <if the offender is sentenced in respect of the offence to a term of imprisonment.>

Kenny MacAskill

168 In schedule 4, page 41, line 22, at end insert <if the offender is sentenced in respect of the offence to a term of imprisonment.>

Schedule 5

Kenny MacAskill

169 In schedule 5, page 43, line 10, column 2, leave out <Section 78(2A) and (2B)>

Kenny MacAskill

170 In schedule 5, page 43, leave out line 12

Kenny MacAskill

171 In schedule 5, page 43, line 28, column 2, at end insert—

<In Schedule 3, paragraph 42.>
Sexual Offences (Scotland) Bill

3rd Groupings of Amendments for Stage 2

This document provides procedural information which will assist in preparing for and following proceedings on the above Bill. The information provided is as follows:

- the list of groupings (that is, the order in which amendments will be debated). Any procedural points relevant to each group are noted;
- a list of any amendments already debated;
- the text of amendments to be debated on the third day of Stage 2 consideration, set out in the order in which they will be debated. THIS LIST DOES NOT REPLACE THE MARSHALLED LIST, WHICH SETS OUT THE AMENDMENTS IN THE ORDER IN WHICH THEY WILL BE DISPOSED OF.

Groupings of amendments

Children: requirement to undertake an information and publicity campaign
133

Positions of trust: power to amend
135, 143, 151

Position of trust: looked-after persons
136, 137, 138, 139, 140, 141, 142, 144, 145

Penalty on indictment for certain offences
111, 50, 51, 52, 55, 112, 56

Establishment of purpose: sexual gratification, causing humiliation or distress
120

Consensual acts carried out for sexual gratification
172

Power to convict for offence other than that charged: notice requirements
146, 147

Power to convict for offence other than that charged: other provisions
121, 122, 123, 124, 125, 126, 127, 128, 129, 130

Sexual exposure: alternative offences
148

Incitement and offences committed outside the UK
149, 150
Criminal Law (Consolidation) (Scotland) Act 1995: definition of “homosexual act”
152, 152A

Persons under 16 years of age: power to modify notification requirements
134

Sexual offences notification requirements
153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 171

Notification of defence of consent
169, 170

Amendments already debated

Special provision as regards failure to establish age of child
With 109 – 110

Definition of sexual
With 6 – 45, 46, 47, 48, 75

Coercing a person into looking at a sexual image
With 9 – 53, 57, 58, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74

Sexual exposure and voyeurism
With 14 – 54

Sexual exposure to children and voyeurism towards children
With 80 - 113, 114, 116, 117

Sexual assault on children: penetration
With 78 – 115

Older children engaging in sexual conduct with each other: oral sex and instructions as to prosecution
With 86 - 118, 119

Defence under section 29(1) of reasonable belief as to age: when not available
With 97 - 131
SEXUAL OFFENCES (SCOTLAND) BILL: The Committee considered the Bill at Stage 2 (Day 3).


Amendments 133, 172, 152A and 134 were moved and, with the agreement of the Committee, withdrawn.

Sections 39, 40 and 41, schedule 3, and sections 44, 45, 48 and 49 were agreed to without amendment.

Sections 31, 32, 33, 34, 35, 36 and 37, schedule 1, section 38, schedule 2, sections 42, 43, 46 and 47, and schedules 4 and 5 were agreed to as amended.

The Long Title was agreed to without amendment.

The Committee completed Stage 2 consideration of the Bill.
On resuming—  

Sexual Offences (Scotland) Bill: Stage 2

The Convener: Agenda item 2 is consideration of the Sexual Offences (Scotland) Bill. This is the third and final day of stage 2 proceedings on the bill. The committee will consider amendments to section 31 to the end of the bill. I welcome the Cabinet Secretary for Justice, Mr Kenn MacAskill, and his officials. I also welcome Patrick Harvie MSP. Members should have their copies of the bill, the marshalled list of amendments and the groupings of amendments.

After section 30

Amendment 110 moved—[Kenny MacAskill]—and agreed to.

The Convener: Amendment 133, in the name of Robert Brown, is in a group on its own.

Robert Brown: The committee will remember that, in our stage 1 discussions on the bill, one of the more significant issues was the Government’s lack of pre-consultation with young people, which was commented on by Scotland’s Commissioner for Children and Young People and several organisations.

The committee made certain recommendations on the issue in its stage 1 report. The committee was 

"surprised by the lack of willingness on the part of the Scottish Government to carry out ... meaningful ... consultation",

and the report recommended:

“following enactment of the Bill the Government should implement an age-appropriate information and publicity campaign after having consulted appropriately with this age group.”

In fairness, the Government has responded to that to a degree and said that it will implement an age-appropriate information and publicity campaign, but what is starkly missing from that undertaking is any commitment to consult that age group appropriately. That is my motivation for lodging amendment 133: I want to hear the Government’s view on the issue.

As the cabinet secretary will be aware, the amendment relates to all sorts of issues, such as how young people react to legislative prompts and the motivations and background reasons behind the fact that about 30 per cent of young people have sexual relations before the age of 16, with all the health worries and issues that go with that. There are also issues about encouraging young people to engage, when appropriate, with health, advice and counselling services, as well as the underlying issue of teenage pregnancies.

The Government ought to inform its work through proper consultation arrangements with young people. The minister may be able to satisfy me in that regard; I know that work has been done on considering the facilities that are available, but this important issue underlies not just the immediate proposals but the committee’s consideration of the age of consent and the implications of various other things.

My views on the matter are borne out by the representations that have been made by Scotland’s Commissioner for Children and Young People and organisations such as Children 1st, which expressed similar views and concerns. The British Medical Association also expressed similar views and concerns about what it thinks might be the implications of our legislative activities. That background impels me to seek the minister’s views on the issues that have been raised by the proposal, which is quite complicated in some ways, and to move the amendment.

I move amendment 133.

Bill Butler (Glasgow Anniesland) (Lab): Amendment 133 seems to be a reasonable addendum. Consulting young people appropriately chimes with what the committee said in its stage 1 report. I hope that the Government sees the amendment as rational and that it will take the proposal on board. I look forward to hearing the cabinet secretary’s response. The amendment seems rational to me.

The Convener: The amendment is consistent with the committee’s report, although there have been doubts about the practicality of the proposal.

Stewart Maxwell (West of Scotland) (SNP): I sympathise with Robert Brown’s and Bill Butler’s comments on the intention behind amendment 133, but am not entirely convinced that such information should be in the bill. I understand that the Government has already said that it intends to undertake an information and publicity campaign—I am sure that the cabinet secretary will explain what will happen—but it does not seem entirely appropriate to include such information in the bill.

The convener mentioned practicality. I am slightly concerned about the practicality of putting in the bill a declaration that would force the Government to undertake a campaign but that did not include any details of that campaign, what it would entail, how it would be progressed and what it would cost. I would prefer it if the cabinet secretary explained his intention clearly and confirmed that the Government will undertake such a campaign.
Cathie Craigie (Cumbernauld and Kilsyth) (Lab): Almost every organisation that represents young people that gave evidence to the committee expressed serious concerns about the lack of age-appropriate consultation with young people on such a major piece of legislation that will affect them. It is clear that we have a serious problem with young people and their attitudes to under age sex and that a full education programme is needed.

The committee expressed concern that the Government had not consulted. There have been several months for taking evidence on the matter, and the committee has expressed its concerns. As far as I know, the Government has not engaged in any way with young people in that period. The amendment is worth considering, and I would like to hear what the cabinet secretary has to say about it.

10:30

The Cabinet Secretary for Justice (Kenny MacAskill): Amendment 133 seeks to impose on the Government two obligations that would require to be discharged before commencement of part 4. The first would be to consult those aged under 18 on their attitudes to part 4. It is not clear from the amendment what that consultation is intended to accomplish; I am grateful to Mr Brown for his explanation in that context.

During stage 1, the committee expressed concerns that the Government had not directly consulted children on the bill, although we did consult children’s organisations extensively, including Scotland’s Commissioner for Children and Young People, Children 1st and Barnardo’s.

A requirement to consult children on their attitudes to part 4 after it has passed into law seems to be of limited value. It would be useful to consult children to help us to decide how we can best take forward the legislation, but their attitudes to part 4 should not be focused on; it would be more productive to consult them on how we can best communicate with them on the issues that are dealt with in the bill—in part 4, certainly, but not exclusively. There are other important issues that are dealt with in the bill that will be of particular relevance to young adults, particularly its provisions on consent and positions of trust.

The second obligation that the amendment would impose on the Government is to undertake an information and publicity campaign. Our response to the stage 1 report on the bill confirmed that the Government intends to undertake an information and publicity campaign following enactment of the bill, and that that will include age-appropriate material that is aimed at young people. I am happy to confirm and to put on the record that we continue to intend to undertake such a campaign and that our intention is that that campaign will link into existing plans to increase drop-in services for young people throughout Scotland to provide direct contact with professionals.

As I have already said, as part of our planning for the campaign, we intend to consult children and young people on the most effective way of communicating with them on the important issues that the bill deals with. That consultation will shape the approach that we take on that aspect of our campaign, which will also extend to adults. I am grateful for Mr Maxwell’s contribution in that context.

I should point out that we consider there to be technical defects in the drafting of the amendment. In particular, the absence of any qualification on the requirement to consult appears to require the Government to consult everyone in Scotland under the age of 18, which is clearly unachievable.

In summary, I am happy to give a commitment that the Government will undertake a publicity campaign before the commencement of part 4. I am also delighted to give a commitment that children and young people will be consulted on the best way in which the campaign can communicate with children on part 4. In light of those commitments and the amendment’s technical faults, which I have highlighted, the imposition of such requirements in legislation is inappropriate and unnecessary, so I invite the member to seek to withdraw the amendment.

Robert Brown: I have been a minister and made observations about alleged technical deficiencies. I do not think that the amendment has technical deficiencies, because it would require ministers to “consult in an appropriate manner”.

When ministers rely on technical deficiencies in that sense, perhaps their argument is beginning to be a little bit weaker than it might otherwise be.

I am, nevertheless, grateful to the cabinet secretary for his response on the merits of the proposal. The key point is consultation with children and young people. I accept Stewart Maxwell’s observation that it may not be appropriate to include such matters in the bill, but wonder whether the cabinet secretary will undertake to meet me to discuss the detail of the proposal further prior to stage 3—I see him indicating that he will; that is helpful. Against that background, I am prepared to seek to withdraw the amendment.

There are requirements in the Children (Scotland) Act 1995 and other legislative arrangements for the views of young people to be
taken into account. The Government should bear that in mind in the future and deal with the spirit and the letter of the proposal in that regard. With those observations, I am happy to seek to withdraw the amendment.

Amendment 133, by agreement, withdrawn.

Section 31—Sexual abuse of trust
Amendment 45 moved—[Kenny MacAskill]—and agreed to.

Section 31, as amended, agreed to.

Section 32—Positions of trust
The Convener: Amendment 135, in the name of the minister, is grouped with amendments 143 and 151.

Kenny MacAskill: The amendments would amend the power in section 32 to modify the definition of a position of trust. Amendment 135 deletes the existing power to define additional conditions constituting a position of trust; amendment 143 creates a new order-making power to add, modify or delete a condition constituting a position of trust; and amendment 151 provides that that order-making power shall be subject to the affirmative resolution procedure. That meets the recommendation by the Subordinate Legislation Committee, which was endorsed by the Justice Committee in its stage 1 report, that, given the potential impact of the exercise of that power to widen the scope of the offence of sexual abuse of trust, affirmative procedure provides the appropriate level of parliamentary scrutiny.

The committee will be aware that the Government indicated to the Subordinate Legislation Committee that we will lodge amendments to provide that any direct modification of primary legislation using the order-making power in section 45 will attract the affirmative procedure. Subsequently, general discussions of the matter have taken place with parliamentary officials, as a similar issue has arisen with other legislation. The Government is, therefore, considering its general approach to the matter in liaison with the Subordinate Legislation Committee and its officials. As a result, we have not lodged any amendments to section 45 at this stage. We will, however, lodge at stage 3 any amendments that are required. I hope that that explanation, although not directly connected to this group of amendments, is helpful to the committee.

I move amendment 135.

Amendment 135 agreed to.

The Convener: Amendment 136, in the name of the minister, is grouped with amendments 142, 144 and 145.

Kenny MacAskill: The amendments alter what constitutes a position of trust in relation to a person B who is under 18. The amendments will ensure that any teacher, care home worker, hospital worker or other relevant person will be considered to be in a position of trust in relation to B if B is detained in, resides at or attends an institution and A looks after any individuals who are under 18 in that institution rather than just looking after B. The amendments will maintain the criteria for what constitutes a position of trust under the law at present.

The Scottish Law Commission rejected this approach, as it considered the provision too wide and that it would create a relationship of trust between, for example, a tutor in a law school on one campus of a university and a student of medicine who is based on another, even though there is no professional contact between the two. We recognise the Law Commission’s concerns regarding universities and further education institutions; therefore, amendment 139 amends the definition of a position of trust in respect of a person who works in an educational establishment so that, in those circumstances, a position of trust exists only when the adult looks after B, the child in question.

Amendments 144 and 145 are consequential on amendment 139.

Amendments 140 to 142 make consequential changes to the definition of “looks after” in section 32(7). Amendment 141 extends the definition of “looks after” explicitly to include the circumstances in which A teaches B.

I move amendment 136.

Amendment 136 agreed to.

Amendments 137 to 143 moved—[Kenny MacAskill]—and agreed to.

Section 32, as amended, agreed to.

Section 33—Interpretation of section 32
Amendments 144 and 145 moved—[Kenny MacAskill]—and agreed to.

Section 33, as amended, agreed to.

Section 34—Sexual abuse of trust: defences
Amendment 46 moved—[Kenny MacAskill]—and agreed to.

Section 34, as amended, agreed to.
Section 35—Sexual abuse of trust of a mentally disordered person

Amendment 47 moved—[Kenny MacAskill]—and agreed to.

Section 35, as amended, agreed to.

Section 36—Sexual abuse of trust of a mentally disordered person: defences

Amendment 48 moved—[Kenny MacAskill]—and agreed to.

Section 36, as amended, agreed to.

Section 37—Penalties

The Convener: Amendment 111, in the name of the minister, is grouped with amendments 50 to 52, 55, 112 and 56.

Kenny MacAskill: The Justice Committee’s stage 1 report recommended that the Government lodge amendments to rule out the possibility of a fine being imposed as a sole penalty when a person is convicted of rape, rape of a young child or serious sexual assault. Our response to the report confirmed that we would do so. Having considered the committee’s recommendations, we have concluded that serious sexual assaults should be defined for this purpose as those tried on indictment.

Amendment 111 therefore amends section 37 to provide that a fine may not be imposed as a sole penalty when the accused is convicted of rape, sexual assault by penetration or rape of a young child, or when the accused is convicted on indictment of sexual assault, sexual assault by penetration of a young child or sexual assault of a young child. The amendments that create the new offence of sexual assault by penetration and sexual assault of a young child by penetration provide that the offence can be tried only on indictment. All such assaults will, therefore, be treated as serious sexual assaults for these and other purposes. Furthermore, amendment 111 provides that the court’s powers to substitute a fine for a penalty of imprisonment under section 199(2) of the Criminal Procedure (Scotland) Act 1995 shall not apply.

The other amendments in the group make consequential changes to schedule 1 to remove the phrase “or a fine” from the maximum penalties for the offences.

I move amendment 111.

Paul Martin (Glasgow Springburn) (Lab): We are sometimes quick to advise Governments when we think that they have got it wrong, but on this occasion the Government has responded appropriately to ensure that the potential loophole whereby the rape of a child could result in a fine has been dealt with. I commend the minister for lodging excellent amendments to deal with that.

The Convener: Yes. The committee was concerned about that. I doubt that it would ever have happened, but it is as well to underline in statute the gravity of that type of offence. Amendment 111 and its related amendments do so.

Amendment 111 agreed to.

Section 37, as amended, agreed to.

Schedule 1

Penalties

Amendments 50 to 55, 112, 56, 57, 113 to 115, 58 and 116 to 119 moved—[Kenny MacAskill]—and agreed to.

Schedule 1, as amended, agreed to.

Before section 38

The Convener: Amendment 120, in the name of the minister, is in a group on its own.

Kenny MacAskill: Amendment 120 introduces a new section concerning the establishment, for offences that require that the accused acts for the purpose of obtaining sexual gratification or causing humiliation, alarm or distress, of the purpose for which the accused acted. The proposed new section provides that the requirement to prove that the accused acted for the purpose of obtaining sexual gratification or causing humiliation, alarm or distress shall be satisfied if it may reasonably be inferred from all the facts and circumstances of the case that the accused acted for that purpose.

The test is similar to that which is used in section 57 of the Civic Government (Scotland) Act 1982 in relation to a person being on premises without lawful authority with the intent to commit theft. Both offences provide that the accused may be convicted if it can be inferred from all the facts and circumstances that the accused had the specified intent. The amendment also provides that, for the avoidance of doubt, there is no requirement that the accused has caused the victim actual humiliation, alarm or distress in determining the accused’s purpose.

I move amendment 120.

Amendment 120 agreed to.
Patrick Harvie (Glasgow) (Green): Thank you, convener. It has been a while.

Amendment 172 relates to the Scottish Law Commission’s recommendation in paragraph 5.27 of its report that what it described as “sado-masochistic practices”—perhaps more widely known in society as BDSM activity—should not be a criminal offence. The commission’s draft bill included a provision to clarify that, and amendment 172 uses text from that draft bill. The Scottish Government decided not to include the provision in its bill. It is perhaps understandable that a decision not to include a particular measure has had less scrutiny than aspects that are proposed in the bill. I lodged the amendment to ensure that there is some examination of and discussion about the Government’s decision not to legislate. Even if the amendment is regarded as a probing amendment, I am keen to give the cabinet secretary the opportunity to state the Government’s position and to address some of the underlying questions.

The reason why the Government’s decision not to include the provision stands out for me is that it appears to conflict with the Government’s intention to place a well-understood concept of consent at the heart of the law on sexual offences. It seems to me that if that principle is applied, consenting adults who take part in BDSM activity would not in normal circumstances expect to be committing an offence.

As I understand it, the Government is concerned that, if the proposal was included in the legislation, it could be misused by those who are accused of assault that is not part of consensual activity. The example of domestic abuse has been suggested, and the possibility has been raised that such cases could become more difficult to prosecute. I have no wish for that to happen, and I am sure that the committee takes seriously the possibility of unintended consequences. None of us would want to underestimate the harm that domestic abuse causes.

However, there are those who argue that it is inherently abusive or wrong for adults to take part in consensual BDSM activity. That is the first issue that I would like the cabinet secretary to address—I would like to be assured that that is not the Government’s position. Is the decision not to legislate based on general views about BDSM activity or solely on the possibility of unintended consequences for other cases, such as cases of domestic abuse? If the latter is the case, I would expect the Government to have considered other approaches that might avoid those consequences while recognising adults’ right to consent to activity in which they choose to take part.

Secondly, if that principle of consent is important, I ask the Government to clarify its understanding of the law both now and under the new legislation, assuming that the bill is passed. Is it the Government’s view that BDSM activity between consenting adults when no other party is involved is, in fact, a criminal offence? The Scottish Law Commission’s report rightly recognises that there is a lack of clarity in that area, so I would like to know the Government’s view. If the cabinet secretary believes that that is a criminal offence at present, does he agree that that is an anomaly and that, all other things being equal, such situations should not be regarded as a priority for prosecution? Situations in which consent is uncontented—where all the people involved agree that there was complete and informed consent between them—should surely not be treated as assaults that are worthy of prosecution and punishment.

Finally, and reiterating the importance that we all place on ending the harm that is caused by domestic abuse, I make the case that the situation that faces the BDSM community can also cause harm. Those people are, in many respects, in a similar situation to that in which gay men were before decriminalisation. Perhaps fearing prosecution, and certainly being vulnerable to condemnation in the media, many ordinary people who simply have a different kind of sex life to other people can lose their jobs, their homes and their families as a result of public disapproval. I am not talking about people who have the resources of Max Mosley, who can put up a fight in the courts based on the principle of privacy. I am not talking about people who are in the public eye, against whom a newspaper may make some form of public interest argument, however dubious. There is no clear law on privacy, so it is right that vigorous debate takes place on the matter on both sides. However, when people are caught in the crossfire of that debate, their lives can be ruined.

The final question that I ask the cabinet secretary to address is whether the Government recognises the harm that many people in the BDSM community experience due to the current legal uncertainty, regardless of whether prosecutions actually take place? If so, is he open to re-examining the law in the future, with a view to finding ways in which to recognise the legitimacy of consent in the area and to reduce the harm that many ordinary people experience? I know that he and his colleagues have thought carefully about the concept of consent, and I am sure that the committee has also done so during its consideration of the bill. Many people in the BDSM community give more detailed and thoughtful consideration to the meaning and importance of consent than most people do in their daily lives. Surely there should be some scope to take that insight and let it inform the law in the area. I look
forward to hearing the cabinet secretary’s response.

I move amendment 172.

**Stewart Maxwell:** I appreciate Patrick Harvie’s comment—and I believe him—that amendment 172 is not intended in any way to put at risk women who have violent partners, and that it is not intended that such partners should be able to use the provision as a defence. The problem that I have with the amendment is that that is exactly what would happen. Eventually, there would be cases in which the defence was that what happened was consensual sexual activity. Some people might say that the woman or the other partner, whoever that might be, could say that it was not consensual and it was therefore an assault, but I am afraid that the reality of society is that many people find it almost impossible to speak out in their own defence when they find themselves at the mercy of a violent partner. In that situation, it is not unknown for women to refuse to speak up and give evidence against violent partners.

Although I understand the logic of what Patrick Harvie says, I cannot support amendment 172 because, when we take the logic to its extreme conclusion, we end up with an illogicality. If we were to agree to the amendment, violent men would use the provision as a defence for violence against women in particular, and against same-sex partners as well. We cannot allow any possibility that that door will be opened.

I suspect that if the authorities, particularly the police, were to come across consensual sexual activity of the type that we are discussing, they would not pursue a prosecution. I do not see that it would be in anybody’s interest to pursue a prosecution.

Therefore, although it might seem illogical, I have to say that I could not support an amendment that would in any way risk putting women even more at risk than some of them currently are.

**Nigel Don (North East Scotland) (SNP):** I will reiterate my position, although Stewart Maxwell has already stated a large part of it. It has seemed to me from the very beginning that amendment 172 should not be considered. During discussion of all the provisions in the bill, we have come down firmly in favour of the idea that, if we have to, we should stray from the obvious and logical line towards the direction of ensuring that the Crown has the best opportunity of convicting the real offender. On the other side of that, we expect that the Crown will use its discretion appropriately. We recognise that we cannot actually write the words in such a way that we hold the fine line between the two.

Amendment 172 relates to activity that I plainly do not understand and do not wish to comment on, but I would go further than Stewart Maxwell and say that, if the amendment was agreed to, rather than the provision’s being used as a defence “eventually”, it would be led as the defence whenever there was a previous relationship—a defence lawyer would be duty bound to introduce it. It would simply open up a hole in the legislation and create one more way for unscrupulous defendants to get off.

We have to rely on the Crown Office and Procurator Fiscal Service to use its discretion appropriately and not to convict or even attempt to convict where there is genuine consent. As I said, I will make no comment on the behaviour because I simply do not understand it.

**Cathie Craigie:** I will make just the same point, I think. I agree with Nigel Don. The bill contains a lot of good provisions that will become law when the bill is enacted. Agreement to amendment 172 would open up a defence for violent partners—regardless of whether they are male or female. I hope that the minister will be able to put up a strong case for not including the amendment in the bill.

**The Convener:** Patrick Harvie is right to bring the matter before the committee. Although some of his arguments are interesting, I have difficulty in accepting them. However, I agree that the type of behaviour that we are talking about—although it might be difficult to understand or even, according to the committee’s view, bizarre—is not analogous with domestic violence. I perhaps differ from Stewart Maxwell on that point.

I wonder whether we are debating the issue in a vacuum. It could be argued that what goes on behind closed doors, between consenting couples, is a matter for them and them alone. However, there would have to be two very important caveats to that: first, that the degree of violence involved did not result in anyone being injured; and secondly, that the activity be consensual. I am open to correction, but I cannot envisage circumstances in which a matter would come to the attention of the police or the prosecuting authorities that had not breached those caveats. On that basis, I feel unable to support amendment 172. Like Nigel Don, I take the view that it is highly probable—indeed, almost inevitable—that the Crown, in considering the circumstances of each case, would be reluctant to prosecute. There is sufficient safety in that.

Patrick Harvie was correct to bring the matter before the committee, particularly bearing in mind that the draft bill, as represented in the report by the Scottish Law Commission, would have included such a provision. Although it is appropriate that the matter be aired today, I just
have some doubts as to amendment 172's efficacy.

Kenny MacAskill: Amendment 172 is intended to decriminalise acts of consensual sexual violence between those aged over 16 provided that the acts are unlikely to result in serious injury. Like the convener, I appreciate that the provision was included in the Scottish Law Commission’s draft bill. However, as Stewart Maxwell, Nigel Don and Cathie Craigie have said, we rejected the Law Commission’s recommendation because of serious concerns that were expressed by consultation respondents that such a provision could provide a loophole for accused persons in cases of rape, sexual assault and domestic violence.

At present, assault is a crime, regardless of whether the victim consented to being assaulted. If amendment 172 were to be agreed to, the accused might seek to argue in such cases that the complainer had consented to the assault and that the assault was for the purpose of obtaining sexual gratification. In some cases, it may be very difficult for the Crown to disprove such a claim.

Respondents to the Government’s consultation and the Law Commission’s report were almost all opposed to the recommendation, with many citing concerns that it could undermine prosecutions for domestic abuse and rape.

Issues have been raised, including by the convener, regarding police and prosecution. Obviously, the Scottish Government does not set prosecution policy, and clearly there is a public interest test that the prosecution requires to consider. In many instances, the comments that were made by the convener represent how the prosecution would view such matters. The prosecution has to consider whether a crime has been committed, whether the crime can be proven and whether it is in the public interest to pursue the matter. Clearly, there are also questions as to whether cases would ever be reported to the police if they were about activity between two consenting adults in the privacy of their own house. As I say, prosecution policy is a matter for the Crown.

Patrick Harvie: The convener said that some of the arguments behind amendment 172 are interesting, which is one of the reasons why it is worth airing them at the committee and having at least some discussion of them.

It appears that the sole reason for not legislating in this area is the possibility of unintended consequences. The cabinet secretary has not said anything to suggest that there is another reason behind the decision. There is still an outstanding question about what alternative approaches were considered that could have recognised the rights of adults to consent, without causing unintended consequences, whether legal or in terms of the experience that those people have in society.

Stewart Maxwell said that most of us would not expect prosecutions to take place in circumstances in which individuals had clearly and freely given informed consent, and in which no one was involved who had not consented. I would like to expect that, but I am not sure that it is always the case. I reiterate that it is not a question simply of which prosecutions take place, but of other kinds of harm that those people can experience, such as threats, blackmail and the fear of losing their jobs if their private lives become public in some way. That happens, and real people's lives are torn apart by such experiences.

11:00

I am grateful for the recognition that I am not seeking to do anything that would undermine the importance that we place on ending the harm that is caused by domestic abuse and I would like wider recognition that harm is being done. At the moment, the law appears not to recognise that or to give it any due importance.

However, having raised the issues and, I hope, having opened up the debate and perhaps stimulated further consideration of what the Government might do in the future, I recognise that the question of unintended consequences is unresolved. It is a strong argument. On that basis, I seek to withdraw amendment 172. I hope that it has been valuable to have some of the issues behind it aired at committee.

Amendment 172, by agreement, withdrawn.

Section 38—Power to convict for offence other than that charged

The Convener: Amendment 146, in the name of the minister, is grouped with amendment 147.

Kenny MacAskill: Amendments 146 and 147 will amend section 38, which is on the power to convict for an offence other than that charged. Where an accused is charged with an offence under the bill, section 38(1) would permit the court or the jury to convict of an alternative offence, provided that it is one of the alternative offences corresponding to the offence, as set out in schedule 2.

At present, it is a precondition of the exercise of that power that the accused has been given “fair notice” of the effect that section 38(1) might have on his case. It is further provided that fair notice will be deemed to have been given where a notice of the alternative verdicts that would be available in the accused’s case is appended to the indictment or complaint.
As I explained in my letter to the committee of 22 December last year, our view is that it is undesirable to place unnecessary procedural burdens on the prosecution and that the accused can, if a statute provides for alternatives, be deemed to have been given sufficient notice of the possibility of being convicted of an alternate offence.

Amendments 146 and 147 will remove the reference to the giving of fair notice as a precondition to the operation of section 38(1).

I move amendment 146.

Amendment 146 agreed to.

The Convener: Amendment 121, in the name of the minister, is grouped with amendments 122 to 130.

Kenny MacAskill: As section 30 is now solely concerned with deeming the age of a child victim or accused where doubt as to his or her age may open up the possibility of the accused being convicted of a more serious offence, amendment 121 and the other amendments in the group are required to address circumstances in which doubt as to the accused's or victim's age might give rise to conviction of a less serious alternative offence.

The amendments will amend schedule 2 so that the provisions concerning power to convict for alternative offences take account of the offences concerning sexual activity between older children.

I move amendment 121.

Amendment 121 agreed to.

Amendment 147 moved—[Kenny MacAskill] and agreed to.

Section 38, as amended, agreed to.

Schedule 2

ALTERNATIVE VERDICTS

Amendments 60 to 64 moved—[Kenny MacAskill]—and agreed to.

The Convener: Amendment 148, in the name of the minister, is in a group on its own.

Kenny MacAskill: Amendment 148 will amend schedule 2, such that it will provide that the common-law offences of breach of the peace and public indecency shall be alternative verdicts when an accused is charged with sexual exposure. In circumstances in which an accused is charged with sexual exposure and a court is not satisfied that the accused committed the offence, but is satisfied that they committed either of the alternative offences of breach of the peace or public indecency, the accused may be convicted of those offences.

I move amendment 148.

Amendment 148 agreed to.

Amendments 122, 123, 65, 124, 66, 125, 67, 126, 68, 127, 69, 128 to 130 and 70 to 74 moved—[Kenny MacAskill]—and agreed to.

Schedule 2, as amended, agreed to.

Sections 39 to 41 agreed to.

Section 42—Incitement to commit certain sexual acts outside the United Kingdom

The Convener: Amendment 149, in the name of the minister, is grouped with amendment 150.

Kenny MacAskill: Amendments 149 and 150 are technical amendments that seek to amend references to acts and to conduct in sections 42 and 43, which deal with offences that relate to incitement to commit certain sexual acts outside the United Kingdom and offences that are committed outside the UK, to ensure drafting consistency.

I move amendment 149.

Amendment 149 agreed to.

Section 42, as amended, agreed to.

Schedule 3 agreed to.

Section 43—Offences committed outside the United Kingdom

Amendment 150 moved—[Kenny MacAskill]—and agreed to.

Section 43, as amended, agreed to.

Sections 44 and 45 agreed to.

Section 46—Orders

Amendments 131 and 151 moved—[Kenny MacAskill]—and agreed to.

Section 46, as amended, agreed to.

Section 47—Interpretation

Amendment 75 moved—[Kenny MacAskill]—and agreed to.

Section 47, as amended, agreed to.

Section 48 agreed to.

Schedule 4

MINOR AND CONSEQUENTIAL AMENDMENTS

The Convener: Amendment 152, in the name of the minister, is grouped with amendment 152A.

Kenny MacAskill: Amendment 152 addresses the concerns that the committee raised, in paragraphs 388 and 389 of its report, about the
definition of a homosexual act that is contained in section 13 of the Criminal Law (Consolidation) (Scotland) Act 1995. The current definition of a homosexual act is that it is an act of sodomy or "an act of gross indecency or shameless indecency by one male person with another male person."

The committee highlighted the concerns that were expressed during evidence at stage 1 that the current definition is potentially offensive. In the Government’s response to the stage 1 report, we made it clear that we agree with those concerns. Amendment 152 seeks to amend the definition by providing that a homosexual act is a sexual act by one male person on another male person. An act is considered to be sexual "if a reasonable person would, in all the circumstances of the case, consider it to be sexual."

Amendment 152A, in the name of Robert Brown, seeks to change the title of section 13 of the 1995 act to reflect the fact that, following the proposed amendment, section 13 of the 1995 act would be concerned solely with male prostitution. Amendment 152A also seeks to ensure that the offence that is dealt with in section 13(9) of the 1995 act, which concerns male soliciting or importuning "for the purpose of procuring the commission of a homosexual act", applies only in the context of male prostitution.

However, from a technical point of view, that part of amendment 152A does not quite work as we presume that it was intended to, because it would not result in the provision of a clear and unambiguous definition in section 13(9) of the 1995 act. That is because reference would be made, in the same phrase, to two different purposes—that of "male prostitution" and that of "procuring the commission of a homosexual act".

That said, I am grateful to Mr Brown for raising the issue and am happy to give a commitment to consider it further, with a view to determining whether an amendment is required at stage 3.

I move amendment 152.

Robert Brown: I am grateful to the cabinet secretary for lodging amendment 152, which responds to an issue that was raised by me and other members of the committee during the stage 1 debate.

Amendment 152A was stimulated by the Equality Network, which expressed a number of concerns about the language that remains in the Criminal Law (Consolidation) (Scotland) Act 1995. There are two points. The first is that the phrase "homosexual offences" is an outdated and now inappropriate piece of terminology. Secondly, there is an issue about whether the offence in section 13(9) of the 1995 act goes beyond prostitution-related behaviour, which the cabinet secretary took on board. I am told that there have been no prosecutions for such offences that do not relate to prostitution for some years, but there remains a concern that the offence is not restricted to prosecution—

The Convener: Did you mean "prostitution"?

Robert Brown: What did I say?

The Convener: "Prosecution".

Robert Brown: I beg your pardon.

There is a fear that any man who sexually propositions another man might commit the offence, which is contrary to the principle of the bill that consenting acts between adults should be dealt with without sexual orientation discrimination. The intention of amendment 152A is to clarify the scope of the offence by ensuring that it applies only if the soliciting or importuning was for the purposes of prostitution. It would not alter the law on prostitution in any way, which is beyond the scope of the bill.

Proposed new subparagraph (d) of the new paragraph that amendment 152 seeks to insert in schedule 4 would change the heading of section 13 of the 1995 act from "Homosexual offences", which is inaccurate and, to lesbian, gay, bisexual and transgender people, offensive, to "Offences relating to male prostitution". That heading should be more accurate, as it reflects the reduced scope of section 13 of the 1995 act, following the other changes to it.

I am not obsessed by the technical aspects of the bill and am grateful for the cabinet secretary’s helpful response. In those circumstances and in the light of the undertaking that he has given, I will be happy to seek leave to withdraw my amendment.

I move amendment 152A.

The Convener: No one else has comments to make. Do you want to wind up, Mr MacAskill?

Kenny MacAskill: I am happy to repeat the undertaking that we will consider whether an amendment is required at stage 3.

Amendment 152A, by agreement, withdrawn.

Amendment 152 agreed to.

The Convener: Amendment 134, in the name of Robert Brown, is in a group on its own.

Robert Brown: Again, this is a probing amendment that deals with an issue that I raised in the stage 1 debate and which was mentioned in the committee’s stage 1 report. It relates to how the arrangements for notification that someone has been on the sex offenders register or has a
Amendment 134 seeks to provide the Government with a power to make provision for separate sex offender notification requirements for those who are under 16. The amendment would achieve that by providing a power to amend by order the provisions of part 2 and paragraphs 36 to 60 of schedule 3 to the Sexual Offences Act 2003, for the purpose of modifying the application of that part to persons who were aged under 16 at the time of committing an offence that is specified in one of those paragraphs.

Although we have every sympathy with the view that children require to be treated sensitively and appropriately by such arrangements, the Government's view is that amendment 134 is unnecessary. We take that view primarily because the current arrangements already make clear provision for children to be treated differently. The vast majority of such cases are handled by the children's reporter rather than the criminal courts. In addition, separate arrangements for sex offender notification are already in place for those aged under 18.

As I have said, there is already considerable discretion in the system for handling under-16-year-olds. Subject to any guidelines from the Lord Advocate, the Crown Office and Procurator Fiscal Service has the option to refer a case involving an under-16-year-old to the children's hearings system for disposal. Only the most serious offences that are committed by under-16-year-olds are dealt with through the courts. Where a case is referred to and disposed of by the children's hearings system, the child will not be subject to sex offender notification requirements.

However, we must recognise that a small minority of children and young people present a clear danger to others. If a person who is under 16 is convicted of a sexual offence in the criminal courts, that reflects the fact that a serious offence has been committed. The duration of the sentence that is imposed will further underline the seriousness of the offence, particularly in light of the fact that the court will no doubt take the age of the offender into account when passing sentence. Given that those who are under 16 have the capacity to commit serious offences, it is important that the police know of their whereabouts so that measures can be taken to protect the public. That is important because some young people change address as they move into and out of secure establishments.

As I have said, the notification requirements already make special provision for young sex offenders. Section 82(2) of the 2003 act defines a young sex offender as a person who is under the age of 18. For such offenders who are sentenced to less than 30 months, the notification period is half that set for an adult offender who is sentenced...
to a similar period. Furthermore, for some offences, certain criteria need to be met before a person who is under 18 becomes subject to the notification requirements. Likewise, some of the amendments that we have lodged make special provision for offenders under the age of 18 who are charged with sexual offences involving consensual sexual conduct with older children. In the Government’s view, it would be an unnecessary complication to the working of the notification system to provide for a different regime for the very small number of offenders subject to notification requirements who are under the age of 16.

Part 2 of the 2003 act also makes provision regarding foreign travel orders and sexual offences prevention orders as well as notification orders. The proposed order-making power would enable those aspects to be modified as they apply to those under the age of 16. Such orders are imposed by a court for a certain period of time, up to the maximum that is set in the legislation. In our view, a court is best placed to determine whether, in the light of the seriousness of the grounds that are set out in the application, it is appropriate in an individual case to impose such an order on an under-16-year-old and, if it is appropriate, for how long such an order should be imposed.

It might be useful to clarify that the sex offender notification requirements in the bill and in the Government’s amendments are not intended to be discretionary. The measures are simply an administrative consequence of a person’s conviction of certain offences in certain circumstances. It is the Government’s view that that should remain the way in which the requirements operate.

The interaction between the panel’s activities and disclosure is something that we are considering, and I will respond on that issue when I meet Mr Brown before stage 3.

In summary, I think that it is unnecessary to modify the application of part 2 of the 2003 act to those aged under 16, as the system that is in place already makes special provision for young people. Therefore, the proposed power in amendment 134 is unnecessary and I invite Mr Brown to withdraw it.

Robert Brown: I am grateful for the cabinet secretary’s response on the matter. I just want to clarify whether I have understood him correctly. I understood him to say that notification requirements in relation to the register do not apply in situations in which the matter has gone to a hearing as opposed to being prosecuted in the courts.

Kenny MacAskill: Yes.

Robert Brown: That is half the issue. The other half, which the cabinet secretary dealt with in his closing comments, relates to the standing of convictions—in inverted commas—before a children’s hearing. By that, I mean situations in which the matter either has been accepted or has been established before a court. As I understand it, these offences would constitute a previous conviction under the definitions in the Rehabilitation of Offenders Act 1974. That is the key bit of information that affects such things as young people’s employment opportunities. I am grateful for the cabinet secretary’s undertaking to discuss the matter further with me. It is a complex area and, as I indicated, I was not sure that I had got wholly to the heart of it. Perhaps we can consider the matter before stage 3, as he suggests, and see whether we can arrive at a common position on it.

Against that background, I am prepared to withdraw amendment 134.

The Convener: Does the committee agree that Robert Brown may withdraw the amendment, which would, as I recollect, have granted the cabinet secretary additional powers? I am sure that Mr Brown will not make a habit of lodging amendments of that type.

Amendment 134, by agreement, withdrawn.

The Convener: Amendment 153, in the name of the minister, is grouped with amendments 154 to 168 and 171.

Kenny MacAskill: Amendments 153, 155, 156, 157, 159 and 166 amend schedule 4 to add to schedule 3 to the Sexual Offences Act 2003 the new offences that have been introduced at stage 2, which relate to sexual assault by penetration, voyeurism and sexual exposure to children, so as to provide that persons who are convicted of those offences shall be subject to sex offender notification requirements. That is subject to the proviso that offenders under the age of 18 who are convicted of offences against older children under part 4, where it is not a requirement that the child did not consent, shall be made subject to the notification requirements only when they are sentenced to a term of imprisonment.

Amendment 154 amends schedule 4 so as to provide that a person who is convicted of sexual exposure shall be subject to sex offender notification requirements only when he or she is sentenced to a term of imprisonment or when the offender is over 18 and the victim is under 18. We have made those changes to avoid persons being placed on the sex offenders register who do not pose a danger to public safety. Our approach is based on the equivalent provisions concerning the offence of sexual exposure in the Sexual Offences Act 2003.
Amendments 158 and 160 to 165 amend schedule 4 so as to provide that a person under the age of 18 who is convicted of a sexual offence against an older child under part 4 shall be subject to sex offender notification requirements only when he or she is sentenced to a term of imprisonment. As I outlined in my response to the committee’s stage 1 report, we consider that it might be disproportionate to provide that offenders under the age of 18 who are convicted of offences concerning consensual sexual conduct with older children should always be made subject to sex offender notification requirements.

Amendments 167 and 168 make the same changes in respect of the offences concerning older children engaging in sexual activity with each other.

Amendment 171 amends schedule 4 to remove the reference to the offence of shameless indecency from schedule 3 to the 2003 act. The case of Webster v Dominick 2003 determined that shameless indecency is not a nomen juris and that, when the indecent conduct involves no individual victim but affronts public sensibilities, the offence is one of “public indecency”.

The offence of public indecency is not solely a sexual offence, and it would not always be appropriate to make offenders subject to sex offender notification requirements. We consider that the best way to resolve the matter is to delete the reference to shameless indecency in paragraph 42 of schedule 3 to the 2003 act. In cases in which an accused is convicted of the offence of public indecency and the court considers that there was a significant sexual aspect to the offender’s behaviour, he will become subject to the sex offender notification requirements by virtue of paragraph 60 of schedule 3 to the 2003 act.

I move amendment 153.

Amendment 153 agreed to.

Amendments 154 to 168 moved—[Kenny MacAskill]—and agreed to.

Schedule 4, as amended, agreed to.

**Schedule 5**

**Repeals**

The Convener: Amendment 169, in the name of the minister, is grouped with amendment 170.

Kenny MacAskill: Amendment 169 seeks to remove from schedule 5 the provision that repeals sections 78(2A) and 78(2B) of the Criminal Procedure (Scotland) Act 1995, which require that, in a case that is tried on indictment, an accused must notify the Crown, the court and any co-accused in advance of the trial if he intends to claim, as his defence against a charge of a sexual offence, that the complainer consented. Amendment 170 seeks to remove from schedule 5 the provision that repeals section 149A of the 1995 act, which made the equivalent change in respect of cases that are tried under the summary procedure.

The Law Commission had provided for the repeal of those provisions as it considered them to be redundant, because the offences are now defined in terms of the absence of consent. As such, that is an element of the crime that the Crown would always have to prove. However, the Crown Office and Rape Crisis Scotland are both of the view that the provisions are valuable in that they provide for advance notice to be given to the complainer of the accused’s intent to claim that sexual activity occurred but that the complainer consented to the act. In the view of those organisations, the bill’s provisions do not change that fact.

During consideration of the Sexual Offences (Procedure and Evidence) (Scotland) Bill, the then Deputy Minister for Justice made it clear that the primary purpose of requiring the accused to give prior notice in that way was “to give fair warning to the complainer. Such notification will allow the complainer to be as well prepared as possible—not in a legal sense, but emotionally and personally—for what they are likely to face in a criminal court.”—[Official Report, Justice 2 Committee, 24 October 2001; c 537.]

I move amendment 169.

Amendment 169 agreed to.

Amendments 170 and 171 moved—[Kenny MacAskill]—and agreed to.

Schedule 5, as amended, agreed to.

Section 49 agreed to.

Long title agreed to.

The Convener: That ends stage 2 consideration of the bill.

Over the weeks, the committee has had to deal with a complex, technical piece of legislation that addresses some highly sensitive matters. I thank all the officials and witnesses who gave evidence to us, and I thank everyone for their professionalism.

11:29

Meeting continued in private until 11:43.
Sexual Offences (Scotland) Bill

[AS AMENDED AT STAGE 2]

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Rape

(1) If a person (“A”), with A’s penis—
   (a) without another person (“B”) consenting, and
   (b) without any reasonable belief that B consents,

penetrates to any extent, either intending to do so or reckless as to whether there is penetration, the vagina, anus or mouth of B then A commits an offence, to be known as the offence of rape.

(2) For the purposes of this section, penetration is a continuing act from entry until withdrawal of the penis; but this subsection is subject to subsection (3).

(3) In a case where penetration is initially consented to but at some point of time the consent is withdrawn, subsection (2) is to be construed as if the reference in it to a continuing act from entry were a reference to a continuing act from that point of time.

(4) In this Act—
   “penis” includes a surgically constructed penis if it forms part of A, having been created in the course of surgical treatment, and

   “vagina” includes—
   (a) the vulva, and
   (b) a surgically constructed vagina (together with any surgically constructed vulva), if it forms part of B, having been created in the course of such treatment.
Sexual assault by penetration

1A Sexual assault by penetration

(1) If a person ("A"), with any part of A’s body or anything else—
   (a) without another person ("B") consenting, and
   (b) without any reasonable belief that B consents,
   penetrates sexually to any extent, either intending to do so or reckless as to whether there is penetration, the vagina or anus of B then A commits an offence, to be known as the offence of sexual assault by penetration.

(2) For the purposes of this section, penetration is a continuing act from entry to withdrawal of whatever is intruded; but this subsection is subject to subsection (3).

(3) In a case where penetration is initially consented to but at some point of time the consent is withdrawn, subsection (2) is to be construed as if the reference in it to a continuing act from entry were a reference to a continuing act from that point of time.

(4) Without prejudice to the generality of subsection (1), the reference in that subsection to penetration with any part of A’s body is to be construed as including a reference to penetration with A’s penis.

Sexual assault and other sexual offences

2 Sexual assault

(1) If a person ("A")—
   (a) without another person ("B") consenting, and
   (b) without any reasonable belief that B consents,
   does any of the things mentioned in subsection (2), then A commits an offence, to be known as the offence of sexual assault.

(2) Those things are, that A—
   (a) penetrates sexually, by any means and to any extent, either intending to do so or reckless as to whether there is penetration, the vagina, anus or mouth of B,
   (b) intentionally or recklessly touches B sexually,
   (c) engages in any other form of sexual activity in which A, intentionally or recklessly, has physical contact (whether bodily contact or contact by means of an implement and whether or not through clothing) with B,
   (d) intentionally or recklessly ejaculates semen onto B,
   (e) intentionally or recklessly emits urine or saliva onto B sexually.

(4) For the purposes of paragraph (a) of subsection (2), penetration is a continuing act from entry until withdrawal of whatever is intruded; but this subsection is subject to subsection (5).

(5) In a case where penetration is initially consented to but at some point of time the consent is withdrawn, subsection (4) is to be construed as if the reference in it to a continuing act from entry were a reference to a continuing act from that point of time.
(6) Without prejudice to the generality of paragraph (a) of subsection (2), the reference in the paragraph to penetration by any means is to be construed as including a reference to penetration with A’s penis.

3 Sexual coercion

If a person (“A”)—

(a) without another person (“B”) consenting to participate in a sexual activity, and
(b) without any reasonable belief that B consents to participating in that activity,

intentionally causes B to participate in that activity, then A commits an offence, to be known as the offence of sexual coercion.

4 Coercing a person into being present during a sexual activity

(1) If a person (“A”)—

(a) without another person (“B”) consenting, and
(b) without any reasonable belief that B consents,

either intentionally engages in a sexual activity and for a purpose mentioned in subsection (2) does so in the presence of B or intentionally and for a purpose mentioned in that subsection causes B to be present while a third person engages in such an activity, then A commits an offence, to be known as the offence of coercing a person into being present during a sexual activity.

(2) The purposes are—

(a) obtaining sexual gratification,
(b) humiliating, distressing or alarming B.

(4) Without prejudice to the generality of subsection (1), the reference in that subsection—

(a) to A engaging in a sexual activity in the presence of B, includes a reference to A engaging in it in a place in which A can be observed by B other than by B looking at an image, and
(b) to B being present while a third person engages in such an activity, includes a reference to B being in a place from which the third person can be so observed by B.

5 Coercing a person into looking at a sexual image

(1) If a person (“A”) intentionally and for a purpose mentioned in subsection (2) causes another person (“B”)—

(a) without B consenting, and
(b) without any reasonable belief that B consents,

to look at a sexual image, then A commits an offence, to be known as the offence of coercing a person into looking at a sexual image.

(2) The purposes are—

(a) obtaining sexual gratification,
(b) humiliating, distressing or alarming B.
(2A) For the purposes of subsection (1), a sexual image is an image (produced by whatever means and whether or not a moving image) of—

(a) A engaging in a sexual activity or of a third person or imaginary person so engaging,

(b) A’s genitals or the genitals of a third person or imaginary person.

6 Communicating indecently etc.

(1) If a person (“A”), intentionally and for a purpose mentioned in subsection (3), sends, by whatever means, a sexual written communication to or directs, by whatever means, a sexual verbal communication at, another person (“B”)—

(a) without B consenting to its being so sent or directed, and

(b) without any reasonable belief that B consents to its being so sent or directed,

then A commits an offence, to be known as the offence of communicating indecently.

(2) If, in circumstances other than are as mentioned in subsection (1), a person (“A”), intentionally and for a purpose mentioned in subsection (3), causes another person (“B”) to see or hear, by whatever means, a sexual written communication or sexual verbal communication—

(a) without B consenting to seeing or as the case may be hearing it, and

(b) without any reasonable belief that B consents to seeing or as the case may be hearing it,

then A commits an offence, to be known as the offence of causing a person to see or hear an indecent communication.

(3) The purposes are—

(a) obtaining sexual gratification,

(b) humiliating, distressing or alarming B.

(4) In this section—

“written communication” means a communication in whatever written form, and without prejudice to that generality includes a communication which comprises writings of a person other than A (as for example a passage in a book or magazine), and

“verbal communication” means a communication in whatever verbal form, and without prejudice to that generality includes—

(a) a communication which comprises sounds of sexual activity (whether actual or simulated), and

(b) a communication by means of sign language.

7 Sexual exposure

(1) If a person (“A”—

(a) without another person (“B”) consenting, and

(b) without any reasonable belief that B consents,
intentionally and for a purpose mentioned in subsection (1A), exposes A’s genitals in a sexual manner to B with the intention that B will see them, then A commits an offence, to be known as the offence of sexual exposure.

(1A) The purposes are—

(a) obtaining sexual gratification,
(b) humiliating, distressing or alarming B.

7A Voyeurism

(1) A person (“A”) commits an offence, to be known as the offence of voyeurism, if A does any of the things mentioned in subsections (2) to (5).

(2) The first thing is that A—

(a) without another person (“B”) consenting, and
(b) without any reasonable belief that B consents,

for a purpose mentioned in subsection (6) observes B doing a private act.

(3) The second thing is that A—

(a) without another person (“B”) consenting, and
(b) without any reasonable belief that B consents,

operates equipment with the intention of enabling A or another person (“C”), for a purpose mentioned in subsection (7), to observe B doing a private act.

(4) The third thing is that A—

(a) without another person (“B”) consenting, and
(b) without any reasonable belief that B consents,

records B doing a private act with the intention that A or another person (“C”), for a purpose mentioned in subsection (7), will look at an image of B doing the act.

(5) The fourth thing is that A—

(a) installs equipment, or
(b) constructs or adapts a structure or part of a structure with the intention of enabling A or another person to do an act referred to in subsection (2), (3) or (4).

(6) The purposes referred to in subsection (2) are—

(a) obtaining sexual gratification,
(b) humiliating, distressing or alarming B.

(7) The purposes referred to in subsections (3) and (4) are—

(a) obtaining sexual gratification (whether for A or C),
(b) humiliating, distressing or alarming B.
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7B Interpretation of section 7A

(1) For the purposes of section 7A, a person is doing a private act if the person is in a place which in the circumstances would reasonably be expected to provide privacy, and—
   (a) the person’s genitals, buttocks or breasts are exposed or covered only with underwear,
   (b) the person is using a lavatory, or
   (c) the person is doing a sexual act that is not of a kind ordinarily done in public.

(2) For the purposes of section 7A(3), operating equipment includes enabling or securing its activation by another person without that person’s knowledge.

(3) In section 7A(5), “structure” includes a tent, vehicle or vessel or other temporary or movable structure.

8 Administering a substance for sexual purposes

(1) If a person (“A”) intentionally administers a substance to, or causes a substance to be taken by, another person (“B”)—
   (a) without B knowing, and
   (b) without any reasonable belief that B knows,
   and does so for the purpose of stupefying or overpowering B, so as to enable any person to engage in a sexual activity which involves B, then A commits an offence, to be known as the offence of administering a substance for sexual purposes.

(2) For the purposes of subsection (1), if A, whether by act or omission, induces in B a reasonable belief that the substance administered or taken is (either or both)—
   (a) of a substantially lesser strength, or
   (b) in a substantially lesser quantity,
   than it is, any knowledge which B has (or belief as to knowledge which B has) that it is being administered or taken is to be disregarded.

PART 2
Consent and reasonable belief

Consent

9 Meaning of “consent” and related expressions

In Parts 1 and 3, “consent” means free agreement (and related expressions are to be construed accordingly).

10 Circumstances in which conduct takes place without free agreement

(1) For the purposes of section 9, but without prejudice to the generality of that section, free agreement to conduct is absent in the circumstances set out in subsection (2).
(2) Those circumstances are—

(a) where the only indication or expression of consent by B to the conduct occurs at a time when B is incapable, because of the effect of alcohol or any other substance, of consenting to it,

(b) where B agrees or submits to the conduct because of violence used against B or any other person, or because of threats of violence made against B or any other person,

(d) where B agrees or submits to the conduct because B is unlawfully detained by A,

(e) where B agrees or submits to the conduct because B is mistaken, as a result of deception by A, as to the nature or purpose of the conduct,

(f) where B agrees or submits to the conduct because A induces B to agree or submit to the conduct by impersonating a person known personally to B, or

(g) where the only expression or indication of agreement to the conduct is from a person other than B.

(3) References in this section to A and to B are to be construed in accordance with sections 1 to 7A.

10A Consent: capacity while asleep or unconscious

(1) This section applies in relation to sections 1 to 7A.

(2) A person is incapable, while asleep or unconscious, of consenting to any conduct.

11 Consent: scope and withdrawal

(1) This section applies in relation to sections 1 to 7A.

(2) Consent to conduct does not of itself imply consent to any other conduct.

(3) Consent to conduct may be withdrawn at any time before, or in the case of continuing conduct, during, the conduct.

(4) If the conduct takes place, or continues to take place, after consent has been withdrawn, it takes place, or continues to take place, without consent.

Reasonable belief

12 Reasonable belief

In determining, for the purposes of Part 1, whether a person’s belief as to consent or knowledge was reasonable, regard is to be had to whether the person took any steps to ascertain whether there was consent or, as the case may be, knowledge; and if so, to what those steps were.
PART 3
MENTALLY DISORDERED PERSONS

Mentally disordered persons

13 Capacity to consent

(1) This section applies in relation to sections 1 to 7A.

(2) A mentally disordered person is incapable of consenting to conduct where, by reason of mental disorder, the person is unable to do one or more of the following—

(a) understand what the conduct is,

(b) form a decision as to whether to engage in the conduct (or as to whether the conduct should take place),

(c) communicate any such decision.

(3) In this Act, “mental disorder” has the same meaning as in section 328 of the Mental Health (Care and Treatment) (Scotland) Act 2003 (asp 13) (and related expressions are to be construed accordingly).

PART 4
CHILDREN

Young children

14 Rape of a young child

If a person (“A”), with A’s penis, penetrates to any extent, either intending to do so or reckless as to whether there is penetration, the vagina, anus or mouth of a child (“B”) who has not attained the age of 13 years, then A commits an offence, to be known as the offence of rape of a young child.

14A Sexual assault on a young child by penetration

(1) If a person (“A”), with any part of A’s body or anything else, penetrates sexually to any extent, either intending to do so or reckless as to whether there is penetration, the vagina or anus of a child (“B”) who has not attained the age of 13 years, then A commits an offence, to be known as the offence of sexual assault on a young child by penetration.

(2) Without prejudice to the generality of subsection (1), the reference in that subsection to penetration with any part of A’s body is to be construed as including a reference to penetration with A’s penis.

15 Sexual assault on a young child

(1) If a person (“A”), does any of the things mentioned in subsection (2) (“B” being in each case a child who has not attained the age of 13 years), then A commits an offence, to be known as the offence of sexual assault on a young child.

(2) Those things are, that A—

(a) penetrates sexually, by any means and to any extent, either intending to do so or reckless as to whether there is penetration, the vagina, anus or mouth of B,
(b) intentionally or recklessly touches B sexually,
(c) engages in any other form of sexual activity in which A, intentionally or recklessly, has physical contact (whether bodily contact or contact by means of an implement and whether or not through clothing) with B,
(d) intentionally or recklessly ejaculates semen onto B,
(e) intentionally or recklessly emits urine or saliva onto B sexually.

(4) Without prejudice to the generality of paragraph (a) of subsection (2), the reference in the paragraph to penetration by any means is to be construed as including a reference to penetration with A’s penis.

16 **Causing a young child to participate in a sexual activity**
If a person (“A”) intentionally causes a child (“B”) who has not attained the age of 13 years to participate in a sexual activity, then A commits an offence, to be known as the offence of causing a young child to participate in a sexual activity.

17 **Causing a young child to be present during a sexual activity**
(1) If a person (“A”) either—
   (a) intentionally engages in a sexual activity and for a purpose mentioned in subsection (2) does so in the presence of a child (“B”) who has not attained the age of 13 years, or
   (b) intentionally and for a purpose mentioned in subsection (2) causes B to be present while a third person engages in such an activity,
then A commits an offence, to be known as the offence of causing a young child to be present during a sexual activity.

(2) The purposes are—
   (a) obtaining sexual gratification,
   (b) humiliating, distressing or alarming B.

(4) Without prejudice to the generality of subsection (1), the reference—
   (a) in paragraph (a) of that subsection to A engaging in a sexual activity in the presence of B, includes a reference to A engaging in it in a place in which A can be observed by B other than by B looking at an image, and
   (b) in paragraph (b) of that subsection to B being present while a third person engages in such an activity, includes a reference to B being in a place from which the third person can be so observed by B.

18 **Causing a young child to look at a sexual image**
(1) If a person (“A”) intentionally and for a purpose mentioned in subsection (2) causes a child (“B”) who has not attained the age of 13 years to look at a sexual image, then A commits an offence, to be known as the offence of causing a young child to look at a sexual image.

(2) The purposes are—
   (a) obtaining sexual gratification,
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(2A) For the purposes of subsection (1), a sexual image is an image (produced by whatever means and whether or not a moving image) of—

(a) a engaging in a sexual activity or of a third person or imaginary person so engaging,

(b) A’s genitals or the genitals of a third person or imaginary person.

19 Communicating indecently with a young child etc.

(1) If a person (“A”), intentionally and for a purpose mentioned in subsection (3)—

(a) sends, by whatever means, a sexual written communication to, or

(b) directs, by whatever means, a sexual verbal communication at, a child (“B”) who has not attained the age of 13 years, then A commits an offence, to be known as the offence of communicating indecently with a young child.

(2) If, in circumstances other than are as mentioned in subsection (1), a person (“A”), intentionally and for a purpose mentioned in subsection (3) causes a child (“B”) who has not attained the age of 13 years to see or hear, by whatever means, a sexual written communication or sexual verbal communication, then A commits an offence, to be known as the offence of causing a young child to see or hear an indecent communication.

(3) The purposes are—

(a) obtaining sexual gratification,

(b) humiliating, distressing or alarming B.

(4) In this section—

“written communication” means a communication in whatever written form, and without prejudice to that generality includes a communication which comprises writings of a person other than A (as for example a passage in a book or magazine), and

“verbal communication” means a communication in whatever verbal form, and without prejudice to that generality includes—

(a) a communication which comprises sounds of sexual activity (whether actual or simulated), and

(b) a communication by means of sign language.

19A Sexual exposure to a young child

(1) If a person (“A”) intentionally and for a purpose mentioned in subsection (2) exposes A’s genitals in a sexual manner to a child (“B”) who has not attained the age of 13 years, with the intention that B will see them, then A commits an offence, to be known as the offence of sexual exposure to a young child.

(2) The purposes are—

(a) obtaining sexual gratification,

(b) humiliating, distressing or alarming B.
19B  Voyeurism towards a young child

(1) If a person (“A”) does any of the things mentioned in subsections (2) to (5) in relation to a child (“B”) who has not attained the age of 13 years, then A commits an offence, to be known as the offence of voyeurism towards a young child.

(2) The first thing is that A, for a purpose mentioned in subsection (6), observes B doing a private act.

(3) The second thing is that A operates equipment with the intention of enabling A or another person (“C”), for a purpose mentioned in subsection (7), to observe B doing a private act.

(4) The third thing is that A records B doing a private act with the intention that A or another person (“C”), for a purpose mentioned in subsection (7), will look at an image of B doing the act.

(5) The fourth thing is that A—
   (a) installs equipment, or
   (b) constructs or adapts a structure or part of a structure with the intention of enabling A or another person to do an act referred to in subsection (2), (3) or (4).

(6) The purposes referred to in subsection (2) are—
   (a) obtaining sexual gratification,
   (b) humiliating, distressing or alarming B.

(7) The purposes referred to in subsections (3) and (4) are—
   (a) obtaining sexual gratification (whether for A or C),
   (b) humiliating, distressing or alarming B.

(8) Section 7B applies for the purposes of this section as it applies for the purposes of section 7A (the references in that section to section 7A(3) and (5) being construed as references to subsections (3) and (5) of this section).

Belief that child had attained the age of 13 years

It is not a defence to a charge in proceedings under any of sections 14 to 19 that A believed that B had attained the age of 13 years.

Older children

21  Having intercourse with an older child

If a person (“A”), who has attained the age of 16 years, with A’s penis, penetrates to any extent, either intending to do so or reckless as to whether there is penetration, the vagina, anus or mouth of a child (“B”), who—

   (a) has attained (or under section 30(1) is deemed to have attained) the age of 13 years, but
   (b) has not attained the age of 16 years,

then A commits an offence, to be known as the offence of having intercourse with an older child.
**21A Engaging in penetrative sexual activity with or towards an older child**

(1) If a person (“A”), who has attained the age of 16 years, with any part of A’s body or anything else penetrates sexually to any extent, either intending to do so or reckless as to whether there is penetration, the vagina or anus of a child (“B”) who—

(a) has attained the age of 13 years (or under section 30(1) is deemed to have attained) the age of 13 years, but

(b) has not attained the age of 16 years,

then A commits an offence, to be known as the offence of engaging in penetrative sexual activity with or towards an older child.

(2) Without prejudice to the generality of subsection (1), the reference in that paragraph to penetration with any part of A’s body is to be construed as including a reference to penetration with A’s penis.

**22 Engaging in sexual activity with or towards an older child**

(1) If a person (“A”), who has attained the age of 16 years, does any of the things mentioned in subsection (2), “B” being in each case a child who—

(a) has attained (or under section 30(1) is deemed to have attained) the age of 13 years, but

(b) has not attained the age of 16 years,

then A commits an offence, to be known as the offence of engaging in sexual activity with or towards an older child.

(2) Those things are, that A—

(a) penetrates sexually, by any means and to any extent, either intending to do so or reckless as to whether there is penetration, the vagina, anus or mouth of B,

(b) intentionally or recklessly touches B sexually,

(c) engages in any other form of sexual activity in which A, intentionally or recklessly, has physical contact (whether bodily contact or contact by means of an implement and whether or not through clothing) with B,

(d) intentionally or recklessly ejaculates semen onto B,

(e) intentionally or recklessly emits urine or saliva onto B sexually.

(4) Without prejudice to the generality of paragraph (a) of subsection (2), the reference in the paragraph to penetration by any means is to be construed as including a reference to penetration with A’s penis.

**23 Causing an older child to participate in a sexual activity**

If a person (“A”), who has attained the age of 16 years, intentionally causes a child (“B”), who—

(a) has attained (or under section 30(1) is deemed to have attained) the age of 13 years, but

(b) has not attained the age of 16 years,

to participate in a sexual activity, then A commits an offence, to be known as the offence of causing an older child to participate in a sexual activity.
24  **Causing an older child to be present during a sexual activity**

(1) If a person (“A”), who has attained the age of 16 years, either—

(a) intentionally engages in a sexual activity and for a purpose mentioned in subsection (2) does so in the presence of a child (“B”), who—

(i) has attained (or under section 30(1) is deemed to have attained) the age of 13 years, but

(ii) has not attained the age of 16 years, or

(b) intentionally, and for a purpose mentioned in subsection (2) causes B to be present while a third person engages in such an activity,

then A commits an offence, to be known as the offence of causing an older child to be present during a sexual activity.

(2) The purposes are—

(a) obtaining sexual gratification,

(b) humiliating, distressing or alarming B.

(4) Without prejudice to the generality of subsection (1), the reference—

(a) in paragraph (a) of that subsection to A engaging in a sexual activity in the presence of B, includes a reference to A engaging in it in a place in which A can be observed by B other than by B looking at an image, and

(b) in paragraph (b) of that subsection to B being present while a third person engages in such an activity, includes a reference to B being in a place from which the third person can be so observed by B.

25  **Causing an older child to look at a sexual image**

(1) If a person (“A”), who has attained the age of 16 years, intentionally and for a purpose mentioned in subsection (2) causes a child (“B”), who—

(a) has attained (or under section 30(1) is deemed to have attained) the age of 13 years, but

(b) has not attained the age of 16 years,

to look at a sexual image, then A commits an offence, to be known as the offence of causing an older child to look at a sexual image.

(2) The purposes are—

(a) obtaining sexual gratification,

(b) humiliating, distressing or alarming B.

(2A) For the purposes of subsection (1), a sexual image is an image (produced by whatever means and whether or not a moving image) of—

(a) A engaging in a sexual activity or of a third person or imaginary person so engaging,

(b) A’s genitals or the genitals of a third person or imaginary person.
26 Communicating indecently with an older child etc.

(1) If a person (“A”), who has attained the age of 16 years, intentionally and for a purpose mentioned in subsection (3), sends, by whatever means, a sexual written communication to or directs, by whatever means, a sexual verbal communication at, a child (“B”) who—

(a) has attained (or under section 30(1) is deemed to have attained) the age of 13 years, but

(b) has not attained the age of 16 years,

then A commits an offence, to be known as the offence of communicating indecently with an older child.

(2) If, in circumstances other than are as mentioned in subsection (1), a person (“A”), who has attained the age of 16 years, intentionally and for a purpose mentioned in subsection (3), causes another person (“B”) who is a child described in paragraphs (a) and (b) of subsection (1) to see or hear, by whatever means, a sexual written communication or sexual verbal communication, then A commits an offence, to be known as the offence of causing an older child to see or hear an indecent communication.

(3) The purposes are—

(a) obtaining sexual gratification,

(b) humiliating, distressing or alarming B.

(4) In this section—

“written communication” means a communication in whatever written form, and without prejudice to that generality includes a communication which comprises writings of a person other than A (as for example a passage in a book or magazine), and

“verbal communication” means a communication in whatever verbal form, and without prejudice to that generality includes—

(a) a communication which comprises sounds of sexual activity (whether actual or simulated), and

(b) a communication by means of sign language.

26A Sexual exposure to an older child

(1) If a person (“A”), who has attained the age of 16 years, intentionally and for a purpose mentioned in subsection (2) exposes A’s genitals in a sexual manner to a child (“B”) who—

(a) has attained the age of 13 years, but

(b) has not attained the age of 16 years,

with the intention that B will see them, then A commits an offence, to be known as the offence of sexual exposure to an older child.

(2) The purposes are—

(a) obtaining sexual gratification,

(b) humiliating, distressing or alarming B.
26B Voyeurism towards an older child

(1) If a person ("A"), who has attained the age of 16 years, does any of the things mentioned in subsections (2) to (5) in relation to a child ("B") who—
   (a) has attained the age of 13 years, but
   (b) has not attained the age of 16 years,
then A commits an offence, to be known as the offence of voyeurism towards an older child.

(2) The first thing is that A, for a purpose mentioned in subsection (6), observes B doing a private act.

(3) The second thing is that A operates equipment with the intention of enabling A or another person ("C"), for a purpose mentioned in subsection (7), to observe B doing a private act.

(4) The third thing is that A records B doing a private act with the intention that A or another person ("C"), for a purpose mentioned in subsection (7), will look at an image of B doing the act.

(5) The fourth thing is that A—
   (a) installs equipment, or
   (b) constructs or adapts a structure or part of a structure with the intention of enabling A or another person to do an act referred to in subsection (2), (3) or (4).

(6) The purposes referred to in subsection (2) are—
   (a) obtaining sexual gratification,
   (b) humiliating, distressing or alarming B.

(7) The purposes referred to in subsections (3) and (4) are—
   (a) obtaining sexual gratification (whether for A or C),
   (b) humiliating, distressing or alarming B.

(8) Section 7B applies for the purposes of this section as it applies for the purposes of section 7A (the references in that section to section 7A(3) and (5) being construed as references to subsections (3) and (5) of this section).

27 Older children engaging in sexual conduct with each other

(1) If a child ("A"), being a child mentioned in subsection (2), does any of the things mentioned in subsection (3), "B" being in each case a child mentioned in subsection (2), then A commits an offence, to be known as the offence of engaging while an older child in sexual conduct with or towards another older child.

(2) The child is a child who—
   (a) has attained the age of 13 years, but
   (b) has not attained the age of 16 years.

(3) The things are that A—
   (a) penetrates sexually, with A’s penis and to any extent, either intending to do so or reckless as to whether there is penetration, the vagina, anus or mouth of B,
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(b) intentionally or recklessly touches the vagina, anus or penis of B sexually with A’s mouth.

(4) In the circumstances specified in subsection (1), if B engages by consent in the conduct in question, then B commits an offence, to be known as the offence of engaging while an older child in consensual sexual conduct with another older child.

(6) In paragraph (b) of subsection (3), the reference to A’s mouth is to be construed as including a reference to A’s tongue or teeth.

28 Penetration and consent for the purposes of section 27

(1) This section applies for the purposes of section 27.

(3) Penetration is a continuing act from entry until withdrawal of whatever is intruded.

(4) “Consent” means free agreement (and related expressions are to be construed accordingly).

(5) Without prejudice to the generality of subsection (4), free agreement to conduct is absent in the circumstances set out in section 10(2) (references in that section to A and B being construed in accordance with section 27).

(5A) A person is incapable, while asleep or unconscious, of consenting to any conduct.

(6) Consent to conduct does not of itself imply consent to any other conduct.

(7) Consent to conduct may be withdrawn at any time before, or in the case of continuing conduct, during, the conduct.

(8) If the conduct takes place, or continues to take place, after consent has been withdrawn, it takes place, or continues to take place, without consent.

29 Defences in relation to offences against older children

(1) It is a defence to a charge in proceedings—

(a) against A under any of sections 21 to 27(1) that A reasonably believed that B had attained the age of 16 years,

(b) against B under section 27(4) that B reasonably believed that A had attained the age of 16 years.

(2) But—

(a) the defence under subsection (1)(a) is not available to A—

(ii) if there is in force in respect of A a risk of sexual harm order,

(b) the defence under subsection (1)(b) is not available to B—

(ii) if there is in force in respect of B a risk of sexual harm order.

(3) It is a defence to a charge in proceedings under any of the sections mentioned in subsection (4) that at the time when the conduct to which the charge relates took place, the difference between A’s age and B’s age did not exceed 2 years.
(4) Those sections are—

(b) section 22(2)(a), but not in so far as the charge is founded on—

(i) penetration of B’s vagina, anus or mouth with A’s penis,

(ii) penetration of B’s vagina or anus with A’s mouth, tongue or teeth,

(ba) section 22(2)(b) or (c), but not in so far as the charge is founded on sexual touching or other physical activity involving—

(i) B’s vagina, anus or penis being touched sexually by A’s mouth,

(ii) A’s vagina, anus or mouth being penetrated by B’s penis,

(iii) A’s vagina, anus or penis being touched sexually by B’s mouth,

(bb) section 22(2)(d),

(c) any of sections 23 to 26B.

(5) In paragraphs (a) and (b) of subsection (2)—

(a) “a relevant offence” means an offence listed in schedule 1Z,

(b) “a risk of sexual harm order” means an order under section 2 of the Protection of Children and Prevention of Sexual Offences (Scotland) Act 2005 (asp 9) or section 123 of the Sexual Offences Act 2003 (c.42).

(5A) The Scottish Ministers may by order modify schedule 1Z so as to add an offence against a child which involves sexual conduct or delete an offence listed there.

(6) It is not a defence to a charge in—

(a) proceedings under any of sections 21 to 27(1) against A that A believed that B had not attained the age of 13 years,

(b) proceedings under section 27(4) against B that B believed that A had not attained the age of 13 years.

General

30 Special provision as regards failure to establish whether child has or has not attained certain ages

(1) Deeming provision 1 applies to a trial where—

(a) A is charged with an offence under any of sections 21 to 26 or 27(1),

(b) there is a failure to establish beyond reasonable doubt that B was a child who had attained the age of 13 years at the relevant time, and

(c) the court or, in the case of a trial of an indictment, the jury is satisfied it is established beyond reasonable doubt that B had not attained the age of 16 years at the time.

(2) Deeming provision 2 applies to a trial where—

(a) B is charged with an offence under section 27(4),

(b) there is a failure to establish beyond reasonable doubt that A was a child who had attained the age of 13 years at the relevant time, and
(c) the court or, in the case of a trial of an indictment, the jury is satisfied it is established beyond reasonable doubt that A had not attained the age of 16 years at the time.

(3) Deeming provision 3 applies to a trial where—
(a) A is charged with an offence under section 27(1),
(b) there is a failure to establish beyond reasonable doubt that A was a child who had not attained the age of 16 years at the relevant time, and
(c) the court or, in the case of a trial of an indictment, the jury is satisfied it is established beyond reasonable doubt that A had attained the age of 13 years at the time.

(4) Deeming provision 4 applies to a trial where—
(a) B is charged with an offence under section 27(4),
(b) there is a failure to establish beyond reasonable doubt that B was a child who had not attained the age of 16 years at the relevant time, and
(c) the court or, in the case of a trial of an indictment, the jury is satisfied it is established beyond reasonable doubt that B had attained the age of 13 years at the time.

(5) In this section and section 30A, the “relevant time” is when the conduct to which the proceedings relate occurred.

30A Special provision as regards age: deeming provisions

The deeming provisions are—

Deeming provision 1 B is to be deemed for the purposes of the proceedings to be a person who has attained the age of 13 years at the relevant time.

Deeming provision 2 A is to be deemed for the purposes of the proceedings to be a person who has attained the age of 13 years at the relevant time.

Deeming provision 3 A is to be deemed for the purposes of the proceedings to be a child who has not attained the age of 16 years at the relevant time.

Deeming provision 4 B is to be deemed for the purposes of the proceedings to be a person who has not attained the age of 16 years at the relevant time.

PART 5

ABUSE OF POSITION OF TRUST

Children

31 Sexual abuse of trust

If a person (“A”) who has attained the age of 18 years—
(a) intentionally engages in a sexual activity with or directed towards another person (“B”) who is under 18, and
(b) is in a position of trust in relation to B,
then A commits an offence, to be known as the offence of sexual abuse of trust.

32 Positions of trust

(1) For the purposes of section 31, a person (“A”) is in a position of trust in relation to another person (“B”) if any of the five conditions set out below is fulfilled.

(2) The first condition is that B is detained by virtue of an order of court or under an enactment in an institution and A looks after persons under 18 in that institution.

(3) The second condition is that B is resident in a home or other place in which accommodation is provided by a local authority under section 26(1) of the Children (Scotland) Act 1995 (c.36) and A looks after persons under 18 in that place.

(4) The third condition is that B is accommodated and cared for in—
(a) a hospital,
(b) accommodation provided by an independent health care service,
(c) accommodation provided by a care home service,
(d) a residential establishment, or
(e) accommodation provided by a school care accommodation service or a secure accommodation service,
and A looks after persons under 18 in that place.

(5) The fourth condition is that B is receiving education at—
(a) a school and A looks after persons under 18 in that school, or
(b) a further or higher education institution and A looks after B in that institution.

(6) The fifth condition is that A—
(a) has any parental responsibilities or parental rights in respect of B,
(b) fulfils any such responsibilities or exercises any such rights under arrangement with a person who has such responsibilities or rights,
(c) had any such responsibilities or rights but no longer has such responsibilities or rights, or
(d) treats B as a child of A’s family,
and B is a member of the same household as A.

(7) A looks after a person for the purposes of this section if A regularly cares for, teaches, trains, supervises, or is in sole charge of the person.

(8) The Scottish Ministers may by order modify this section (other than this subsection) and section 33 so as to add, delete or amend a condition.
Interpretation of section 32

In section 32—

“care home service” has the meaning given by section 2(3) of the Regulation of Care (Scotland) Act 2001 (asp 8) (“the 2001 Act”),

“further or higher education institution” means a body listed in schedule 2 to the Further and Higher Education (Scotland) Act 2005 (asp 6),

“hospital” means a health service hospital (as defined in section 108(1) of the National Health Service (Scotland) Act 1978 (c.29)),

“independent health care service” has the meaning given by section 2(5) of the 2001 Act,

“local authority” means a council constituted under section 2 of the Local Government etc. (Scotland) Act 1994 (c.39),

“parental responsibilities” and “parental rights” have the same meanings as in the Children (Scotland) Act 1995 (c.36),

“residential establishment” has the meaning given by section 93(1)(a) of that Act of 1995,

“school” has the same meaning as in the Education (Scotland) Act 1980 (c.44),

“school care accommodation service” has the meaning given by section 2(4) of the 2001 Act, and

“secure accommodation service” has the meaning given by section 2(9) of the 2001 Act.

Sexual abuse of trust: defences

(1) It is a defence to a charge in proceedings under section 31 that A reasonably believed—

(a) that B had attained the age of 18, or

(b) that B was not a person in relation to whom A was in a position of trust.

(2) It is a defence to a charge in proceedings under section 31—

(a) that B was A’s spouse or civil partner, or

(b) that immediately before the position of trust came into being, a sexual relationship existed between A and B.

(3) Subsection (2) does not apply if A was in a position of trust in relation to B by virtue of section 32(6).

Mentally disordered persons

Sexual abuse of trust of a mentally disordered person

(1) If a person (“A”)—

(a) intentionally engages in a sexual activity with or directed towards a mentally disordered person (“B”), and

(b) is a person mentioned in subsection (2),
then A commits an offence, to be known as sexual abuse of trust of a mentally disordered person.

(2) Those persons are—
(a) a person providing care services to B,

(b) a person who—
(i) is an individual employed in, or contracted to provide services in or to, or
(ii) not being the Scottish Ministers, is a manager of,

a hospital, independent health care service or state hospital in which B is being given medical treatment.

(4) References in this section to the provision of care services are references to anything done by way of such services—
(a) by,
(b) by an employee of, or
(c) in the course of a service provided or supplied by,

a care service, whether by virtue of a contract of employment or any other contract or in such other circumstances as may be specified in an order made by the Scottish Ministers.

(5) In this section—
“care service” has the meaning given by subsection (1)(a), (b), (e), (g), (h), (k) and (n) as read with subsections (2), (3), (6), (9), (10), (16) and (27) of section 2 of the Regulation of Care (Scotland) Act 2001 (asp 8),
“hospital” and “independent health care service” have the meanings given in section 33, and
“state hospital” means a hospital provided under section 102(1) of the National Health Service (Scotland) Act 1978 (c. 29).

36 Sexual abuse of trust of a mentally disordered person: defences

(1) It is a defence to a charge in proceedings under section 35 that A reasonably believed—
(a) that B did not have a mental disorder, or
(b) that A was not a person specified in section 35(2).

(2) It is a defence to a charge in proceedings under section 35—
(a) that B was A’s spouse or civil partner, or
(b) in a case where A was—
(i) a person specified in section 35(2)(a), that immediately before A began to provide care services to B, a sexual relationship existed between A and B,
(ii) a person specified in section 35(2)(b), that immediately before B was admitted to the hospital (or other establishment) referred to in that provision or (where B has been admitted to that establishment more than once) was last admitted to it, such a relationship existed.
**PART 6**

**PENALTIES**

**Penalties**

37  **Penalties**

(1) A person guilty of an offence mentioned in the first column of schedule 1 is liable—

(a) on summary conviction, to the penalty mentioned in the third column,

(b) on conviction on indictment, to the penalty mentioned in the fourth column.

(2) Where a person is convicted on indictment of rape, sexual assault by penetration, sexual assault, rape of a young child, sexual assault on a young child by penetration or sexual assault on a young child, a penalty of imprisonment without a fine may be imposed, but not a penalty of a fine alone; and the power of the court in section 199(2)(b) of the Criminal Procedure (Scotland) Act 1995 (c.20) (to substitute a fine for imprisonment) is not available.

**PART 7**

**MISCELLANEOUS AND GENERAL**

**Miscellaneous**

37A  **Establishment of purpose for the purposes of sections 4 to 7A, 17 to 19B and 24 to 26B**

(1) For the purposes of sections 4 to 7A, 17 to 19B and 24 to 26B, A’s purpose was—

(a) obtaining sexual gratification, or

(b) humiliating, distressing or alarming B,

if in all the circumstances of the case it may reasonably be inferred A was doing the thing for the purpose in question.

(2) In applying subsection (1) to determine A’s purpose, it is irrelevant whether or not B was in fact humiliated, distressed or alarmed by the thing done by A.

38  **Power to convict for offence other than that charged**

(1) If, in a trial—

(a) on an indictment for an offence mentioned in the first column of schedule 2 the jury are not satisfied that the accused committed the offence charged but are satisfied that the accused committed the alternative offence (or as the case may be one of the alternative offences) mentioned in the third column, they may, or

(b) in summary proceedings for an offence mentioned in the first column of that schedule the court is not satisfied that the accused committed the offence charged but is satisfied that the accused committed the alternative offence (or as the case may be one of the alternative offences) mentioned in the third column, it may, acquit the accused of the charge but find the accused guilty of the alternative offence in respect of which so satisfied (the accused then being liable to be punished accordingly).
(1A) Where either of conditions 1 or 2 apply in a trial, the court or jury may acquit the accused of the charge but find the accused guilty of the alternative older child offence (the accused then being liable to be punished accordingly).

(1B) Condition 1 is that—

(a) A is charged with an offence under sections 14 to 19, and
(b) but for a failure to establish beyond reasonable doubt that B had attained the age of 13 years at the relevant time, a court or jury would, by virtue of subsection (1), find that A committed an offence ("the alternative older child offence") of—

(i) having intercourse with an older child,
(ii) engaging in sexual activity with or towards an older child,
(iii) causing an older child to participate in a sexual activity,
(iv) causing an older child to be present during a sexual activity,
(v) causing an older child to look at a sexual image,
(vi) communicating indecently with an older child,
(vii) causing an older child to see or hear an indecent communication,
(viii) engaging while an older child in sexual conduct with or towards another older child,
(ix) engaging while an older child in consensual sexual conduct with another older child.

(1C) Condition 2 is that—

(a) A is charged with an offence under section 21 or 22, and
(b) but for a failure to establish beyond reasonable doubt that A had not attained the age of 16 years at the relevant time, a court or jury would, by virtue of subsection (1), find that A committed an offence ("the alternative older child offence") of—

(i) engaging while an older child in sexual conduct with or towards another older child,
(ii) engaging while an older child in consensual sexual conduct with another older child.

(1D) In this section, the "relevant time" is when the conduct to which the proceedings relate occurred.

(5) A reference in this section to an offence includes a reference to—

(a) an attempt to commit,
(b) incitement to commit,
(c) counselling or procuring the commission of, and
(d) involvement art and part in,

an offence.

Exceptions to inciting or being involved art and part in offences under Part 4 or 5

A person ("X") is not guilty of inciting, or being involved art and part in, an offence under Part 4 or 5 if, as regards another person ("Y"), X acts—
(a) for the purpose of—
   (i) protecting Y from sexually transmitted infection,
   (ii) protecting the physical safety of Y,
   (iii) preventing Y from becoming pregnant, or
   (iv) promoting Y’s emotional well-being by the giving of advice, and

(b) not for the purpose of—
   (i) obtaining sexual gratification,
   (ii) humiliating, distressing or alarming Y, or
   (iii) causing or encouraging the activity constituting the offence or Y’s participation in it.

40 Common law offences

For all purposes not relating to offences committed before the coming into force of this section—

(a) the common law offences of—
   (i) rape,
   (ii) clandestine injury to women,
   (iii) lewd, indecent or libidinous practice or behaviour, and
   (iv) sodomy,

are abolished, and

(b) without prejudice to paragraph (a), in so far as the provisions of this Act regulate any conduct they replace any rule of law regulating that conduct.

41 Continuity of law on sexual offences

(1) This section applies where, in any trial—

(a) the accused is charged in respect of the same conduct both with an offence under this Act (“the new offence”) and with an offence specified in subsection (2) (“the existing offence”),

(b) there is a failure to establish beyond reasonable doubt that—
   (i) the time when the conduct took place was after the coming into force of the provision providing for the new offence, and
   (ii) the time when the conduct took place was before the abolishment or replacement of or, as the case may be, the coming into force of the repeal of the enactment providing for, the existing offence, and

(c) the court (or, in the case of a trial of an indictment, the jury) is satisfied in every other respect that the accused committed the offences charged.

(2) The offences referred to in subsection (1)(a) are—

(a) rape (at common law),

(b) clandestine injury to women,
(c) lewd, indecent or libidinous practice or behaviour,
(d) any other common law offence which is replaced by an offence under this Act,
(e) an offence under section 3 of the Criminal Law (Consolidation) (Scotland) Act 1995 (c.39) (intercourse of person in position of trust with child under 16),
(f) an offence under section 5(1), (2) or (3) (intercourse with girl under 16) or 6 (indecent behaviour towards girl between 12 and 16) of that Act,
(g) an offence under section 3 of the Sexual Offences (Amendment) Act 2000 (c.44) (abuse of position of trust).

(3) Where this section applies, the accused may be found guilty—
(a) if the maximum penalty for the existing offence is less than the maximum penalty for the new offence, of the existing offence,
(b) in any other case, of the new offence.

(4) In subsection (3) the reference, in relation to an offence, to the maximum penalty is a reference to the maximum penalty by way of imprisonment or other detention that could be imposed on the accused on conviction of the offence in the proceedings in question.

(5) A reference in this section to an offence includes a reference to—
(a) an attempt to commit an offence,
(b) incitement to commit an offence,
(c) counselling or procuring the commission of an offence,
(d) involvement art and part in an offence, and
(e) an offence as modified by section 16A or 16B of the Criminal Law (Consolidation) (Scotland) Act 1995 (c.39).

42 Incitement to commit certain sexual acts outside the United Kingdom

(1) If a person does an act in Scotland which would amount to the offence of incitement to commit a listed offence but for the fact that what the person had in view (referred to in this section as “the relevant conduct”) is intended to occur in a country outside the United Kingdom, then—
(a) the relevant conduct is to be treated as the listed offence, and
(b) the person accordingly commits the offence of incitement to commit the listed offence.

(2) However, a person who is not a UK national commits an offence by virtue of subsection (1) only if the relevant conduct would also involve the commission of an offence under the law in force in the country where the whole or any part of it was intended to take place.

(3) Conduct punishable under the law in force in the country is an offence under that law for the purposes of subsection (2) however it is described in that law.

(4) The condition specified in subsection (2) is to be taken as satisfied unless, not later than such time as may be prescribed by Act of Adjournal, the accused serves on the prosecutor a notice—
(a) stating that, on the facts as alleged with respect to the relevant conduct, the condition is not in the accused’s opinion satisfied,
(b) setting out the grounds for the accused’s opinion, and
(c) requiring the prosecutor to prove that the condition is satisfied.

(5) But the court, if it thinks fit, may permit the accused to require the prosecutor to prove that the condition is satisfied without the prior service of a notice under that subsection.

(6) In proceedings on indictment, the question whether the condition is satisfied is to be determined by the judge alone.

(7) Any act of incitement by means of a message (however communicated) is to be treated as done in Scotland if the message is sent or received in Scotland.

(8) In this section—

“country” includes territory,
“listed offence” means an offence listed in Part 1 of schedule 3,
“UK national” means an individual who was at the time the relevant conduct took place, or who has subsequently become—
(a) a British citizen, a British overseas territories citizen, a British National (Overseas) or a British Overseas citizen,
(b) a person who under the British Nationality Act 1981 is a British subject, or
c) a British protected person within the meaning of that Act.

43 Offences committed outside the United Kingdom

(1) If a UK national does an act in a country outside the United Kingdom which would, if it had been done in Scotland, constitute a listed offence then the UK national commits that offence.

(2) If—
(a) a UK resident does an act in a country outside the United Kingdom which would, if it had been done in Scotland, constitute a listed offence, and
(b) the act constitutes an offence under the law in force in that country,
then the UK resident commits the listed offence.

(3) For the purposes of subsection (2)(b), an act punishable under the law in force in the country is an offence under that law however it is described in that law.

(4) The condition specified in subsection (2)(b) is to be taken as satisfied unless, not later than such time as may be prescribed by Act of Adjournal, the accused serves on the prosecutor a notice—
(a) stating that, on the facts as alleged with respect to the act in question, the condition is not in the accused’s opinion satisfied,
(b) setting out the grounds for the accused’s opinion, and
(c) requiring the prosecutor to prove that the condition is satisfied.

(5) But the court, if it thinks fit, may permit the accused to require the prosecutor to prove that the condition is satisfied without the prior service of a notice under that subsection.

(6) In proceedings on indictment, the question whether the condition is satisfied is to be determined by the judge alone.
(7) A person may be proceeded against, indicted, tried and punished for any offence to which this section applies—

(a) in any sheriff court district in Scotland in which the person is apprehended or is in custody, or

(b) in such sheriff court district as the Lord Advocate may determine,

as if the offence had been committed in that district; and the offence is, for all purposes incidental to or consequential on trial or punishment, to be deemed to have been committed in that district.

(8) In this section—

“country” includes territory,

“listed offence” means an offence listed in Part 2 of schedule 3,

“sheriff court district” is to be construed in accordance with section 307(1) (interpretation) of the Criminal Procedure (Scotland) Act 1995 (c.46),

“UK national” has the meaning given in section 42,

“UK resident” means an individual who was at the time the act mentioned in subsection (2) took place, or who has subsequently become, resident in the United Kingdom.

44 Continuity of law on sexual offences committed outside the United Kingdom

(1) This section applies where, in any trial—

(a) the accused is charged in respect of the same conduct both—

(i) with an offence mentioned in subsection (2) as modified by section 16B of the Criminal Law (Consolidation) (Scotland) Act 1995 (commission of certain sexual acts outside the United Kingdom), and

(ii) with that offence as modified by section 43,

(b) there is a failure to establish beyond reasonable doubt that—

(i) the time when the conduct took place was after the coming into force of section 43, and

(ii) the time when the conduct took place was before the coming into force of the repeal of section 16B of the Criminal Law (Consolidation) (Scotland) Act 1995, and

(c) the court (or, in the case of a trial of an indictment, the jury) is satisfied in every other respect that the accused committed the offences charged.

(2) The offences referred to in subsection (1)(a) are—

(a) an offence under section 52 of the Civic Government (Scotland) Act 1982 (c.45) (taking and distribution of indecent images of children),

(b) an offence under section 52A of that Act (possession of indecent images of children),

(c) an offence under section 9 of the Protection of Children and Prevention of Sexual Offences (Scotland) Act 2005 (asp 9) (paying for sexual services of a child),

(d) an offence under section 10 of that Act (causing or inciting provision by child of sexual services or pornography),
(e) an offence under section 11 of that Act (controlling a child providing sexual services or involved in pornography),

(f) an offence under section 12 of that Act (arranging or facilitating provision by child of sexual services or pornography).

(3) Where this section applies, the accused may be found guilty of the offence mentioned in subsection (2) as modified by section 16B of the Criminal Law (Consolidation) (Scotland) Act 1995.

(4) A reference in this section to an offence includes a reference to—

(a) an attempt to commit,

(b) incitement to commit,

(c) counselling or procuring the commission of, and

(d) involvement art and part in,

an offence.

General provisions

Ancillary provision

(1) The Scottish Ministers may by order make such incidental, supplemental, consequential, transitional, transitory or saving provision as they consider necessary or expedient for the purposes of, or in consequence of, or for giving full effect to, this Act or any provision of it.

(2) An order under this section may modify any enactment, instrument or document.

Orders

(1) Any power of the Scottish Ministers to make orders under this Act—

(a) must be exercised by statutory instrument,

(b) may be exercised so as to make different provision for different purposes,

(c) includes power to make incidental, supplemental, consequential, transitional, transitory or saving provision.

(2) A statutory instrument containing an order made under this Act (except an order made under section 49(2)) is, subject to subsection (3), subject to annulment in pursuance of a resolution of the Parliament.

(3) A statutory instrument containing—

(a) an order under section 29(5A) or section 32(8), or

(b) an order under section 45 containing provisions which add to, replace or omit any part of the text of an Act,

is not to be made unless a draft of the instrument has been laid before, and approved by resolution of, the Parliament.

Interpretation

(1) In this Act—
“mental disorder” has the meaning given by section 13(3),
“penis” and “vagina” have the meanings given by section 1(4).

(2) For the purposes of this Act—
   (a) penetration, touching, or any other activity,
   (b) a communication,
   (c) a manner of exposure, or
   (d) a relationship,
   is sexual if a reasonable person would, in all the circumstances of the case, consider it to be sexual.

48 Modification of enactments

(1) Schedule 4 (which contains modifications of enactments) has effect.

(2) The enactments mentioned in the first column of schedule 5 are repealed to the extent specified in the second column of that schedule.

49 Short title and commencement

(1) This Act may be cited as the Sexual Offences (Scotland) Act 2009.

(2) This Act (other than sections 1(4), 13(3), 45 to 47 and this section) comes into force in accordance with provision made by the Scottish Ministers by order.
SCHEDULE 1Z
(introduced by section 29(5)(a))
RELEVANT SEXUAL OFFENCES

PART 1

OFFENCES THAT MAY CURRENTLY BE COMMITTED

1 Any of the following offences under this Act—
   (a) an offence under Part 1 against a person under the age of 16,
   (b) an offence under Part 4 (but not an offence of engaging while an older child in sexual conduct with or towards another older child (section 27(1)) or engaging while an older child in consensual sexual conduct with another older child (section 27(4)),
   (c) sexual abuse of trust (section 31) of a person under the age of 16.

2 An offence under any of the following provisions of the Protection of Children and Prevention of Sexual Offences (Scotland) Act 2005 (asp 9) against a person under the age of 16—
   (a) section 1 (meeting a person following certain preliminary contact with intention of engaging in unlawful sexual activity),
   (b) section 9 (paying a person for sexual services),
   (c) section 10 (causing or inciting provision by a person of sexual services or pornography),
   (d) section 11 (controlling a person providing sexual services or involved in pornography),
   (e) section 12 (arranging or facilitating provision by a person of sexual services or pornography).

3 An offence under—
   (a) any of the following provisions of the Sexual Offences Act 2003 (c.42) against a person under the age of 16—
      (i) section 1 (rape),
      (ii) section 2 (assault by penetration),
      (iii) section 3 (sexual assault),
      (iv) section 25 (sexual activity with a family member under 18),
      (v) section 26 (inciting a family member under 18 to engage in sexual activity),
   (b) section 47 (paying for sexual services of a person under 18) of that Act—
      (i) in its application to England and Wales, against a person under the age of 16,
      (ii) in its application to Northern Ireland, against a person under the age of 17.

4 An offence under any of the following provisions of that Act—
   (a) section 5 (rape of a child under 13),
   (b) section 6 (assault of a child under 13 by penetration),
Sexual Offences (Scotland) Bill
Schedule 1Z—Relevant sexual offences
Part 1—Offences that may currently be committed

(c) section 7 (sexual assault of a child under 13),
(d) section 8 (causing or inciting a child under 13 to engage in sexual activity),
(e) section 9 (sexual activity with a child under 16),
(f) section 10 (causing or inciting a child under 16 to engage in sexual activity),
5  
(g) section 11 (engaging in sexual activity in the presence of a child under 16),
(h) section 12 (causing a child under 16 to watch a sexual act),
(i) section 13 (sex offences against a child under 16 committed by children or young persons),
(j) section 14 (arranging or facilitating commission of a sex offence against a child under 16),
(k) section 15 (meeting a child under 16 following sexual grooming etc.)—

(i) in its application to England and Wales, against a person under the age of 16,

(ii) in its application to Northern Ireland, against a person under the age of 17.

An offence under any of the following provisions of the Criminal Justice (Northern Ireland) Order 2003 (SI No. 1247 (N.I. 13)) against a person under the age of 17—

(a) article 18 (rape),
(b) article 19 (buggery),
(c) article 20 (assault with intent to commit buggery),
(d) article 21 (indecent assault on a male).

Any of the following offences under the Criminal Law (Consolidation) (Scotland) Act 1995 (c.39)—

(a) an offence under section 8 against a girl under the age of 16 (abduction of a woman or girl for purposes of unlawful sexual intercourse),
(b) an offence under section 10 (person having parental responsibilities causing or encouraging sexual activity in relation to a girl under 16).

An offence under section 160 of the Criminal Justice Act 1988 (c.33) against a person under the age of 16 (possession of indecent photographs of a person under 18).

An offence under article 15 of the Criminal Justice (Evidence, Etc.) (Northern Ireland) Order 1988 (SI No. 1847 (N.I. 17)) (possession of indecent photographs of a person under 16).

An offence under the following provisions of the Civic Government (Scotland) Act 1982 (c.45) against a person under the age of 16—

(a) section 52 (taking and distribution of indecent images of a person under 18),
(b) section 52A (possession of indecent images of a person under 18).

An offence under article 9 of the Criminal Justice (Northern Ireland) Order 1980 (SI No. 704 (N.I. 6) (inciting a girl under 16 to have incestuous sexual intercourse).
Sexual Offences (Scotland) Bill
Schedule 1Z—Relevant sexual offences
Part 2—Offences replaced by an offence in Part 1 or this Part

11 An offence under section 1 of the Protection of Children Act 1978 (c.37) against a person under the age of 16 (taking or distribution of indecent images of a person under 18).


13 An offence under any of the following sections of the Children and Young Persons Act (Northern Ireland) 1968 (c.34) (N.I.)—
   (a) section 21 (causing or encouraging seduction or prostitution of girl under 17),
   (b) section 22 (indecent conduct towards person under 17).

14 An attempt, conspiracy or incitement to commit an offence in Part 1 of this schedule.

15 An offence under section 293(2) of the Criminal Procedure (Scotland) Act 1995 (c.46) (aiding and abetting etc. the commission of a statutory offence) relating to an offence in paragraphs 1, 2, 6 or 9 of that Part.

PART 2

OFFENCES REPLACED BY AN OFFENCE IN PART 1 OR THIS PART

16 The following common law offences against a person under the age of 16 years—
   (a) rape,
   (b) clandestine injury to women,
   (c) sexual assault,
   (d) lewd, indecent or libidinous practice or behaviour,
   (e) sodomy.

17 Rape under the common law of Northern Ireland of a person under the age of 17.

18 An offence under section 3 of the Sexual Offences (Amendment) Act 2000 (c.44) against a person under the age of 16.

19 An offence under section 3, 5, 6 or 13(5)(c) of the Criminal Law (Consolidation) (Scotland) Act 1995.

20 An offence under section 54 of the Criminal Law Act 1977 (c.45).

21 An offence under section 3, 4, 5 or 10(1) of the Sexual Offences (Scotland) Act 1976 (c.67).

22 An offence under section 1 of the Indecency with Children Act 1960 (c.33).

23 An offence under section 1, 12, 14, 15 or 16 of the Sexual Offences Act 1956 (c.69) against a person under the age of 16.

24 An offence under section 5, 6 or 28 of that Act.

25 An offence under section 3 or 5 of the Criminal Law Amendment Act 1885 (48 & 49 Vict.) (c.69) against a person under the age of 16.

26 An offence under section 6 of that Act.

27 An offence under section 52, 53, 54, 61 or 62 of the Offences Against the Person Act 1861 (24 & 25 Vict.) (c.100) against a person under the age of 16.
28 An attempt, conspiracy or incitement to commit an offence in Part 2 of this schedule.
29 An offence under section 293(2) of the Criminal Procedure (Scotland) Act 1995 (c.46) (aiding and abetting etc. the commission of a statutory offence) relating to an offence in paragraphs 18, 19, 21 of that Part.

### SCHEDULE 1

*(introduced by section 37)*

#### PENALTIES

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#### Schedule 2—Alternative verdicts

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SCHEDULE 3
(introduced by section 42)

LISTED OFFENCES

PART 1

INCITEMENT TO COMMIT CERTAIN SEXUAL ACTS OUTSIDE UK

1. An offence under Part 1 of this Act against a person under the age of 18.
2. An offence under Part 4 of this Act.
3. Sexual abuse of trust (section 31 of this Act).
4. Sexual abuse of trust of a mentally disordered person (section 35 of this Act) where the mentally disordered person is under the age of 18.
5. Indecent assault of a person under the age of 18.

PART 2

OFFENCES COMMITTED OUTSIDE UK

6. An offence under Part 1 of this Act against a person under the age of 18.
7. An offence under Part 4 of this Act.
8. Sexual abuse of trust (section 31 of this Act).
9. Sexual abuse of trust of a mentally disordered person (section 35 of this Act) where the mentally disordered person is under the age of 18.
10. Indecent assault of a person under the age of 18.
12. An offence under section 52A of that Act (possession of indecent images of children).
14. An offence under section 10 of that Act (causing or inciting provision by child of sexual services or pornography).
15. An offence under section 11 of that Act (controlling a child providing sexual services or involved in pornography).
16. An offence under section 12 of that Act (arranging or facilitating provision by child of sexual services or pornography).
17. Conspiracy or incitement to commit any offence specified in paragraphs 6 to 16.
18. An offence under section 293(2) of the Criminal Procedure (Scotland) Act 1995 (c.46) (aiding and abetting etc. the commission of a statutory offence) relating to any offence mentioned in paragraphs 6 to 9 or 11 to 16.
SCHEDULE 4
(introduced by section 48)

MINOR AND CONSEQUENTIAL AMENDMENTS

The Criminal Law (Consolidation) (Scotland) Act 1995 (c.39)

1. (1) The Criminal Law (Consolidation) (Scotland) Act 1995 is amended as follows.

2. In section 4 (proceedings and penalties for offences under sections 1 to 3), in each of subsections (1) and (5), for the words “, 2 or 3” there is substituted “or 2”.

3. In the section title of that section, for the words “to 3” there is substituted “and 2”.

4. In section 9 (permitting girl under 16 years to use premises for intercourse)—

   (a) in subsection (2), for the words “man under the age of 24 years” there is substituted “person”,

   (b) in subsection (3)(b), for paragraph (b) there is substituted—

   “(b) section 21 of the Sexual Offences (Scotland) Act 2009 (asp 00) (having intercourse with an older child);

   (ba) section 27(1) of that Act (engaging while an older child in sexual conduct with or towards another older child);

   (bb) section 27(4) of that Act (engaging while an older child in consensual sexual conduct with another older child);”;

   (c) in subsection (3)(c)—

   (i) at the beginning there is inserted “section 5(3) of this Act,”,

   (ii) for the words “paragraphs (a) and (b)” there is substituted “paragraph (a), (b) or, as the case may be, (ba)”.

5. In section 10(3) (application of provisions of section 10 to offence of indecent behaviour towards girl under 16), for “section 6 of this Act” there is substituted “sections 16 to 19 and 22 to 26 of the Sexual Offences (Scotland) Act 2009 (asp 00) (certain sexual offences relating to children)”.

6. In section 13 (homosexual offences)—

   (a) in subsection (4), for “sodomy or an act of gross indecency or shameless indecency” substitute “an act of engaging in sexual activity”,

   (b) after subsection (4) insert—

   “(4A) For the purposes of subsection (4), an activity is sexual in any case if a reasonable person would, in all the circumstances of the case, consider it to be sexual.”.

The Criminal Procedure (Scotland) Act 1995 (c.46)

2. (1) The Criminal Procedure (Scotland) Act 1995 is amended as follows.

2. In section 3(6) (jurisdiction and powers of solemn courts), after the word “rape” there is inserted “(whether at common law or under section 1(1) of the Sexual Offences (Scotland) Act 2009 (asp 00)), rape of a young child (under section 14 of that Act)”.

35
(3) In section 7(8)(b)(i) (district court: jurisdiction and powers), after the word “rape” there is inserted “(whether at common law or under section 1(1) of the Sexual Offences (Scotland) Act 2009 (asp 00)), rape of a young child (under section 14 of that Act)”. 

(4) In section 19A (samples etc. from persons convicted of sexual and violent crimes)—

(a) in subsection (6), in the definition of “relevant sexual offence”—

(i) in paragraph (a), after the word “rape” there is inserted “at common law”,
(ii) the word “and” which immediately follows paragraph (h) is repealed, and
(iii) after paragraph (i) there is inserted “and

(j) any offence which consists of a contravention of any of the following provisions of the Sexual Offences (Scotland) Act 2009 (asp 00)—

(i) section 1 (rape),
(ii) section 2 (sexual assault),
(iii) section 3 (sexual coercion),
(iv) section 4 (coercing a person into being present during a sexual activity),
(v) section 5 (coercing a person into looking at a sexual image),
(vi) section 6(1) (communicating indecently),
(vii) section 6(2) (causing a person to see or hear an indecent communication),
(viii) section 7 (sexual exposure),
(ix) section 14 (rape of a young child),
(x) section 15 (sexual assault on a young child),
(xi) section 16 (causing a young child to participate in a sexual activity),
(xii) section 17 (causing a young child to be present during a sexual activity),
(xiii) section 18 (causing a young child to look at a sexual image),
(xiv) section 19(1) (communicating indecently with a young child),
(xv) section 19(2) (causing a young child to see or hear an indecent communication),
(xvi) section 21 (having intercourse with an older child),
(xvii) section 22 (engaging in sexual activity with or towards an older child),
(xviii) section 23 (causing an older child to participate in a sexual activity),
(xix) section 24 (causing an older child to be present during a sexual activity),
(xx) section 25 (causing an older child to look at a sexual image),
(xxi) section 26(1) (communicating indecently with an older child),
(xxii) section 26(2) (causing an older child to see or hear an indecent communication),
(xxxiii) section 27(1) (engaging while an older child in sexual conduct with or towards another older child),
(xxiv) section 27(4) (engaging while an older child in consensual sexual conduct with another older child),
(xxv) section 31 (sexual abuse of trust) but only if the condition set out in section 32(6) of that Act is fulfilled,
(xxvi) section 35 (sexual abuse of trust of a mentally disordered person);”;
(b) in subsection (7), in paragraph (b)(i) after the words “paragraph (i)” there is inserted “or (j)”.

(5) In section 24A (bail conditions: remote monitoring of restrictions on movements), in each of subsections (2)(a), (3) and (5)(a), for the words “or rape” there is substituted “rape (whether at common law or under section 1(1) of the Sexual Offences (Scotland) Act 2009 (asp 00)) or rape of a young child (under section 14 of that Act)”.

(6) In section 78(2) (notice of special defences), for the words from “coercion” to “consent” there is substituted “or coercion”.

(7) In section 210A(10) (extended sentences for sex and violent offenders), in the definition of “sexual offence”—
(a) in paragraph (i), after the word “rape” there is inserted “at common law”, and
(b) after paragraph (xxvi) there is inserted “and
(xxvii) an offence which consists of a contravention of any of the following provisions of the Sexual Offences (Scotland) Act 2009 (asp 00)—

(A) section 1 (rape),
(B) section 2 (sexual assault),
(C) section 3 (sexual coercion),
(D) section 4 (coercing a person into being present during a sexual activity),
(E) section 5 (coercing a person into looking at a sexual image),
(F) section 6(1) (communicating indecently),
(G) section 6(2) (causing a person to see or hear an indecent communication),
(H) section 7 (sexual exposure),
(I) section 8 (administering a substance for sexual purposes),
(J) section 14 (rape of a young child),
(K) section 15 (sexual assault on a young child),
(L) section 16 (causing a young child to participate in a sexual activity),
(M) section 17 (causing a young child to be present during a sexual activity)
(N) section 18 (causing a young child to look at a sexual image),
(O) section 19(1) (communicating indecently with a young child),
(P) section 19(2) (causing a young child to see or hear an indecent communication),
(Q) section 21 (having intercourse with an older child),
(R) section 22 (engaging in sexual activity with or towards an older child),
(S) section 23 (causing an older child to participate in a sexual activity),
(T) section 24 (causing an older child to be present during a sexual activity),
(U) section 25 (causing an older child to look at a sexual image),
(V) section 26(1) (communicating indecently with an older child),
(W) section 26(2) (causing an older child to see or hear an indecent communication),
(X) section 27(1) (engaging while an older child in sexual conduct with or towards another older child),
(Y) section 27(4) (engaging while an older child in consensual sexual conduct with another older child),
(Z) section 31 (sexual abuse of trust),
(ZA) section 35 (sexual abuse of trust of a mentally disordered person).

(8) In section 288C(2) (prohibition of personal conduct of defence in cases of certain sexual offences)—

(a) in paragraph (a), after the word "rape" there is inserted "(whether at common law or under section 1(1) of the Sexual Offences (Scotland) Act 2009 (asp 00))", and
(b) for paragraph (j) there is substituted—

“(j) an offence under any of the following provisions of the Sexual Offences (Scotland) Act 2009 (asp 00)—

(i) section 2 (sexual assault),
(ii) section 3 (sexual coercion),
(iii) section 4 (coercing a person into being present during a sexual activity),
(iv) section 5 (coercing a person into looking at a sexual image),
(v) section 6(1) (communicating indecently),
(vi) section 6(2) (causing a person to see or hear an indecent communication),
(vii) section 7 (sexual exposure),
(viii) section 14 (rape of a young child),
(ix) section 15 (sexual assault on a young child),
(x) section 16 (causing a young child to participate in a sexual activity),

(xi) section 17 (causing a young child to be present during a sexual activity),

(xii) section 18 (causing a young child to look at a sexual image),

(xiii) section 19(1) (communicating indecently with a young child),

(xiv) section 19(2) (causing a young child to see or hear an indecent communication),

(xv) section 21 (having intercourse with an older child),

(xvi) section 22 (engaging in sexual activity with or towards an older child),

(xvii) section 23 (causing an older child to participate in a sexual activity),

(xviii) section 24 (causing an older child to be present during a sexual activity),

(xix) section 25 (causing an older child to look at a sexual image),

(xx) section 26(1) (communicating indecently with an older child),

(xxi) section 26(2) (causing an older child to see or hear an indecent communication),

(xxii) section 27(1) (engaging while an older child in sexual conduct with or towards another older child),

(xxiii) section 27(4) (engaging while an older child in consensual sexual conduct with another older child),

(xxiv) section 31 (sexual abuse of trust) but only if the condition set out in section 32(6) of that Act is fulfilled,

(xxv) section 35 (sexual abuse of trust of a mentally disordered person);”,

(c) after paragraph (j) (as inserted by paragraph (b) above), there is inserted—

“(k) attempting to commit any of the offences set out in paragraphs (a) to (j).”.

(9) In Schedule 1 (offences against children under the age of 17 years to which special provisions apply)—

(a) after paragraph 1 there is inserted—

“1A Any offence under section 14 (rape of a young child) or 21 (having intercourse with an older child) of the Sexual Offences (Scotland) Act 2009 (asp 00).

1B Any offence under section 15 (sexual assault on a young child) or 22 (engaging in sexual activity with or towards an older child) of that Act.

1C Any offence under section 31 of that Act (sexual abuse of trust) towards a child under the age of 17 years but only if the condition set out in section 32(6) of that Act is fulfilled.”, and

(b) after paragraph 4 there is inserted—
“4A Any offence under section 4 (coercing a person into being present during a sexual activity), 5 (coercing a person into looking at a sexual image), 6 (communicating indecently etc.) or 7 (sexual exposure) of the Sexual Offences (Scotland) Act 2009 (asp 00) towards a child under the age of 17 years.

4B Any offence under any of sections 16 to 19 or 23 to 27 of that Act (certain sexual offences relating to children).”.

The Criminal Injuries Compensation Act 1995 (c. 53)

3 In section 11(9) of the Criminal Injuries Compensation Act 1995 (approval by parliament of certain alterations to the Tariff or provisions of the Scheme), at the end there is inserted “, and in relation to anything done in Scotland means rape (whether at common law or under section 1(1) of the Sexual Offences (Scotland) Act 2009 (asp 00)) and rape of a young child (under section 14 of that Act)”.

The Sexual Offences Act 2003 (c.42)

4 In Schedule 3 to the Sexual Offences Act 2003 (sexual offences for purposes of Part 2 of that Act)—

(a) in paragraph 36, at the end there is added “at common law”,

(b) after paragraph 59C there is inserted—

“59D An offence under section 1 of the Sexual Offences (Scotland) Act 2009 (asp 00) (rape).

59DA An offence under section 1A of that Act (sexual assault by penetration).

59E An offence under section 2 of that Act (sexual assault).

59F An offence under section 3 of that Act (sexual coercion).

59G An offence under section 4 of that Act (coercing a person into being present during a sexual activity).

59H An offence under section 5 of that Act (coercing a person into looking at a sexual image).

59J An offence under section 6(1) of that Act (communicating indecently).

59K An offence under section 6(2) of that Act (causing a person to see or hear an indecent communication).

59L An offence under section 7 of that Act (sexual exposure) if—

(a) the offender is or has been sentenced in respect of the offence to a term of imprisonment, or

(b) the offender was 18 or over and the victim was under 18.

59LA An offence under section 7A of that Act (voyeurism).

59M An offence under section 8 of that Act (administering a substance for sexual purposes).

59N An offence under section 14 of that Act (rape of a young child).

59NA An offence under section 14A of that Act (sexual assault on a young child by penetration).
59P An offence under section 15 of that Act (sexual assault on a young child).

59Q An offence under section 16 of that Act (causing a young child to participate in a sexual activity).

59R An offence under section 17 of that Act (causing a young child to be present during a sexual activity).

59S An offence under section 18 of that Act (causing a young child to look at a sexual image).

59T An offence under section 19(1) of that Act (communicating indecently with a young child).

59U An offence under section 19(2) of that Act (causing a young child to see or hear an indecent communication).

59UA An offence under section 19A of that Act (sexual exposure to a young child).

59UB An offence under section 19B of that Act (voyeurism towards a young child).

59V An offence under section 21 of that Act (having intercourse with an older child) if the offender—

(a) was 18 or over, or

(b) is or has been sentenced in respect of the offence to a term of imprisonment.

59VA An offence under section 21A of that Act (engaging in penetrative sexual activity with or towards an older child) if the offender—

(a) was 18 or over, or

(b) is or has been sentenced in respect of the offence to a term of imprisonment.

59W An offence under section 22 of that Act (engaging in sexual activity with or towards an older child) if the offender—

(a) was 18 or over, or

(b) is or has been sentenced in respect of the offence to a term of imprisonment.

59X An offence under section 23 of that Act (causing an older child to participate in a sexual activity) if the offender—

(a) was 18 or over, or

(b) is or has been sentenced in respect of the offence to a term of imprisonment.

59Y An offence under section 24 of that Act (causing an older child to be present during a sexual activity) if the offender—

(a) was 18 or over, or

(b) is or has been sentenced in respect of the offence to a term of imprisonment.

59Z An offence under section 25 of that Act (causing an older child to look at a sexual image) if the offender—

(a) was 18 or over, or
(b) is or has been sentenced in respect of the offence to a term of imprisonment.

59ZA An offence under section 26(1) of that Act (communicating indecently with an older child) if the offender—
   (a) was 18 or over, or
   (b) is or has been sentenced in respect of the offence to a term of imprisonment.

59ZB An offence under section 26(2) of that Act (causing an older child to see or hear an indecent communication) if the offender—
   (a) was 18 or over, or
   (b) is or has been sentenced in respect of the offence to a term of imprisonment.

59ZBA An offence under section 26A of that Act (sexual exposure to an older child) if the offender—
   (a) was 18 or over, or
   (b) is or has been sentenced in respect of the offence to a term of imprisonment.

59ZBB An offence under section 26B of that Act (voyeurism towards an older child) if the offender—
   (a) was 18 or over, or
   (b) is or has been sentenced in respect of the offence to a term of imprisonment.

59ZC An offence under section 27(1) of that Act (engaging while an older child in sexual conduct with or towards another older child) if the offender is sentenced in respect of the offence to a term of imprisonment.

59ZD An offence under section 27(4) of that Act (engaging while an older child in consensual sexual conduct with another older child) if the offender is sentenced in respect of the offence to a term of imprisonment.

59ZE An offence under section 31 of that Act (sexual abuse of trust) where (either or both)—
   (a) the offender is 20 or over,
   (b) the condition set out in section 32(6) of that Act is fulfilled.

59ZF An offence under section 35 of that Act (sexual abuse of trust of a mentally disordered person).”, and

(c) in paragraph 60, for the words “59C” there is substituted “59ZE”.

The Mental Health (Care and Treatment) (Scotland) Act 2003 (asp 13)

5 In section 326(4)(c) of the Mental Health (Care and Treatment) (Scotland) Act 2003, for “310 or 313(5)” there is substituted “or 310”.
The Protection of Children and Prevention of Sexual Offences (Scotland) Act 2005 (asp 9)

6 In section 1(5) of the Protection of Children and Prevention of Sexual Offences (Scotland) Act 2005, for the words from “Subsections” to “(c.39)” substitute “Subsection (7) of section 43 of the Sexual Offences (Scotland) Act 2009 (asp 00)”.

The Protection of Vulnerable Groups (Scotland) Act 2007 (asp 14)

7 In schedule 1 to the Protection of Vulnerable Groups (Scotland) Act 2007 (relevant offences for purposes of Part 1 of that Act), at the end of paragraph 1 there is added—

“(w) an offence under section 14 (rape of a young child) of the Sexual Offences (Scotland) Act 2009 (asp 00),

(x) an offence under section 15 (sexual assault on a young child) of that Act,

(y) an offence under section 16 (causing a young child to participate in a sexual activity) of that Act,

(z) an offence under section 17 (causing a young child to be present during a sexual activity) of that Act,

(za) an offence under section 18 (causing a young child to look at a sexual image) of that Act,

(zb) an offence under section 19(1) (communicating indecently with a young child) of that Act,

(zc) an offence under section 19(2) (causing a young child to see or hear an indecent communication) of that Act,

(zd) an offence under section 21 (having intercourse with an older child) of that Act,

(ze) an offence under section 22 (engaging in sexual activity with or towards an older child) of that Act,

(zf) an offence under section 23 (causing an older child to participate in a sexual activity) of that Act,

(zg) an offence under section 24 (causing an older child to be present during a sexual activity) of that Act,

( zh) an offence under section 25 (causing an older child to look at a sexual image) of that Act,

(zi) an offence under section 26(1) of that Act (communicating indecently with an older child) of that Act,

(zj) an offence under section 26(2) (causing an older child to see or hear an indecent communication) of that Act,

(zk) an offence under section 27(1) (engaging while an older child in sexual conduct with or towards another older child) of that Act,

(zl) an offence under section 27(4) (engaging while an older child in consensual sexual conduct with another older child) of that Act,

(zm) an offence under section 31 (sexual abuse of trust) of that Act.”.
### SCHEDULE 5
*(introduced by section 48)*

#### REPEALS

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Sexual Offences (Scotland) Bill
[AS AMENDED AT STAGE 2]

An Act of the Scottish Parliament to make new provision about sexual offences, and for connected purposes.

Introduced by: Kenny MacAskill
On: 17 June 2008
Bill type: Executive Bill
INTRODUCTION

2. These Explanatory Notes have been prepared by the Scottish Government in order to assist the reader of the Bill and to help inform debate on it. They do not form part of the Bill and have not been endorsed by the Parliament.

3. The Notes should be read in conjunction with the Bill as amended at Stage 2. They are not, and are not meant to be, a comprehensive description of the Bill. So where a section or schedule, or a part of a section or schedule, does not seem to require any explanation or comment, none is given.

THE BILL – AN OVERVIEW

4. The Sexual Offences (Scotland) Bill provides for a statutory framework for sexual offences in Scots law. The Bill repeals the common law offences of rape, sodomy and clandestine injury to women and a number of statutory sexual offences in addition to creating new statutory offences relating to sexual conduct, in particular where that takes place without consent. It provides a general definition of consent as “free agreement” and supplements this with a non-exhaustive list of factual circumstances in which free agreement, and therefore consent, is not present.

5. The Bill creates new statutory offences of rape, sexual assault by penetration, sexual assault, sexual coercion, coercing a person to be present during sexual activity, coercing a person to look at an image of sexual activity, communicating indecently, sexual exposure, voyeurism and administering a substance for a sexual purpose. The Bill also creates new “protective offences” which criminalise sexual activity with a person whose capacity to consent to sexual activity it either entirely absent or not fully formed either because of their age or because of a mental disorder. Separate “protective” offences are provided for in respect of sexual activity with young children (under the age of 13) and older children (from age 13 to age 15). In addition, the Bill makes it an offence of “abuse of position of trust” for a person in a position of trust (over a child or person with a mental disorder) to engage in sexual activity with that child or person.

SEXUAL OFFENCES (SCOTLAND) BILL

[AS AMENDED AT STAGE 2]

REVISED EXPLANATORY NOTES

CONTENTS

1. As required under Rule 9.7.8A of the Parliament’s Standing Orders, these revised Explanatory Notes are published to accompany the Sexual Offences (Scotland) Bill as amended at Stage 2. Text has been added or deleted as necessary to reflect the amendments made to the Bill at Stage 2 and these changes are indicated by sidelong in the right margin.
COMMENTARY ON SECTIONS

PART ONE – RAPE ETC

Section 1 – Rape

6. This section creates a statutory offence of “rape”. Subsection (1) provides that a person will commit the offence of rape by intentionally or recklessly penetrating, with their penis, the victim’s vagina, anus or mouth, in circumstances where the victim does not consent, and the accused has no reasonable belief that the victim is consenting to the penetration.

7. Subsection (2) defines “penetration” for the purposes of this section. It is defined as a continuing act from entry of the penis until its withdrawal.

8. Subsection (3) provides that there may be circumstances where penetration is initially consented to but consent is subsequently withdrawn. In these circumstances, a person will have committed rape only if the penetration of the victim’s vagina, anus or mouth takes place (or continues to take place) after the point at which consent is withdrawn.

9. Subsection (4) defines the terms “penis” and “vagina”.

Section 1A – Sexual assault by penetration

10. This section creates a statutory offence of “sexual assault by penetration”. Subsection (1) provides that a person commits the offence of sexual assault by penetration by intentionally or recklessly sexually penetrating the victim’s vagina or anus, in circumstances where the victim does not consent, and the accused has no reasonable belief that the victim is consenting to the penetration.

11. Subsection (2) defines “penetration” for the purposes of this section. It is defined as a continuing act from entry of whatever is intruded until it is withdrawn.

12. Subsection (3) caters for the scenario where penetration is initially consented to but consent is subsequently withdrawn. It modifies the definition of penetration in subsection (2) to a person will have committed the offence if the penetration of the victim’s vagina or anus takes place (or continues to take place) after the point at which consent is withdrawn.

13. Subsection (4) provides that the reference in subsection (1) to penetration “with any part of A’s body” includes penetration with A’s penis. This means that there is an overlap between the conduct which constitutes sexual assault by penetration under this section, that which constitutes rape under section 1 and that which constitutes sexual assault at section 2. This is deliberate and intended to cover circumstances where the victim knows that he or she was penetrated, but is unable to say whether penetration was penile or not (for example, due to being blindfolded).

Section 2 – Sexual assault

14. This section creates a statutory offence of “sexual assault”. The constituent elements of the offence are set out in subsections (1) and (2).
15. Subsection (1) provides that such an offence is committed only if the victim did not consent to the sexual conduct in question and the perpetrator had no reasonable belief that the victim was consenting.

16. Subsection (2) sets out five separate sexual acts, each of which constitute the offence of sexual assault. It also provides that, in each case, in order to commit an offence the perpetrator must either act intentionally or recklessly when carrying out one of these sexual acts. The five sexual acts are:

(a) penetrating the victim’s vagina, anus or mouth by any means in a sexual way;
(b) touching the victim in a sexual way;
(c) having any other sexual physical contact with the victim, whether directly or through clothing and whether with a body part or implement;
(d) ejaculating semen onto the victim; and
(e) emitting urine or saliva onto the victim sexually.

17. Subsections (4), (5) and (6) deal with penetration. Subsections (4) and (5) define penetration as a continuing activity and provide for circumstances where penetration is initially consented to but consent is then withdrawn before penetration has ended. This is similar to section 1(2) and (3) (see paragraph 7 and 8 above). Subsection (6) provides that penetration “by any means” in subsection (2) includes with the perpetrator’s penis. This means there is an overlap between the conduct which constitutes sexual assault under this section, that which constitutes rape under section 1 and that which constitutes sexual assault by penetration at section 1A. This is deliberate and is intended to cover circumstances where the victim knows that he or she was penetrated, but is unable to say whether penetration was penile or not (for example due to being blindfolded).

Section 3 – Sexual coercion

18. This section creates the offence of “sexual coercion”. Subsection (1) provides that the offence is committed if the perpetrator intentionally causes the victim to participate in a sexual activity without the victim’s consent and without any reasonable belief that the victim was consenting.

Section 4 – Coercing a person into being present during a sexual activity

19. This section creates the offence of “coercing a person into being present during a sexual activity”. Subsection (1) provides that there are two circumstances in which the offence is committed. These are first, that the perpetrator intentionally engaged in a sexual activity in the presence of the victim or, secondly, that the perpetrator intentionally caused the victim to be present while a third person engaged in a sexual activity. In either instance, the offence is committed only if the victim did not consent to being present during the sexual activity and the perpetrator did not have any reasonable belief that the victim consented.

20. Subsection (2) provides that an offence is committed only where the perpetrator has acted for the purpose of obtaining sexual gratification or humiliating, distressing or alarming the victim.
21. Subsection (4) provides that, for the purposes of this offence, the requirement that the victim is present, or that an activity is carried out in his or her presence, includes situations other than in which the person engaging in the sexual activity can be observed by means of an image (such as an image on a screen which is generated by a webcam). It is not essential that it be proved that the victim can be proved to have actually observed the activity; it is enough that the activity was in a place where it was capable of being observed by the victim.

Section 5- Coercing a person into looking at a sexual image

22. This section creates the offence of “coercing a person into looking at a sexual image”. Subsections (1) and (2) provide that an offence is committed if a person intentionally (and for the purpose of obtaining sexual gratification or for the purpose of humiliating, distressing or alarming the victim) causes the victim to look at a sexual image. The offence is only committed if the victim did not consent to looking at the image and the accused had no reasonable belief that the victim so consented. Furthermore, the accused does not commit the offence if he or she had intended to direct or send the image to someone other than the victim (e.g. by email).

23. Subsection (2A) defines a “sexual image” for the purposes of this section. A “sexual image” is an image of a person, whether real or imaginary, engaging in a sexual activity or an image of the genitals of a person, whether real or imaginary.

Section 6 – Communicating indecently etc.

24. This section creates two offences, each relating to unwanted sexual communication. Both subsections (1) and (2) provide that the offences are committed only where the victim did not consent to the activity and the perpetrator had no reasonable belief that the victim consented. For an offence to be committed, the accused must intend to communicate with the victim.

25. Subsection (1) creates the offence of “communicating indecently”. It is committed if a person, in the circumstances set out in paragraph 24 above, intentionally sends the victim a sexual written communication by whatever means, or directs a sexual verbal communication at the victim, by whatever means.

26. Subsection (2) creates the offence of “causing a person to see or hear an indecent communication”. It is committed if, in circumstances other than specified in subsection (1), a person causes the victim to see a sexual written communication or to hear a sexual verbal communication, in each case by whatever means and in the circumstances described in paragraph 24 above.

27. Subsection (3) provides that an offence under subsection (1) or (2) is committed only where the perpetrator’s purpose is to obtain sexual gratification, or to humiliate, distress or alarm the victim.

28. Subsection (4) defines “written communication” and “verbal communication” for the purpose of this section.
Section 7 – Sexual exposure

29. This section creates the offence of ‘sexual exposure’. Subsection (1) provides that the offence of sexual exposure is committed if a person intentionally exposes his or her genitals in a sexual manner to another person with the intention that the person will see them without that person’s consent and without any reasonable belief that the person consented.

30. Subsection (1A) provides that an offence under subsection (1) is committed only where the accused’s purpose is to obtain sexual gratification or to humiliate, distress or alarm the victim.

Section 7A – Voyeurism

31. Section 7A creates the offence of “voyeurism”. It is committed if a person does any of the things mentioned in subsections (2) to (5).

32. Subsection (2) provides that a person commits an offence if that person observes the victim engaging in a private act. Subsection (3) provides that a person commits an offence if that person operates equipment with the intention of enabling himself or another person to observe the victim engaging in a private act. Subsection (4) provides that a person commits an offence if that person records the victim engaging in a private act with the intention that he or another person will look at an image of the victim doing the act. Subsection (5) provides that a person commits an offence if that person installs equipment (such as a video camera) or constructs, or adapts a structure or part of a structure (e.g. by drilling a “peep hole”) with the intention of enabling himself, or a third person, to commit any of the offences in subsections (2) to (4). In all cases, the offences are committed where the victim does not consent and the accused has no reasonable belief that the victim consented.

33. Subsections (6) and (7) provide that an offence under subsections (2) to (4) is committed only where the perpetrator’s purpose is to obtain sexual gratification (whether for himself or a third person in the case of the offences at subsections (3) and (4)) or to cause humiliation, distress or alarm to the victim.

Section 7B – Interpretation of section 7A

34. Section 7B defines the meaning of certain terms for the purposes of section 7A. Subsection (1) provides a definition of a “private act”. Subsection (2) provides that the reference to “operating equipment” in section 7A(3) includes enabling or securing its activation by another person without that person’s knowledge (so the offence would be committed if a person used a camera designed to be activated automatically by the presence of another person in the room). Subsection (3) provides that the reference to a “structure” in section 7A(5) includes tents, vehicles, vessels and other temporary or movable structures.

Section 8 – Administering a substance for sexual purposes

35. This section creates the offence of “administering a substance for a sexual purpose” where a person intentionally gives a victim an intoxicant, or otherwise causes an intoxicant to be taken by the victim without the victim knowing, and without reasonable belief that the victim knows, for the purpose of stupefying or overpowering the victim in order that the perpetrator, or any other
person, may engage in a sexual activity with the victim. It is immaterial whether or not any sexual activity actually takes place.

36. Subsection (2) extends the offence to apply to certain situations in which the victim does in fact know that he or she is taking the intoxicating substance. In such a situation, a person will commit an offence if he or she intentionally induces in the victim a reasonable belief that the substance is either substantially weaker than it really is, or is of a substantially smaller quantity than it really is. The fact that the victim knows that he or she is taking an intoxicant is to be disregarded.

PART 2 – CONSENT AND REASONABLE BELIEF

Section 9 – Meaning of “consent” and related expressions

37. This section defines consent as “free agreement”. The definition applies to Parts 1 and 3 of the Act.

Section 10 – Circumstances in which conduct takes place without free agreement

38. This section builds on the general definition of consent in section 9. It provides that, in the particular situations which are set out in subsection (2), there is no free agreement to sexual activity by a victim, and hence no consent. It is a non-exhaustive list and therefore does not imply that in situations which are not listed in subsection (2) there is free agreement.

39. Subsection (2)(a) provides that there is no consent if the victim’s only indication or expression of consent to sexual activity is given at a time when he or she is so intoxicated through alcohol or any other substance that he or she is incapable of giving consent. The exact point at which the victim reaches this level of intoxication will be a matter to be decided by the court but once it has been reached then any acting by the victim will not amount to consent.

40. Subsection (2)(c) provides that there is no consent in situations in which the victim agrees or submits to sexual activity because of violence used against him or her or another person, or because of threats of violence against him or her or another person.

41. Subsection 2(d) provides that there is no consent if the victim agrees or submits to sexual activity because he or she is unlawfully detained by the accused. The detention need not necessarily involve the use of direct force or violence.

42. Subsection 2(e) provides that the victim does not consent to sexual activity when the accused has deceived him or her and, as a result, the victim is mistaken as to the nature or the purpose of the activity.

43. Subsection 2(f) provides that there is no consent if the victim agrees or submits to sexual activity with the perpetrator as a result of the perpetrator impersonating someone whom the victim knows personally.
44. Subsection (2)(g) provides that there is no consent if the only expression or indication of the victim’s consent to sexual activity is from someone other than the victim.

45. Subsection (3) provides that in each of the paragraphs of subsection (2), the references to “A” and “B” are to be read in the same way as they are read in sections 1 to 7A. Therefore, “A” is the person accused of the offence and “B” is the victim or complainer.

Section 10A – Consent: capacity while asleep or unconscious

46. Section 10A provides that a person is incapable, while asleep or unconscious, of giving consent to any conduct.

Section 11 – Consent: scope and withdrawal

47. This section makes further provision as to the meaning of consent for sections 1 to 7A of the Bill. It deals with two separate aspects of consent.

48. Subsection (2) provides that consent given to particular sexual conduct does not, of itself, imply consent to any other type of sexual conduct.

49. Subsections (3) and (4) deal with the withdrawal of consent. Subsection (3) provides that consent may be withdrawn at any time before or during that sexual activity. Consent may therefore be withdrawn before the activity begins or while the sexual activity it is taking place. Subsection (4) provides that, if consent is withdrawn, the activity takes place without consent.

Section 12 – Reasonable belief

50. This section makes further provision in respect of determining, for the purposes of Part 1 of the Bill, whether a person’s belief as to consent or knowledge, in relation to the sexual activity that has taken place, was reasonable.

51. It will be for a court or the jury to determine in each particular case what amounts to reasonable belief but this section provides that, in determining whether such belief is reasonable, regard is to be had to whether the accused took any steps to ascertain whether there was consent, or, as the case may be, knowledge, and if so, to what those steps were.

PART 3 – MENTALLY DISORDERED PERSONS

Section 13 – Capacity to consent

52. This section deals with the capacity of those with a mental disorder to consent to sexual activity. Subsection (1) provides that it relates to the offences in sections 1 to 7A, where lack of consent is an essential element.

53. Subsection (2) states that a mentally disordered person is incapable of consenting to conduct (i.e. any conduct which falls within sections 1 to 7A) where, by reason of the mental disorder, he or she is unable to do any of the things listed in sub-paragraphs (a) to (c). This test
for capacity mirrors the one set out in section 311(4) of the Mental Health (Care and Treatment) (Scotland) Act 2003.

PART 4 – CHILDREN

54. Part 4 of the Bill provides for a range of “protective offences”, which prohibit sexual contact with children. It makes separate provision for offences involving sexual activity with “young” and “older” children.

YOUNG CHILDREN

55. Sections 14 to 20 of the Bill make provision in relation to sexual conduct involving “young children”. The Bill uses the term “young child” to refer to a child who is under the age of 13 at the time the offence was committed. Therefore, each of the offences under sections 14 to 19 can be committed only against a child who is aged under 13.

Section 14 – Rape of a young child

56. This section creates the statutory offence of “rape of a young child”. It provides that a person will commit this offence by intentionally or recklessly penetrating, with their penis, the vagina, anus or mouth of a young child. There is no reference to consent of the victim in this section. An offence will be committed irrespective of whether a young child apparently ‘consented’ to the penetration.

Section 14A – Sexual assault on a young child by penetration

57. This section creates the offence of “sexual assault on a young child by penetration”. Subsection (1) provides that a person commits this offence by intentionally or recklessly sexually penetrating, with any part of his or her body, or anything else (i.e. an object) the vagina or anus of a young child.

58. Subsection (2) provides that penetration “by any part of A’s body” in subsection (1) includes with the perpetrator’s penis. This means there is an overlap between the conduct which constitutes sexual assault on a young child by penetration, that which constitutes rape of a young child and that which constitutes sexual assault on a young child. This is necessary for the same reasons as specified for the overlap between the offences at sections 1, 1A and 2 of the Bill (see paragraph 13 above).

Section 15 – Sexual assault on a young child

59. This section creates the offence of “sexual assault on a young child”. Subsection (2) sets out five separate sexual acts, each of which constitute an offence. It also provides that, in each case, in order to commit an offence the perpetrator must either act intentionally or recklessly when carrying out one of these sexual acts. The five sexual acts are:

(a) penetrating a young child’s vagina, anus or mouth by any means in a sexual way;
(b) touching a young child in a sexual way;
(c) having any other sexual physical contact with a young child, whether directly or through clothing and whether with a body part or with an implement;
(d) ejaculating semen onto a young child; and
(e) intentionally or recklessly emitting urine or saliva onto a young child in a sexual way.

60. Subsection (4) provides that penetration “by any means” in subsection (2) includes with the perpetrator’s penis. This means that there is an overlap between the conduct which constitutes sexual assault on a young child, that which constitutes sexual assault by penetration on a young child and that which constitutes rape of a young child. This is necessary for the same reasons as specified for the overlap between the offences at section 1 and 2 of the Bill (see paragraph 13 above).

Section 16 – Causing a young child to participate in a sexual activity

61. This section creates the offence of “causing a young child to participate in a sexual activity”. Subsection (1) provides that the offence is committed if the perpetrator intentionally causes the young child to participate in a sexual activity.

Section 17 – Causing a young child to be present during a sexual activity

62. This section creates the offence of “causing a young child to be present during a sexual activity”. Subsection (1) provides that there are two circumstances in which the offence is committed. These are first, that the perpetrator intentionally engaged in a sexual activity in the presence of a young child or, secondly, that the perpetrator intentionally caused a young child to be present while a third person engaged in a sexual activity.

63. Subsection (2) provides that an offence is committed only where the perpetrator’s purpose in having a young child present is to obtain sexual gratification or to humiliate, distress or alarm the young child.

64. Subsection (4) provides that, for the purposes of subsection (1), the requirement that the young child is present or that the activity is carried out in his or her presence, includes situations in which the person engaging in the sexual activity can be observed by the young child (other than by means of an image). It is not essential that it be proved that the young child actually observed the activity; it is sufficient that the young child was in a place where the sexual activity was capable of being observed from.

Section 18 – Causing a young child to look at a sexual image

65. Section 18 creates the offence of “causing a young child to look at a sexual image”. Subsection (1) provides that the offence is committed if a person intentionally causes a young child to look at a sexual image.

66. Subsection (2) provides that an offence is committed only if the perpetrator acts for the purpose of obtaining sexual gratification or to humiliate, distress or alarm the young child.
67. Subsection (2A) provides a definition of a “sexual image”. It is the same as that used in the offence at section 5 (see paragraph 23).

Section 19 – Communicating indecently with a young child etc

68. This section creates two offences, each relating to sexual communication with a young child. There are some common features shared by both offences.

69. Subsection (1) creates the offence of “communicating indecently with a young child”. It is committed if a person intentionally sends a young child a sexual written communication by whatever means or directs a sexual verbal communication at a young child, by whatever means.

70. Subsection (2) creates the offence of “causing a young child to see or hear an indecent communication”. It is committed if a person causes the young child to see a sexual written communication or to hear a sexual verbal communication in circumstances other than as described in subsection (1).

71. Subsection (3) provides that an offence is committed only where the perpetrator acts for the purpose of obtaining sexual gratification or to humiliate, distress or alarm the young child.

72. Subsection (4) defines “written communication” and “verbal communication” for the purposes of this section.

Section 19A – Sexual exposure to a young child

73. This section creates the offence of “sexual exposure to a young child”. Subsection (1) provides that the offence is committed if a person intentionally exposes his or her genitals in a sexual manner to a child who has not attained the age of 13 years.

74. Subsection (2) provides that an offence is committed only where the perpetrator acts for the purpose of obtaining sexual gratification or to humiliate, distress or alarm the young child.

Section 19B – Voyeurism towards a young child

75. This section creates the offence of “voyeurism towards a young child”. Subsection (1) provides that it is committed if a person does any of the things mentioned in subsections (2) to (5) in relation to a child who has not attained the age of 13 years.

76. Subsection (2) provides that a person commits an offence if that person observes a young child engaging in a private act. Subsection (3) provides that a person commits an offence if that person operates equipment with the intention of enabling himself or another person to observe a young child engaging in a private act. Subsection (4) provides that a person commits an offence if that person records a young child engaging in a private act with the intention that he or another person will look at an image of the young child doing the act. Subsection (5) provides that a person commits an offence if that person installs equipment (such as a video camera) or constructs, or adapts a structure or part of a structure (e.g. by drilling a “peep hole”) with the
intention of enabling himself, or a third person, to commit any of the offences in subsections (2) to (4).

77. Subsections (6) and (7) provide that an offence under subsections (2) to (4) is committed only where the perpetrator’s purpose is to obtain sexual gratification (whether for himself or a third person in the case of the offences at subsections (3) and (4)) or to cause humiliation, distress or alarm to the child. Subsection (8) provides that the definitions of various terms at section 7B apply to this section as they apply to the offence at section 7A.

Section 20 – Belief that a child has attained the age of 13 years

78. Section 20 provides that it shall not be defence to a charge of a sexual offence against a young child, under sections 14 to 19 of the Bill, that the accused believed that the young child was aged 13 years or over.

OLDER CHILDREN

79. Sections 21 to 29 of the Bill make provision in relation to sexual conduct involving “older children”. The Bill uses the term “older child” to refer to a child who is aged 13, 14 or 15 at the time the offence was committed. Therefore, each of the offences under sections 21 to 27 can be committed only against an older child of those ages.

Section 21 – Having intercourse with an older child

80. This section creates the offence of “having intercourse with an older child”. It provides that the offence may be committed only by a person aged 16 or over. A person will commit an offence under this section by intentionally or recklessly penetrating, with their penis, the vagina, anus or mouth of an older child.

Section 21A – Engaging in penetrative sexual activity with or towards an older child

81. This section creates the offence of “engaging in penetrative sexual activity with or towards an older child.” Subsection (1) provides that a person commits this offence by intentionally or recklessly sexually penetrating to any extent, with any part of his or her body, or anything else (i.e. an object), the vagina or anus of an older child. The offence may only be committed by a person aged 16 or over.

82. Subsection (2) provides that penetration “by any part of A’s body” in subsection (1) includes with the perpetrator’s penis. This means there is an overlap between the conduct which constitutes engaging in penetrative sexual activity with an older child, that which constitutes having intercourse with an older child under section 21 and that which constitutes engaging in sexual activity with an older child. This is necessary for the same reasons as specified for the overlap between the offences at sections 1, 1A and 2 of the Bill (see paragraph 13 above).
Section 22 – Engaging in sexual activity with or towards an older child

83. This section creates the offence of “engaging in sexual activity with or towards an older child”. Subsection (1) provides that the offence may be committed only by a person aged 16 or over.

84. Subsection (2) sets out five separate sexual acts, each of which constitute an offence. It also provides that, in each case, in order to commit an offence the perpetrator must either act intentionally or recklessly when carrying out one of these sexual acts. The five sexual acts are:
   (a) penetrating an older child’s vagina, anus or mouth by any means in a sexual way;
   (b) touching an older child in a sexual way;
   (c) having any other sexual physical contact with an older child, whether directly or through clothing and whether with a body part or with an implement; and
   (d) ejaculating semen onto an older child, and
   (e) intentionally or recklessly emitting urine or saliva onto a young child in a sexual way.

85. Subsection (4) provides that penetration “by any part of A’s body” for the purposes of subsection (2) includes with the perpetrator’s penis. This means that there is an overlap between the conduct which constitutes the offence of engaging in sexual activity with an older child, that of having intercourse with an older child at section 21 and that of engaging in penetrative sexual activity with an older child at section 21A. This is necessary for the same reasons as specified for the overlap between the offences at section 1, 1A and 2 of the Bill (see paragraph 13 above).

Section 23 – Causing an older child to participate in a sexual activity

86. This section creates the offence of “causing an older child to participate in a sexual activity”. Subsection (1) provides that the offence may be committed only by a person aged 16 or over. Further, it provides that the offence is committed only where the perpetrator intentionally causes an older child to participate in a sexual activity.

Section 24 – Causing an older child to be present during a sexual activity

87. This section creates the offence of “causing an older child to be present during a sexual activity”. Subsection (1) provides that the offence may be committed only by a person aged 16 or over. It provides that the two circumstances in which this offence is committed are, first, where the perpetrator intentionally engages in a sexual activity in the presence of an older child or, secondly, where the perpetrator causes an older child to be present while a third party engages in a sexual activity.

88. Subsection (2) provides that the activities at subsection (1) are a crime only where the perpetrator acts for the purpose of obtaining sexual gratification or to humiliate, distress or alarm the older child.

89. Subsection (4) provides that, for the purposes of this offence, the requirement that an older child is present when the perpetrator or a third person carried out sexual activity includes
situations in which the person engaging in the sexual activity can be observed by an older child (other than by means of an image). It is not essential to prove that the older child actually observed the activity; so long as the older child was in a place where the sexual activity was capable of being observed from.

Section 25 – Causing an older child to look at a sexual image

90. This section creates the offence of “causing an older child to look at a sexual image”. Subsection (1) provides that the offence is committed where a person over the age of 16 intentionally causes an older child to look at a sexual image.

91. Subsection (2) provides that it is an offence only where the perpetrator acts for the purpose of obtaining sexual gratification or to humiliate, distress or alarm the older child.

92. Subsection (2A) provides a definition of a “sexual image” for the purposes of this section. It is the same as that used in the offence at section 5 (see paragraph 23).

Section 26 – Communicating indecently with an older child etc.

93. This section creates two offences, each relating to sexual communication with an older child by a person aged 16 or over.

94. Subsection (1) creates the offence of “communicating indecently with an older child”. It provides that the offence is committed if a person intentionally sends an older child a sexual written communication by whatever means, or directs a sexual verbal communication at an older child, by whatever means.

95. Subsection (2) creates the offence of “causing an older child to see or hear an indecent communication”. It provides that an offence is committed where a person causes an older child to see a sexual written communication or to hear a sexual verbal communication by whatever means in any circumstances other than those specified in subsection (1).

96. Subsection (3) provides that an offence is committed only where the perpetrator acts for the purpose of obtaining sexual gratification or to humiliate, distress or alarm the older child.

97. Subsection (4) defines “written communication” and “verbal communication” for the purposes of this section.

Section 26A – Sexual exposure to an older child

98. This section creates the offence of “sexual exposure to an older child”. Subsection (1) provides that the offence is committed if a person intentionally and for a purpose mentioned in subsection (2), exposes his or her genitals in a sexual manner to an older child. The offence may only be committed by a person who is 16 years or over.

99. Subsection (2) provides that an offence is committed only where the accused acts for the purpose of obtaining sexual gratification or to humiliate, distress or alarm the victim.
Section 26B – Voyeurism towards an older child

100. This section creates the offence of “voyeurism towards an older child”. Subsection (1) provides that the offence is committed if a person does any of the things mentioned in subsections (2) to (5) in relation to an older child. The offence may only be committed by a person who is 16 years or over.

101. Subsection (2) provides that a person commits an offence if that person observes an older child engaging in a private act. Subsection (3) provides that a person commits an offence if that person operates equipment with the intention of enabling himself or another person to observe an older child engaging in a private act. Subsection (4) provides that a person commits an offence if that person records an older child engaging in a private act with the intention that he or another person will look at an image of the older child doing the act. Subsection (5) provides that a person commits an offence if that person installs equipment (such as a video camera) or constructs, or adapts a structure or part of a structure (e.g. by drilling a “peep hole”) with the intention of enabling himself, or a third person, to commit any of the offences in subsections (2) to (4).

102. Subsections (6) and (7) provide that an offence under subsections (2) to (4) is committed only where the perpetrator’s purpose is to obtain sexual gratification (whether for himself or a third person in the case of the offences at subsections (3) and (4)) or to cause humiliation, distress or alarm to the child. Subsection (8) provides that the definitions of various terms at section 7B apply to this section as they apply to the offence at section 7A.

Section 27 – Older children engaging in sexual conduct with each other

103. Section 27 provides that an older child who participates in certain sexual conduct with another older child commits an offence.

104. Subsections (1), (2) and (3) provide that an older child who intentionally or recklessly penetrates sexually another older child’s vagina, anus or mouth with his penis or intentionally or recklessly touches another older child’s vagina, anus or penis with his or her mouth commits the offence of “engaging while an older child in sexual conduct with or towards another older child”.

105. Subsection (4) provides that an older child who consents to engaging in the sexual conduct at subsection (3) will also be guilty of an offence; that offence being “engaging while an older child in consensual sexual conduct with another older child”.

Section 28 – Penetration and consent for the purposes of section 27

106. This section makes further provision as to the meaning of penetration and consent for the purposes of section 27.

107. Subsections (4) to (8) mirror the approach taken in Part 1 of the Bill. Subsections (4) and (5) provide that for the purposes of section 27 “consent” means “free agreement” (as defined in section 9) and that free agreement to sexual conduct is absent in the circumstances specified in section 10(2). Subsection (5A) provides that a person is incapable, while asleep or unconscious, of consenting to any conduct (as with section 10A).
108. Subsection (6) (like section 11) provides that consent given to particular sexual conduct does not, of itself, imply consent to any other type of sexual conduct.

109. Subsections (7) and (8) (like section 11) deal with the withdrawal of consent. Subsection (7) provides that consent to the sexual conduct may be withdrawn at any time before or during that conduct. Subsection (8) reinforces this by providing that any sexual conduct which takes place after consent is withdrawn takes place without consent.

Section 29 – Defences in relation to offences against older children

110. This section provides that a defence can be invoked by a person who has criminal proceedings brought against them for an offence against an older child.

111. Subsection (1) provides that an accused person, who has criminal proceedings brought against them for an offence under sections 21 to 27 may make use of a defence in those proceedings that he or she reasonably believed that the older child had attained the age of 16 years at the time the conduct took place.

112. Subsection (2) provides that an accused may not use the defence set out in subsection (1) if he or she has previously been charged by the police with a relevant sexual offence or if there is in force in respect of the accused a Risk of Sexual Harm Order. Subsection (5) provides that a relevant offence is one which is listed in schedule 1Z. This subsection also defines the term “Risk of Sexual Harm Order.” This definition means that if there is a Risk of Sexual Harm Order in force against a person in Scotland, England, Wales or Northern Ireland, and such a person is charged by the police in Scotland with an offence under sections 21 to 27, the defence of reasonable mistaken belief of age cannot be invoked by that person.

113. Subsections (3) and (4) provide that it shall be a defence to any criminal proceedings relating to the offences in sections 22 to 26 that the difference between the accused’s age and that of the older child did not exceed 2 years. However, this defence is not available to the offences under section 22 where the conduct would constitute an offence under section 27 if both parties were aged 13 to 15.

114. Subsection (6) provides that a belief that the child was in fact a young child is not a defence to a charge of any of the offences in sections 21 to 27.

Section 30 – Special provision as regards failure to establish whether child has or has not attained certain ages

115. The offences in Part 4 of the Bill divide into two distinct groups: those concerning sexual activity with a young child (where the child is under the age of 13 at the time of the conduct - sections 14 to 19B), and those concerning sexual activity with an older child (where, at the time of the conduct, the child has attained the age of 13 but is not yet the age of 16 (sections 21 to 27)). The question of which offence is appropriate in any particular case is determined solely by the age of the child accused or victim at the time when the offence is said to have been committed, and not by the accused’s belief as to the child’s age. Section 30 provides for “deeming of age” provisions in circumstances where it is not possible to establish the age of a child.
116. Subsection (1) provides that “deeming provision 1” applies where the accused is charged with an offence against an older child at sections 21 to 27(1) and it is not possible to establish beyond reasonable doubt that the child had attained the age of 13 at the time the offence is alleged to have been committed, but it is possible to establish that the child had not attained the age of 16 at that time.

117. Subsection (2) provides that “deeming provision 2” applies where the accused is charged with an offence under section 27(4) and there is a failure to establish beyond reasonable doubt that the other child involved in the sexual activity had attained the age of 13 years at the time the offence is alleged to have been committed, but the court is satisfied that that child had not attained the age of 16 at that time.

118. Subsection (3) provides that “deeming provision 3” applies where the accused is charged with an offence under section 27(1) and there is a failure to establish beyond reasonable doubt that the accused was a child who had not attained the age of 16 years at the time the offence is alleged to have been committed, but the court is satisfied that the accused had attained the age of 13 years.

119. Subsection (4) provides that “deeming provision 4” applies where the accused is charged with an offence under section 27(4) and there is a failure to establish beyond reasonable doubt that the accused was a child who had not attained the age of 16 years at the time the offence is alleged to have been committed, but the court is satisfied that the accused had attained the age of 13 years.

Section 30A – Special provision as regards age: deeming provisions

120. Section 30A provides for the “deeming of age” provisions in consequence of section 30. Deeming provision 1 provides that in the circumstances set out in section 30(1), the child is deemed to be a person who has attained the age of 13 years at the relevant time. Deeming provision 2 provides that, in the circumstances set out in section 30(2), the child is deemed to be a person who had attained the age of 13 years at the relevant time. Deeming provision 3 provides that, in the circumstances set out in section 30(3), the accused is deemed to be a child who has not attained the age of 16 years at the relevant time. Deeming provision 4 provides that, in the circumstances set out in section 30(4), the accused is deemed to be a child who has not attained the age of 16 years at the relevant time.

PART 5 – ABUSE OF POSITION OF TRUST

Section 31 – Sexual abuse of trust

121. Section 31 creates the offence of “sexual abuse of trust”. Subsection (1) provides that a person commits the offence of sexual abuse of trust if he or she is aged 18 years or older and intentionally engage in a sexual activity with, or directed at, a person who is under 18 and in respect of whom the perpetrator is in a position of trust. Section 32 defines what is meant by “a position of trust.”
Section 32 – Positions of trust

122. This section defines “position of trust” for the purposes of the offence of sexual abuse of trust in section 31. Definitions of the terms used in this section are provided in section 33.

123. Subsection (1) states that person A is in a position of trust in relation to person B if any of the five conditions set out in the remainder of the section are fulfilled.

124. Subsection (2) provides that a position of trust is constituted where B is detained in an institution by virtue of an order of a court or under an enactment and A looks after persons under 18 in that institution.

125. Subsection (3) provides that a position of trust is constituted where B resides in accommodation provided by a local authority under section 26(1) of the Children (Scotland) Act 1995 and A looks after persons under 18 in that place.

126. Subsection (4) provides that a position of trust is constituted where B is accommodated in any of the places described in paragraphs (a) to (e) of this subsection and A looks after persons under the age of 18 in that place.

127. Subsection (5) provides that a position of trust is constituted where B is receiving education at a school and A looks after persons under the age of 18 in that school or where B is receiving education in a further or higher education institution and A looks after B in that institution.

128. Subsection (6) provides that a position of trust is constituted if A and B are members of the same household and A has (or had, or fulfils) parental rights or parental responsibilities in respect of B, or if A treats B as a child of A’s family.

129. Subsection (7) provides that A “looks after” a person for the purposes of this section if A cares for, teaches, trains, supervises or is in sole charge of the person, so long as A does so regularly.

Section 33 – Interpretation of section 32

130. This section defines the meaning of certain terms for the purposes of section 32.

Section 34 – Sexual abuse of trust: defences

131. This section provides for the defences which can be invoked by a person who is charged with an offence under section 31 (sexual abuse of trust).

132. Subsection (1)(a) provides that it is a defence if the accused reasonably believed that, at the time the sexual conduct took place, the person with whom it took place (or towards whom it was directed) was aged 18 or over.
133. Subsection (1)(b) provides that it is a defence if the accused reasonably believed, at the time of the sexual conduct, that the person with whom it took place (or towards whom it was directed) was not a person in relation to whom the accused was in a position of trust.

134. Subsection (2)(a) provides that it is a defence for the accused to show that the other party was his or her spouse or civil partner at the time of the conduct they are charged with.

135. Subsection (2)(b) provides that it is a defence for the accused to show that a sexual relationship with the victim was in existence immediately before the particular position of trust with the victim was established. This defence has been provided in order that those who were already in a sexual relationship (but who are not married to, or in civil partnership with, each other) at the time that a position of trust arises should be free to continue that relationship while a position of trust persists without committing a criminal offence.

136. Subsection (3) provides that the defences under subsection (2) do not apply where the position of trust is as described in section 32(6). In other words, they do not apply where the position of trust is within a family setting.

Section 35 – Sexual abuse of trust of a mentally disordered person

137. This section creates the offence of “sexual abuse of trust of a mentally disordered person”. The definition of “mental disorder” is provided at section 47. It is the same definition as in section 328 of the Mental Health (Care and Treatment) (Scotland) Act 2003.

138. Subsection (1) states that a person commits an offence under this section if they fall within the class of persons specified in subsection (2) and intentionally engage in a sexual activity with, or directed at, a mentally disordered person.

139. Subsection (2) defines those classes of person who are subject to the offence provisions in subsection (1). It provides that they are those who provide a care service to a mentally disordered person and those who are employed in (or contracted to provide services in, or who manage), a hospital in which a mentally disordered person is receiving medical treatment.

140. Subsection (4) defines the meaning of “providing care services” for the purpose of subsection (2) and provides that the Scottish Ministers may set out further circumstances which fall within this term by order (subject to negative resolution procedure).

141. Subsection (5) defines certain terms used elsewhere in this section.

Section 36 - Sexual abuse of a mentally disordered person: defences

142. This section provides for the defences which can be invoked by a person who is charged with an offence under section 35 (sexual abuse of trust of a mentally disordered person).

143. Subsection (1)(a) provides that it is a defence that the accused reasonably believed, at the time of the sexual conduct, that the person with whom that conduct took place (or towards whom it was directed) did not have a mental disorder.
144. Subsection (1)(b) provides that it is a defence that the accused reasonably believed, at the time of the sexual conduct, that he or she was not a person who fell within any of the classes of person specified in section 35(2).

145. Subsection (2)(a) provides that it is a defence for the accused to show that the victim was his or her spouse or civil partner at the time the sexual conduct in the charge was said to have taken place.

146. Subsection (2)(b) provides that it is a defence for the accused to show that a sexual relationship with the victim existed immediately before the time when the accused is considered to have fallen within either of the classes of person specified in section 35(2).

PART 6 – PENALTIES

Section 37 – Penalties

147. Subsection (1) introduces schedule 1, which sets out the maximum penalties which may be imposed for each of the offences created by the Bill. For those offences which may be tried under either summary or solemn procedure the maximum penalties are as specified in the third and fourth column of schedule 1 respectively. Four offences, rape, sexual assault by penetration, rape of a young child and sexual assault on a young child by penetration, may only be tried under solemn procedure.

148. Subsection (2) provides that where a person is convicted on indictment of rape, sexual assault by penetration, sexual assault, rape of a young child, sexual assault on a young child by penetration or sexual assault on a young child, a fine cannot be imposed as a sole penalty.

PART 7 – MISCELLANEOUS AND GENERAL

Section 37A – Establishment of purpose for the purposes of sections 4 to 7A, 17 to 19B and 24 to 26B

149. Section 37A makes provision with regard to the “purpose test” used in the offences at sections 4 to 7A, 17 to 19B and 24 to 26B. Subsection (1) provides that where it is required to prove that the accused acted for the purpose of obtaining sexual gratification, or of humiliating, alarming or distressing the victim, this requirement is satisfied if, in all the circumstances, it may reasonably be inferred that the accused acted for such a purpose. Subsection (2) provides that it is irrelevant whether or not the victim was in fact humiliated, alarmed or distressed by the accused’s act.

Section 38 – Power to convict for offence other than that charged

150. This section provides that, where a charge is brought under certain provisions in the Bill but the court or the jury are not satisfied that the accused committed the offence in the charge, it may be open to convict the accused of a specified alternative offence. Schedule 2 specifies the available alternatives.
151. Subsection (1) provides that this power may be used where the court or jury are not satisfied that the accused committed or attempted to commit the offence which is charged but are satisfied (to the normal criminal standard of proof) that the accused committed or attempted to commit another offence (where the other offence is specified, in schedule 2 to the Bill, as being an available alternative to the offence charged). If these conditions are met, then the court or jury may acquit the accused of the offence which was charged but may find him or her guilty of the alternative offence.

152. Subsections (1A) to (1D) provide for circumstances where the accused is charged with an offence against a child and doubt as to the age of either the accused or the victim opens up the possibility of the accused being found guilty of an alternative offence to the offence charged. Subsection (1A) provides that where either of conditions 1 or 2 apply, the court or jury may acquit the accused of the charge but find the accused guilty of one of the alternative older child offences listed in subsections (1B) and (1C).

153. Subsection (1B) provides for condition 1 which is that the accused is charged with an offence at sections 14 to 19 against a young child and, but for a failure to establish beyond reasonable doubt that the child victim had attained the age of 13 years at the relevant time, a court or jury would be entitled to find that the accused had committed one of the alternative older child offences set out at section 38(1B)(b)(i) to (ix).

154. Subsection (1C) provides for condition 2, which is that the accused is charged with an offence under section 21 or 22 and, but for a failure to establish beyond reasonable doubt that the accused had not attained the age of 16 at the relevant time, a court or jury would be entitled to find that the accused had one of the alternative older child offences set out at section 38(1C)(b)(i) or (ii).

155. Subsection (1D) provides that for the purposes of this section, “relevant time” is the time when the conduct to which the proceedings relate took place.

156. Subsection (5) provides that references to an offence in section 38 includes attempting, inciting, counselling or procuring the commission of that offence or being involved art and part in that offence.

Section 39 – Exceptions to inciting or being involved art and part in offences under Part 4 or 5

157. This section provides that a person who acts for any of the purposes specified in paragraph (a) will not be guilty of any of the offences contained in Part 4 and Part 5 of the Bill providing that they are not also acting for any of the purposes in paragraph (b).

158. Paragraph (a) of this section specifies purposes including protecting others from sexually transmitted infection or from physical harm, the prevention of pregnancy or promoting their emotional wellbeing.
159. Paragraph (b) of this section specifies the purposes as including obtaining sexual gratification, humiliating, distressing or alarming a person or causing or encouraging the activity which constitutes an offence or a person’s participation in such conduct.

Section 40 – Common law offences

160. This section provides that the common law offences listed in paragraph (a) are abolished (other than in respect of offences committed before this section is commenced).

161. This means that, where conduct which would otherwise have constituted one of those common-law offences is committed on or after this section has been commenced, that common law offence will not have been committed. Instead, the conduct will fall under one of the offences in the Bill. The particular common law offences which are to be abolished are rape, clandestine injury to women, lewd, indecent and libidinous practice or behaviour, and sodomy. All other common law crimes remain in place.

162. Paragraph (b) qualifies this by providing that any conduct which constitutes an offence under one of the provisions of the Bill and which takes place after the commencement of this section must be charged as an offence under the Bill. This means that it will not be competent to bring a charge under the common law nor under any other statutory offence in respect of that sexual conduct. Thus, for example, conduct falling within section 2 must be charged as sexual assault and not as a common law assault aggravated by indecency.

Section 41 – Continuity of law on sexual offences

163. This section is intended to provide a smooth transition between the current law in respect of sexual offences and the new offences contained in the Bill. The main purpose of this section is to make allowance for cases in which the sexual conduct in the charge takes place around the time that the offences contained in the Bill come into force. It may not always be possible to prove exactly when the sexual conduct took place and hence whether this occurred before or after the relevant offence in the Bill was commenced.

164. Subsection (1) provides that this section applies where a person is charged, in respect of the same conduct, with an existing offence specified in subsection (2) and with an offence under the Bill. It provides that the court or jury must be satisfied in all respects that the accused committed the offences charged, other than as to the time on which the sexual conduct took place.

165. Subsection (3) provides that the accused may be found guilty, where the conditions in subsection (1) apply, of whichever of the offences they are charged with has the lower maximum penalty (as defined by subsection (4)). Where the penalties are the same, it provides that the accused may be found guilty of the new offence.

166. Subsection (5) provides that a reference to an offence in this section includes an attempt to commit the offence, inciting its commission, and being involved art and part in it and to an offence as modified by section 16A or 16B of the Criminal Law (Consolidation) (Scotland) Act 1995.
Section 42 – Incitement to commit certain sexual acts outside the United Kingdom

167. Section 42 removes the dual criminality requirement in respect of UK nationals. Therefore, a UK national will commit an offence under this section if he or she incites a sexual act (which is intended to take place outside the UK) that would constitute an offence in Scotland. It is no longer necessary to show that the sexual act which was incited was an offence in the country in which it was intended to take place. This follows, but goes beyond, the requirements of the Council of Europe Convention on the Protection of Children Against Sexual Exploitation and Abuse which was signed by the UK Government on 8 May 2008. That Convention requires the removal of the dual criminality requirements in relation to offences of child abuse, child pornography and child prostitution. Dual criminality is retained for UK residents and persons other than UK nationals.

168. The section applies to the offences which are listed in part 1 of schedule 3. These include inciting offences under Part 1 of the Act (rape etc.) which are committed against a person under the age of 18, the offences against children in Part 4 and the sexual abuse of trust offences in sections 31 and 35.

169. By way of example, incitement in Scotland to commit rape in Scotland would be an offence by virtue of section 293 of the Criminal Procedure (Scotland) Act 1995. The effect of section 42 is that incitement in Scotland to commit rape in another country is also an offence in Scotland, for non-UK nationals if rape is an offence in that other country. It will be an offence for UK nationals to incite rape (which is an offence in Scotland) outside the UK regardless of whether it is an offence in that other country.

Section 43 – Offences committed outside the United Kingdom

170. As with section 42, this dual criminality requirement is removed in respect of UK nationals, in line with the Council of Europe Convention. Therefore, a UK national will commit an offence under this section if he or she carries out a sexual act outside the UK that would constitute an offence in Scotland. It is no longer necessary to show that the sexual act that was committed is also an offence in the country in which it was intended to take place. The dual criminality test is retained in relation to UK residents.

Section 44 – Continuity of sexual offences committed abroad

171. Section 44 ensures the continuity of the extraterritorial sexual offences provisions in section 16B of the Criminal Law (Consolidation) (Scotland) Act 1995 (“the 1995 Act”) which are replaced by section 43 of the Bill. It deals with cases where it cannot be proved precisely when the offence occurred, i.e. before or after section 16B of the 1995 Act is repealed.

172. Subsection (1) provides that this section applies where a person is charged, in respect of the same conduct, with an existing offence as modified by section 16B of the 1995 Act and with the offence as modified by section 43 of the Bill. As with section 41, it provides that the court or jury must be satisfied in all respects that the accused committed the offences charged, other than as to the time on which the sexual conduct took place.
173. Subsection (3) provides that where this section applies the accused may be found guilty, of the offence as modified by section 16B of the 1995 Act.

Section 45 – Ancillary provision

174. This section enables Scottish Ministers to make ancillary provision by statutory instrument which is necessary or expedient, or in consequence of, giving full effect to the Bill.

Section 46 – Orders

175. This section sets out the order making powers which can be exercised by the Scottish Ministers in the Bill and the applicable parliamentary procedure.

Section 47 – Interpretation

176. This section provides definitions of various terms used in the Bill. Subsection (2) provides a definition of the term “sexual” where it is used in the Bill. It provides that a penetration, touching, activity, communication, manner of exposure or relationship is sexual if in all the circumstances of the case, a reasonable person would consider it to be so.

Section 48 – Modification of enactments

177. This section provides for the modification of existing enactments. Subsection (1) introduces schedule 4 to the Bill which provides for modifications of existing enactments in consequence of the Bill. Subsection (2) introduces schedule 5 to the Bill which provides for repeal of certain existing enactments in consequence of the Bill.

Section 49 – Short title and commencement

178. This section provides that the Bill will come into force on a day or days decided by order by Scottish Ministers. Such orders may make different provision for different purposes.
Purpose

1. This Memorandum has been prepared by the Scottish Government to assist the Subordinate Legislation Committee in its consideration of the Sexual Offences (Scotland) Bill. This Memorandum explains changes to the powers to make subordinate legislation under the Sexual Offences (Scotland) Bill resulting from amendments at Stage 2. This supplementary memorandum should be reading in conjunction with the original Delegated Powers Memorandum for the Bill.

AMENDMENTS TO DELEGATED POWERS

2. During Stage 2 proceedings, Scottish Ministers modified some of the delegated powers that were introduced by the Bill. These changes are designed to give Parliament a greater role in scrutinising subordinate legislation made under the Bill and respond to comments made by both the Subordinate Legislation Committee and the Justice Committee on these powers.

3. There follows a description of the delegated powers which have been amended at Stage 2.

Section 29(5A) – Power to specify “relevant sexual offences” for the purpose of section 29(2)

Power conferred on: Scottish Ministers
Power exercisable by: Order made by statutory instrument
Parliamentary procedure: Affirmative resolution procedure

Provision

4. Section 29(1) provides that it shall be a defence for an accused person who is charged with an offence under sections 21 to 27 (which are concerned with sexual activity involving or directed towards children aged 13-15) that he or she reasonably believed that the child with whom he or she engaged in sexual activity had attained the age of 16 years at the time the conduct took place. Section 29(2) provides that such a defence is not available to an accused if that accused has previously been charged by the police with a ‘relevant sexual offence’. Section 29(5) of the Bill, as introduced, provided Scottish Ministers with an order making power to specify what offences would be “relevant offences” for the purpose of section 29. This order making power was subject to negative resolution procedure.
5. Section 29(5) of the Bill, as amended at Stage 2, now provides that a “relevant offence” means an offence listed in schedule 1Z to the Bill (amendments will be made at Stage 3 so that section 29(5)(a) refers to “relevant sexual offences” to ensure consistency with the rest of section 29). Schedule 1Z provides a list of “relevant offences”. These are offences concerning sexual activity with children under the age of consent in Scotland, England & Wales and Northern Ireland. This schedule was introduced at Stage 2 in response to comments from the Justice Committee that “relevant offences” were not defined on the face of the Bill.

6. Section 29(5A) of the Bill contains an order making power which enables Scottish Ministers to modify the list of relevant offences contained in schedule 1Z. In line with the recommendation contained in the Subordinate Legislation Committee’s Stage 1 Report, the power to amend the Schedule to add new offences had been restricted to sexual offences involving children.

Reason for taking power

7. Although “relevant offences” are listed in a schedule to the Bill, it is considered appropriate to retain a power to add or delete offences from the list of “relevant offences” to ensure that there is flexibility to respond to changing legislation in all parts of the United Kingdom. It may be that primary legislation is brought forward in other parts of the United Kingdom which create new sexual offences in those jurisdictions or revoke the offences which are listed in schedule 1Z. The list of “relevant offences” will need to be updated in consequence of that legislation. Using this order making power provides the flexibility to take account of these changes, given that it may not be competent for the legislation brought forward in other parts of the UK to amend the schedule of “relevant offences”. Furthermore, as section 29(2) prevents a person from using a defence if he or she is charged with a “relevant offence”, it is also important that such changes are brought forward as soon as possible. An order making power provides the best mechanism to do this, as opposed to bringing forward primary legislation in Scotland which will be subject to longer timescales.

Choice of procedure

8. The Subordinate Legislation Committee’s Stage 1 Report recommended that, given the significance of the exercise of the proposed power in determining when a defence of mistaken belief as to age is available to an accused, any power to specify a “relevant offence” should be subject to affirmative resolution procedure. In light of the Committee’s recommendation, amendments were brought forward at Stage 2 which provide that the exercise of the power at section 29(5A) to amend the schedule of offences shall be subject to affirmative resolution procedure.
Section 32(8) – Power to amend the definition of what constitutes a ‘position of trust’ in respect of the offence of sexual abuse of trust at section 31

Power conferred on: Scottish Ministers
Power exercisable by: Order made by statutory instrument
Parliamentary procedure: Affirmative resolution procedure

Provision

9. Section 31 creates an offence of sexual abuse of trust. It provides that a person commits an offence of sexual abuse of trust if he or she is aged 18 years or older and intentionally engages in a sexual activity with, or directed at, a person who is under 18 and in respect of whom he or she is in a position of trust. Section 32 defines “position of trust” for the purpose of the offence of sexual abuse of trust at section 31. Section 33 interprets terms used in section 32 of the Bill.

10. Section 32(8) provides the Scottish Ministers with an order making power to modify section 32 and 33, (other than section 32(8)) so as to add, delete or amend a condition constituting a position of trust. This order-making power was introduced at Stage 2 and replaces the order-making power at section 32(1) of the Bill, as introduced, which provided only an order making power to add new conditions which constitute a position of trust (and not to delete or amend existing conditions).

Reason for taking this power

11. The reason for widening the original power in section 32(1) of the Bill is to allow for sufficient flexibility to amend the definition of a ‘position of trust’ to reflect any future changes to the arrangements relating to the education or care of young people in Scotland. These changes may result in needing to amend or remove the conditions in section 32 (and modify section 33 to add, remove or modify the definition of any terms in section 33) as well as needing to create additional conditions. Ensuring that children are protected from harm by those in positions of trust or responsibility over them has been an area of policy subject to recent developments and it is possible that further developments in the future may necessitate changes to the definition of a ‘position of trust’. Without a power to modify and remove conditions (as well as add conditions) by statutory instrument, primary legislation will be required to ensure that this definition continues to accurately reflect the changes in circumstances in which positions of trust arise, which would be subject to longer timescales and inhibit Government’s ability to respond quickly to changes in the arrangements for the care and education of young people. Given these changes will impact on whether a person has committed a criminal offence, there is a need for the Government to give effect to such changes quickly.

Choice of procedure

12. The Bill as introduced provided that the order making power in section 32(1) was subject to negative resolution procedure. The Subordinate Legislation Committee’s Stage 1 Report recommended that, given the potential impact of the exercise of this power to widen the scope of the offence of sexual abuse of trust, affirmative resolution procedure is the appropriate level of Parliamentary scrutiny. In light of the Committee’s recommendation, amendments were brought forward at Stage 2 which provide that the exercise of the power at section 32(8) shall be subject to affirmative resolution procedure.
Sexual Offences (Scotland) Bill – Section 45 – Ancillary Provision

I am writing to you concerning the Scottish Government’s proposed approach to amending the provision at section 45 of the Sexual Offences Bill, which confers on the Scottish Ministers a power to make by order such incidental, supplemental, consequential, transitional, transitory or saving provision as they consider necessary or expedient for the purposes of, or in connection with, or in order to give full effect to the Bill.

The Subordinate Legislation Committee, in its Stage 1 Report, recommended that the order-making power should be amended so as to provide that any modification of primary legislation, however effected, should be subject to affirmative procedure. In our response to the Committee’s Report, the Government undertook that, in the particular circumstances of this Bill, the Government is willing to bring forward amendments to ensure that any direct modification of primary legislation, whether textual or otherwise, will attract affirmative procedure.

As I explained to the Justice Committee during Stage 2 consideration of the Bill on 31 March, we did not lodge amendments to section 45 at Stage 2 owing to general discussions of the matter which have taken place with parliamentary officials, as a similar issue has arisen with other legislation. We committed to lodge any amendments that are required at Stage 3.
Following consideration of the matter we now propose to amend the Bill at Stage 3 so as to require:

- Affirmative procedure for any ancillary order making consequential, incidental or supplemental provision, and
- Negative procedure for any ancillary order making transitional, transitory or saving provision.

We recognise that, as this Bill is replacing the common law and deals with a sensitive area, special circumstances apply in respect of this Bill. The first part of our proposed amendment therefore goes further than the undertaking given in our response to the Committee's Stage 1 Report. It would mean that an order containing supplemental, consequential or incidental provisions would attract affirmative procedure regardless of whether it modified an enactment. For example, if an order made such provision adjusting the existing common law on criminal offences, it would be subject to the higher lever of scrutiny provided for by affirmative procedure even though no enactment is modified. Our proposed amendment also avoids possible uncertainty that an amendment based on any provision modifying an Act could create with respect to exactly when a provision modifies primary legislation and when it does not.

The second part of our proposed amendment recognises that orders making transitional, transitory and savings provision deal with different issues. The Bill already contains significant transitional provision on the continuity of the law on sexual offences, and this has been subject to Parliamentary scrutiny. Retaining any aspect of the common law for a period of time, and when exactly the common law should be repealed is a matter for the timing of commencement orders as opposed to a savings provision. Transitory provision is concerned only with short term provision. We therefore consider that it is appropriate for orders containing such provision to attract negative procedure in the circumstances of this Bill.

I hope this information is helpful in explaining our proposed approach to amending the ancillary order-making power at section 45 at Stage 3.

KENNY MACASKILL
Subordinate Legislation Committee

Remit and membership

Remit:

1. The remit of the Subordinate Legislation Committee is to consider and report on-

(a) any-

   (i) subordinate legislation laid before the Parliament;

   (ii) Scottish Statutory Instrument not laid before the Parliament but classified as general according to its subject matter,

and, in particular, to determine whether the attention of the Parliament should be drawn to any of the matters mentioned in Rule 10.3.1;

(b) proposed powers to make subordinate legislation in particular Bills or other proposed legislation;

(c) general questions relating to powers to make subordinate legislation; and

(d) whether any proposed delegated powers in particular Bills or other legislation should be expressed as a power to make subordinate legislation.

*(Standing Orders of the Scottish Parliament, Rule 6.11)*

Membership:

Jackson Carlaw
Malcolm Chisholm
Bob Doris
Helen Eadie
Tom McCabe
Ian McKee (Deputy Convener)
Jamie Stone (Convener)
Committee Clerking Team:

Clerk to the Committee
Shelagh McKinlay

Assistant Clerk
Jake Thomas
Sexual Offences (Scotland) Bill as amended at Stage 2

The Committee reports to the Parliament as follows—

1. At its meeting on 2 June the Subordinate Legislation Committee considered the delegated powers provisions in the Sexual Offences (Scotland) Bill as amended at Stage 2. The Committee submits this report to the Parliament under Rule 9.7.9 of Standing Orders.

2. The Scottish Government provided the Parliament with a supplementary memorandum on the delegated powers provisions in the Bill. 

Delegated Powers Provisions

3. The Committee considered all of the powers as set out in the supplementary DPM and is content with sections: 29(5A) and 32(8).

Section 45 – Ancillary provision

4. Section 45 of the Bill contains ancillary powers. As is customary the powers may make provision which is incidental, supplemental, consequential, transitional, transitory or saving as is considered necessary or expedient for the purposes of or for giving full effect to the Act.

5. The power can be used to modify enactments. At introduction the exercise of ancillary powers was subject to negative procedure except where the provision made included the textual amendment of acts in which case it was subject to affirmative procedure.

6. In its stage 1 report, the Committee asked the Scottish Government whether it would be prepared to agree that any modification of primary legislation should be subject to affirmative procedure, and if not, to give an undertaking that any significant or permanent modification made to enactments using this power would be effected through textual amendment and subject to affirmative procedure.

1 Supplementary Delegated Powers Memorandum
7. In its response to the Committee’s stage 1 report the Scottish Government confirmed that it would be willing to bring forward amendments to ensure that any direct modification of primary legislation, whether textual or otherwise will attract affirmative procedure. However, at stage 2 the Cabinet Secretary explained that amendments had not been brought forward at that stage on account of ongoing discussions between the Government and parliamentary officials.

8. The Cabinet Secretary sent a letter to the Convener on 27 May to clarify the Government’s position. This letter advises that the Government proposes to bring forward amendments at stage 3 to provide that any order which makes incidental, supplemental or consequential provision will be subject to affirmative procedure and that any order which makes transitional, transitory or saving provision will be subject to negative procedure.

9. The Cabinet Secretary notes that this Bill deals with the replacement of the common law within a sensitive area. On that basis it is recognised that the Parliament has a greater interest in participating actively in the scrutiny of ancillary powers.

10. The Committee considers that it has a responsibility for ensuring that so far as possible ancillary powers are framed no more broadly than is required for the circumstances and that a suitable level of Parliamentary procedure is specified.

11. The Government has gone further than originally proposed in offering to provide that ancillary powers to make incidental, supplemental, or consequential provision will always be subject to affirmative procedure. As such powers may be used to make additional substantive provision in relation to sexual offences the Committee considers that affirmative procedure is appropriate.

12. In the case of ancillary powers to make transitional, transitory or saving provision the Government proposes that all exercise of the power is subject to negative procedure – whether the provision made modifies primary legislation or not. This therefore provides for less Parliamentary scrutiny in such cases than was previously proposed.

13. The Committee is aware that transitional provisions can make significant provision albeit of a temporary nature and therefore it does not consider that the temporary nature of the power is conclusive in considering the level of scrutiny that is appropriate. However, the Cabinet Secretary’s letter highlights that in this particular Bill consideration has already been given to such matters and significant transitional provision is already set out in section 41 of the Bill, in relation to the continuity of common law in relation to trials. On the basis that the Government has already made provision for those transitional provisions which are considered most significant in the primary legislation itself the Committee is content that the power to make transitional, transitory and saving provision is subject to negative procedure.

14. The Committee therefore finds the proposed amendments to ancillary powers set out in the Cabinet Secretary’s letter of 27 May to be acceptable.

---

2 Letter from Minister
Sexual Offences (Scotland) Bill

**Marshalled List of Amendments selected for Stage 3**

The Bill will be considered in the following order—

<table>
<thead>
<tr>
<th>Sections 1 to 49</th>
<th>Schedules 1Z to 5</th>
</tr>
</thead>
<tbody>
<tr>
<td>Long Title</td>
<td></td>
</tr>
</tbody>
</table>

Amendments marked * are new (including manuscript amendments) or have been altered.

**Section 10**

**Margaret Curran**

1 In section 10, page 7, line 2, leave out `<the only indication or expression of consent by B to>`

**Section 20**

**Kenny MacAskill**

2 In section 20, page 11, line 27, leave out `<19>` and insert `<19B>`

**Section 21**

**Kenny MacAskill**

3 In section 21, page 11, line 34, leave out `<(or under section 30(1) is deemed to have attained)>`.

**Section 21A**

**Kenny MacAskill**

4 In section 21A, page 12, line 5, leave out from `<the>` to `<attained>` in line 6

**Section 22**

**Kenny MacAskill**

5 In section 22, page 12, line 16, leave out `<(or under section 30(1) is deemed to have attained)>`.

**Section 23**

**Kenny MacAskill**

6 In section 23, page 12, line 36, leave out `<(or under section 30(1) is deemed to have attained)>`.
Section 24
Kenny MacAskill
7 In section 24, page 13, line 5, leave out <(or under section 30(1) is deemed to have attained)>

Section 25
Kenny MacAskill
8 In section 25, page 13, line 25, leave out <(or under section 30(1) is deemed to have attained)>

Section 26
Kenny MacAskill
9 In section 26, page 14, line 6, leave out <(or under section 30(1) is deemed to have attained)>

Section 29
Kenny MacAskill
10 In section 29, page 17, line 13, after <relevant> insert <sexual>

Section 30
Kenny MacAskill
11 In section 30, page 17, line 28, leave out <26> and insert <26B>

Kenny MacAskill
12 In section 30, page 18, line 17, at end insert—
<( ) Where any of the deeming provisions apply, references in sections 21 to 27 to A or B having or not having attained a particular age are to be construed in accordance with this section and section 30A.>

After section 30A
Robert Brown
120 After section 30A, insert—
<Information and publicity
The Scottish Ministers must, prior to the commencement of this Part—
(a) consult in an appropriate manner with children and young people under the age of 18 about their attitudes to this Part,
(b) undertake an information and publicity campaign about this Part.>
Section 37

Kenny MacAskill
13 In section 37, page 22, line 8, leave out <a person> and insert <an individual>

Robert Brown
121 In section 37, page 22, line 8, leave out second <sexual assault,>

Robert Brown
122 In section 37, page 22, line 9, leave out from first <sexual> to <child> in line 10 and insert <or sexual assault on a young child by penetration>

Kenny MacAskill
14 In section 37, page 22, line 13, at end insert—
   <( ) Where—
      (a) a body corporate,
      (b) a Scottish partnership, or
      (c) an unincorporated association other than a Scottish partnership,
      is convicted on indictment of an offence specified in subsection (2), a penalty of a fine alone may be imposed.>

Section 38

Kenny MacAskill
15 In section 38, page 23, line 5, leave out <19> and insert <19B>

Kenny MacAskill
16 In section 38, page 23, line 9, at end insert—
   <( ) engaging in penetrative sexual activity with or towards an older child,>

Kenny MacAskill
17 In section 38, page 23, line 15, at end insert—
   <( ) sexual exposure to an older child,
   ( ) voyeurism towards an older child,>

Kenny MacAskill
18 In section 38, page 23, line 21, after <21> insert <, 21A>
Before section 45

Kenny MacAskill

19 Before section 45, insert—

<Offences by bodies corporate etc.

(1) Where—

(a) an offence under this Act has been committed by—

(i) a body corporate,

(ii) a Scottish partnership, or

(iii) an unincorporated association other than a Scottish partnership, and

(b) it is proved that the offence was committed with the consent or connivance of, or

was attributable to any neglect on the part of—

(i) a relevant individual, or

(ii) an individual purporting to act in the capacity of a relevant individual,

that individual (as well as the body corporate, partnership or, as the case may be, unincorporated association) commits the offence and is liable to be proceeded against and punished accordingly.

(2) In subsection (1), “relevant individual” means—

(a) in relation to a body corporate (other than a limited liability partnership)—

(i) a director, manager, secretary or other similar officer of the body,

(ii) where the affairs of the body are managed by its members, a member,

(b) in relation to a limited liability partnership, a member,

(c) in relation to a Scottish partnership, a partner,

(d) in relation to an unincorporated association other than a Scottish partnership, a person who is concerned in the management or control of the association.>

Section 46

Kenny MacAskill

20 In section 46, page 28, line 32, leave out from <provisions> to end of line 33 and insert <incidental, supplemental or consequential provision>

Schedule 1Z

Kenny MacAskill

21 In schedule 1Z, page 30, line 12, at end insert—

<( ) sexual abuse of trust of a mentally disordered person (section 35) of a person under the age of 16>
In schedule 1Z, page 30, line 12, at end insert—

<An offence under any of the following provisions of the Sexual Offences (Northern Ireland) Order 2008 (SI No. 1769 (N.I. 2)) against a person under the age of 16—

( ) article 5 (rape),
( ) article 6 (assault by penetration),
( ) article 7 (sexual assault),
( ) article 8 (causing a person to engage in sexual activity without consent),
( ) article 23 (abuse of position of trust: sexual activity with a child under 18),
( ) article 24 (abuse of position of trust: causing or inciting a child under 18 to engage in sexual activity),
( ) article 25 (abuse of position of trust: sexual activity in the presence of a child under 18),
( ) article 26 (abuse of position of trust: causing a child under 18 to watch a sexual act),
( ) article 32 (sexual activity with an under 18 child family member),
( ) article 33 (inciting an under 18 child family member to engage in sexual activity),
( ) article 37 (paying for sexual services of a child under 18),
( ) article 38 (causing or inciting a child under 18 to become a prostitute or to be involved in pornography),
( ) article 39 (controlling the activities of a child under 18 in relation to prostitution or involvement in pornography),
( ) article 40 (arranging or facilitating the prostitution or involvement in pornography of a child under 18),
( ) article 51 (care workers: sexual activity with a person with a mental disorder),
( ) article 52 (care workers: causing or inciting a person with a mental disorder to engage in sexual activity),
( ) article 53 (care workers: sexual activity in the presence of a person with a mental disorder),
( ) article 54 (care workers: causing a person with a mental disorder to watch a sexual act),
( ) article 65 (administering a substance with intention of stupefying etc. for sexual activity),
( ) article 70 (exposure of genitals),
( ) article 71 (voyeurism).>
( ) article 13 (assault of a child under 13 by penetration),
( ) article 14 (sexual assault of a child under 13),
( ) article 15 (causing or inciting a child under 13 to engage in sexual activity),
( ) article 16 (sexual activity with a child under 16),
( ) article 17 (causing or inciting a child under 16 to engage in sexual activity),
( ) article 18 (engaging in sexual activity in the presence of a child under 16),
( ) article 19 (causing a child under 16 to watch a sexual act),
( ) article 20 (offences under articles 16 to 19 by a person under 18),
( ) article 21 (arranging or facilitating commission of an offence under articles 16 to 20),
( ) article 22 (meeting a child under 16 following sexual grooming etc.).>

Kenny MacAskill
24 In schedule 1Z, page 30, line 30, at end insert—
   <( ) section 4 (causing a person to engage in sexual activity without consent),
   ( ) section 16 (abuse of position of trust: sexual activity with a child under 18),
   ( ) section 17 (abuse of position of trust: causing or inciting a child under 18 to engage in sexual activity),
   ( ) section 18 (abuse of position of trust: sexual activity in the presence of a child under 18),
   ( ) section 19 (abuse of position of trust: causing a child under 18 to watch a sexual act),>

Kenny MacAskill
25 In schedule 1Z, page 30, line 32, at end insert—
   <( ) section 38 (care workers: sexual activity with a person with a mental disorder),
   ( ) section 39 (care workers: causing or inciting a person with a mental disorder to engage in sexual activity),
   ( ) section 40 (care workers: sexual activity in the presence of a person with a mental disorder),
   ( ) section 41 (care workers: causing a person with a mental disorder to watch a sexual act),
   ( ) section 47 (paying for sexual services of a person under 18),
   ( ) section 48 (causing or inciting a child under 18 to become a prostitute or to be involved in pornography),
   ( ) section 49 (controlling the activities of a child under 18 in relation to prostitution or involvement in pornography),
   ( ) section 50 (arranging or facilitating the prostitution or involvement in pornography of a child under 18),>
( ) section 61 (administering a substance with intention of stupefying etc. for sexual activity),
( ) section 66 (exposure of genitals),
( ) section 67 (voyeurism).>

Kenny MacAskill
26 In schedule 1Z, page 30, leave out lines 33 to 36

Kenny MacAskill
27 In schedule 1Z, page 31, leave out lines 12 to 14

Kenny MacAskill
28 In schedule 1Z, page 31, line 15, leave out paragraph 5

Kenny MacAskill
29 In schedule 1Z, page 31, line 22, at end insert—

<( ) an offence under section 1 (incest) or 2 (intercourse with a step-child) against a child under the age of 16,
( ) an offence under section 3 (intercourse of person in position of trust with a child under 16).>

Kenny MacAskill
30 In schedule 1Z, page 31, line 24, at end insert—

<( ) an offence under section 9 (permitting a girl under 16 to use premises for intercourse).>

Kenny MacAskill
31 In schedule 1Z, page 31, line 36, leave out paragraph 10

Kenny MacAskill
32 In schedule 1Z, page 32, line 7, leave out paragraph 13

Kenny MacAskill
33 In schedule 1Z, page 32, line 23, at end insert—

<Any of the following offences under the Sexual Offences Act 2003, in its application to Northern Ireland—
( ) an offence under section 15,
( ) an offence under section 16, 17, 18, 19, 47, 48, 49, 50, 66 or 67 against a child under the age of 17.>
In schedule 1Z, page 32, line 23, at end insert—

<An offence under article 18, 19, 20 or 21 of the Criminal Justice (Northern Ireland) Order 2003 (SI No. 1247 (N.I. 13)) against a person under the age of 17.>

In schedule 1Z, page 32, line 27, at end insert—

<An offence under article 123 of the Mental Health (Northern Ireland) Order 1986 (SI No. 595 (N.I. 4)) against a person under the age of 17.>

In schedule 1Z, page 32, line 27, at end insert—

<An offence under article 9 of the Criminal Justice (Northern Ireland) Order 1980 (SI No. 704 (N.I. 6)).>

In schedule 1Z, page 32, line 29, leave out <An offence under section 3, 4, 5 or 10(1) of> and insert <Any of the following offences under>

In schedule 1Z, page 32, line 30, at end insert—

<(  ) an offence under section 2A or 2B against a person under the age of 16,
(  ) an offence under section 2C, 3, 4, 5 or 10(1)>

In schedule 1Z, page 32, line 30, at end insert—

<An offence under section 21 or 22 of the Children and Young Persons Act (Northern Ireland) 1968 (c.34).>

In schedule 1Z, page 32, line 31, after <1,> insert <10, 11,>

In schedule 1Z, page 32, line 34, at end insert—

<An offence under section 1 of the Punishment of Incest Act 1908 (c.45)—
(  ) in its application to England and Wales, against a girl under the age of 16,
( ) in its application to Northern Ireland, against a girl under the age of 17.>

Kenny MacAskill

43 In schedule 1Z, page 32, line 35, leave out <An offence under section 3 or 5 of> and insert <Any of the following offences under>

Kenny MacAskill

44 In schedule 1Z, page 32, line 36, leave out from <against> to end of line 37 and insert—

<( ) an offence under section 2, 3, 5, 7 or 8—

(i) in its application to Scotland or England and Wales, against a girl under the age of 16,

(ii) in its application to Northern Ireland, against a girl under the age of 17,

( ) an offence under section 4 or 6.>

Kenny MacAskill

45 In schedule 1Z, page 32, line 38, leave out <An offence under section 52, 53, 54, 61 or 62 of> and insert <Any of the following offences under>

Kenny MacAskill

46 In schedule 1Z, page 32, line 39, leave out <against a person under the age of 16> and insert—

<( ) an offence under section 52, 53 or 54—

(i) in its application to England and Wales, against a person under the age of 16,

(ii) in its application to Northern Ireland, against a person under the age of 17,

( ) an offence under section 61 or 62.>

Kenny MacAskill

47 In schedule 1Z, page 33, line 3, leave out <an offence in paragraphs 18, 19, 21 of that Part> and insert <any of the following offences—

( ) an offence against a person under the age of 16 under section 3 of the Sexual Offences (Amendment) Act 2000 in its application to Scotland (see paragraph 18),

( ) an offence in paragraph 19 or 21,

( ) an offence against a girl under the age of 16 under section 2, 3, 5, 7 or 8 of the Criminal Law Amendment Act 1885 in its application to Scotland.>

Schedule 1

Robert Brown

124* In schedule 1, page 33, line 15, column 4, leave out <and a fine> and insert <or a fine (or both)>
Robert Brown

125* In schedule 1, page 34, line 21, column 4, leave out <and a fine> and insert <or a fine (or both)>

Schedule 2

Kenny MacAskill

48 In schedule 2, page 37, line 7, column 3, at beginning insert—

<Sexual assault by penetration>

Kenny MacAskill

49 In schedule 2, page 37, line 9, at end insert—

<Sexual assault by Section 1A Sexual assault penetration

Engaging in penetrative sexual activity with or towards an older child

Engaging in sexual activity with or towards an older child

Assault at common law>

Kenny MacAskill

50 In schedule 2, page 38, line 26, at end insert—

<Voyeurism Section 7A Breach of the peace at common law>

Kenny MacAskill

51 In schedule 2, page 38, line 27, column 3, at beginning insert—

<Sexual assault on a young child by penetration>

Kenny MacAskill

52 In schedule 2, page 38, line 29, column 3, at end insert—

<Engaging in penetrative sexual activity with or towards an older child>

Kenny MacAskill

53 In schedule 2, page 39, line 3, at end insert—

<Sexual assault on a young child by penetration Section 14A Sexual assault on a young child

Engaging in penetrative sexual activity with or towards an older child

Engaging in sexual activity with or towards an older child

Assault at common law>
Kenny MacAskill
54 In schedule 2, page 40, line 10, column 3, at end insert—
   <Sexual exposure to a young child>

Kenny MacAskill
55 In schedule 2, page 40, line 16, column 3, at end insert—
   <Sexual exposure to an older child>

Kenny MacAskill
56 In schedule 2, page 40, line 22, column 3, at end insert—
   <Sexual exposure to a young child>

Kenny MacAskill
57 In schedule 2, page 40, line 28, column 3, at end insert—
   <Sexual exposure to an older child>

Kenny MacAskill
58 In schedule 2, page 41, line 9, column 3, at end insert—
   <Sexual exposure to a young child>

Kenny MacAskill
59 In schedule 2, page 41, line 15, column 3, at end insert—
   <Sexual exposure to an older child>

Kenny MacAskill
60 In schedule 2, page 41, line 21, column 3, at end insert—
   <Sexual exposure to a young child>

Kenny MacAskill
61 In schedule 2, page 41, line 27, column 3, at end insert—
   <Sexual exposure to an older child>

Kenny MacAskill
62 In schedule 2, page 41, line 27, column 3, at end insert—
<Sexual exposure to an older child
Public indecency at common law
Breach of the peace at common law

Voyeurism towards an older child
Breach of the peace at common law>

Kenny MacAskill

63 In schedule 2, page 41, line 28, column 3, at beginning insert—
<Engaging in penetrative sexual activity with or towards an older child>

Kenny MacAskill

64 In schedule 2, page 42, line 3, at end insert—
<Engaging in penetrative sexual activity with or towards an older child>
Engaging while an older child in sexual conduct with or towards another older child

Kenny MacAskill

65 In schedule 2, page 42, line 22, column 3, at end insert—
<Sexual exposure to an older child>

Kenny MacAskill

66 In schedule 2, page 42, line 28, column 3, at end insert—
<Sexual exposure to an older child>

Kenny MacAskill

67 In schedule 2, page 42, line 34, at column 3, at end insert—
<Sexual exposure to an older child>

Kenny MacAskill

68 In schedule 2, page 43, line 9, column 3, at end insert—
Sexual exposure to an older child

Sexual exposure to an older child

Section 26A

Public indecency at common law

Breach of the peace at common law

Voyeurism towards an older child

Section 26B

Breach of the peace at common law

Schedule 4

Kenny MacAskill

In schedule 4, page 45, line 10, leave out from <for> to the end of line 11 and insert—

<(  ) after the word “charge” there is inserted “in proceedings”,

(  ) the words from “, being” to “offence,” are omitted,>

Kenny MacAskill

In schedule 4, page 45, line 11, at end insert—

<(  ) after that subsection, there is inserted—

“(2A) But the defence under subsection (2) is not available to the person so charged if—

(a) that person has previously been charged by the police with a relevant sexual offence; or

(b) there is in force in respect of that person a risk of sexual harm order.”,>

Kenny MacAskill

In schedule 4, page 45, line 12, leave out from <(3)(b)> to the end of line 22 and insert <(3), for the words from “(2)” to the end there is substituted “(2A) above—

(a) “a relevant sexual offence” has the same meaning as in section 29(5)(a) of the Sexual Offences (Scotland) Act 2009 (asp 00); and

(b) “a risk of sexual harm order” has the same meaning as in section 29(5)(b) of that Act.”>

Kenny MacAskill

In schedule 4, page 45, line 24 leave out <16 to 19 and 22 to 26> and insert <14A to 19B and 21A to 26B>

Kenny MacAskill

In schedule 4, page 45, line 26, at end insert—

<(  ) After section 12, there is inserted—>
“12A Sections 11(5) and 12: further provision

(1) Premises shall be treated for the purposes of sections 11(5) and 12 of this Act as a brothel if people resort to them for the purposes of homosexual acts in circumstances in which resort to them for heterosexual practices would have led to the premises being treated as a brothel for the purposes of those sections.

(2) For the purposes of this section, a homosexual act is an act of engaging in sexual activity by one male person with another male person; and an activity is sexual in any case if a reasonable person would, in all the circumstances of the case, consider it to be sexual.”.

Kenny MacAskill

74 In schedule 4, page 45, line 26, at end insert—

<( ) For the heading above section 13, there is substituted “Living on earnings of another from male prostitution”.>

<( ) For the section title, there is substituted “Living on earnings of another from male prostitution”.

Kenny MacAskill

75 In schedule 4, page 45, leave out lines 28 to 33 and insert <, in subsection (9), the words from “or who” to “above” are omitted>

Kenny MacAskill

76 In schedule 4, page 46, line 1, leave out <district> and insert <JP>

Kenny MacAskill

77 In schedule 4, page 46, line 11, at end insert—

<( ) section 1A (sexual assault by penetration).>

Kenny MacAskill

78 In schedule 4, page 46, line 20, at end insert—

<( ) section 7A (voyeurism).>

Kenny MacAskill

79 In schedule 4, page 46, line 21, at end insert—

<( ) section 14A (sexual assault on a young child by penetration).>

Kenny MacAskill

80 In schedule 4, page 46, line 30, at end insert—

<( ) section 19A (sexual exposure to a young child),
( ) section 19B (voyeurism towards a young child),>
In schedule 4, page 46, line 31, at end insert—

<(  ) section 21A (engaging in penetrative sexual activity with or towards an older child),>

In schedule 4, page 47, line 2, at end insert—

<(  ) section 26A (sexual exposure to an older child),
(  ) section 26B (voyeurism towards an older child),>

In schedule 4, page 47, leave out lines 17 and 18

In schedule 4, page 47, line 25, at end insert—

<(  ) section 1A (sexual assault by penetration),>

In schedule 4, page 47, line 34, at end insert—

<(  ) section 7A (voyeurism),>

In schedule 4, page 47, line 36, at end insert—

<(  ) section 14A (sexual assault on a young child by penetration),>

In schedule 4, page 48, line 4, at end insert—

<(  ) section 19A (sexual exposure to a young child),
(  ) section 19B (voyeurism towards a young child),>

In schedule 4, page 48, line 5, at end insert—

<(  ) section 21A (engaging in penetrative sexual activity with or towards an older child),>

In schedule 4, page 48, line 15, at end insert—

<(  ) section 26A (sexual exposure to an older child),
(  ) section 26B (voyeurism towards an older child),>
Kenny MacAskill
90 In schedule 4, page 48, line 29, at end insert—

<(  ) section 1A (sexual assault by penetration),>

Kenny MacAskill
91 In schedule 4, page 48, line 38, at end insert—

<(  ) section 7A (voyeurism),>

Kenny MacAskill
92 In schedule 4, page 48, line 39, at end insert—

<(  ) section 14A (sexual assault on a young child by penetration),>

Kenny MacAskill
93 In schedule 4, page 49, line 8, at end insert—

<(  ) section 19A (sexual exposure to a young child),
(  ) section 19B (voyeurism towards a young child),>

Kenny MacAskill
94 In schedule 4, page 49, line 9, at end insert—

<(  ) section 21A (engaging in penetrative sexual activity with or
towards an older child),>

Kenny MacAskill
95 In schedule 4, page 49, line 19, at end insert—

<(  ) section 26A (sexual exposure to an older child),
(  ) section 26B (voyeurism towards an older child),>

Kenny MacAskill
96 In schedule 4, page 49, line 35, at end insert—

<Any offence under section 14A (sexual assault on a young child by
penetration) or 21A (engaging in penetrative sexual activity with or
towards an older child) of that Act.>

Kenny MacAskill
97 In schedule 4, page 50, line 3, leave out <or 7 (sexual exposure)> and insert <, 7 (sexual
exposure) or 7A (voyeurism)>

Kenny MacAskill
98 In schedule 4, page 50, line 5, leave out <19> and insert <19B>
Kenny MacAskill

99* In schedule 4, page 50, line 12, at end insert—

The Protection of Children (Scotland) Act 2003 (asp 5)

(1) Schedule 1 to the Protection of Children (Scotland) Act 2003 is amended as follows.

(2) At the end of paragraph 1 there is inserted—

“(n) an offence under section 14 (rape of a young child) of the Sexual Offences (Scotland) Act 2009 (asp 00);

(o) an offence under section 14A (sexual assault on a young child by penetration) of that Act;

(p) an offence under section 15 (sexual assault on a young child) of that Act;

(q) an offence under section 16 (causing a young child to participate in a sexual activity) of that Act;

(r) an offence under section 17 (causing a young child to be present during a sexual activity) of that Act;

(s) an offence under section 18 (causing a young child to look at a sexual image) of that Act;

(t) an offence under section 19(1) (communicating indecently with a young child) of that Act;

(u) an offence under section 19(2) (causing a young child to see or hear an indecent communication) of that Act;

(v) an offence under section 19A (sexual exposure to a young child) of that Act;

(w) an offence under section 19B (voyeurism towards a young child) of that Act;

(x) an offence under section 21 (having intercourse with an older child) of that Act;

(y) an offence under section 21A (engaging in penetrative sexual activity with or towards an older child) of that Act;

(z) an offence under section 22 (engaging in sexual activity with or towards an older child) of that Act;

(za) an offence under section 23 (causing an older child to participate in a sexual activity) of that Act;

(zb) an offence under section 24 (causing an older child to be present during a sexual activity) of that Act;

(zc) an offence under section 25 (causing an older child to look at a sexual image) of that Act;

(zd) an offence under section 26(1) (communicating indecently with an older child) of that Act;

(zf) an offence under section 26A (sexual exposure to an older child) of that Act;
(zg) an offence under section 26B (voyeurism towards an older child) of that Act;

(zh) an offence under section 31 (sexual abuse of trust) of that Act.”.

(3) After paragraph 2(d) there is inserted—

“(da) commits an offence under section 1 (rape) of the Sexual Offences (Scotland) Act 2009 (asp 00) in relation to a child;

(db) commits an offence under section 1A (sexual assault by penetration) of that Act in relation to a child;

(dc) commits an offence under section 2 (sexual assault) of that Act in relation to a child;

(dd) commits an offence under section 3 (sexual coercion) of that Act in relation to a child;

(de) commits an offence under section 4 (coercing a person into being present during a sexual activity) of that Act in relation to a child;

(df) commits an offence under section 5 (coercing a person into looking at a sexual image) of that Act in relation to a child;

(dg) commits an offence under section 6(1) (communicating indecently) of that Act in relation to a child;

(dh) commits an offence under section 6(2) (causing a person to see or hear an indecent communication) of that Act in relation to a child;

(di) commits an offence under section 7 (sexual exposure) of that Act in relation to a child;

(dj) commits an offence under section 7A (voyeurism) of that Act in relation to a child;

(dk) commits an offence under section 35 (sexual abuse of trust of a mentally disordered person) of that Act in relation to a child;”.

Kenny MacAskill

100 In schedule 4, page 50, line 16, at end insert—

<(< ) after paragraph 41, there is inserted—

“41A Public indecency if—

(a) a person (other than the offender) involved in the offence was under 18, and

(b) the court determines that there was a significant sexual aspect to the offender’s behaviour in committing the offence.”>

Kenny MacAskill

101 In schedule 4, page 50, line 31, leave out from <is> to <imprisonment> on line 32 and insert <, in respect of the offence, is or has been—

(i) sentenced to a term of imprisonment, or

(ii) admitted to a hospital>
Kenny MacAskill

102 In schedule 4, page 51, leave out lines 17 and 18 and insert—

< ( ) in respect of the offence, is or has been—

(i) sentenced to a term of imprisonment, or
(ii) admitted to a hospital.>

Kenny MacAskill

103 In schedule 4, page 51, leave out lines 22 and 23 and insert—

< ( ) in respect of the offence, is or has been—

(i) sentenced to a term of imprisonment, or
(ii) admitted to a hospital.>

Kenny MacAskill

104 In schedule 4, page 51, leave out lines 27 and 28 and insert—

< ( ) in respect of the offence, is or has been—

(i) sentenced to a term of imprisonment, or
(ii) admitted to a hospital.>

Kenny MacAskill

105 In schedule 4, page 51, leave out lines 32 and 33 and insert—

< ( ) in respect of the offence, is or has been—

(i) sentenced to a term of imprisonment, or
(ii) admitted to a hospital.>

Kenny MacAskill

106 In schedule 4, page 51, leave out lines 37 and 38 and insert—

< ( ) in respect of the offence, is or has been—

(i) sentenced to a term of imprisonment, or
(ii) admitted to a hospital.>

Kenny MacAskill

107 In schedule 4, page 52, leave out lines 1 and 2 and insert—

< ( ) in respect of the offence, is or has been—

(i) sentenced to a term of imprisonment, or
(ii) admitted to a hospital.>

Kenny MacAskill

108 In schedule 4, page 52, leave out lines 6 and 7 and insert—
<(  ) in respect of the offence, is or has been—
  (i) sentenced to a term of imprisonment, or
  (ii) admitted to a hospital.>

Kenny MacAskill

109 In schedule 4, page 52, leave out lines 11 and 12 and insert—
<(  ) in respect of the offence, is or has been—
  (i) sentenced to a term of imprisonment, or
  (ii) admitted to a hospital.>

Kenny MacAskill

110 In schedule 4, page 52, leave out lines 16 and 17 and insert—
<(  ) in respect of the offence, is or has been—
  (i) sentenced to a term of imprisonment, or
  (ii) admitted to a hospital.>

Kenny MacAskill

111 In schedule 4, page 52, leave out lines 21 and 22 and insert—
<(  ) in respect of the offence, is or has been—
  (i) sentenced to a term of imprisonment, or
  (ii) admitted to a hospital.>

Kenny MacAskill

112 In schedule 4, page 52, line 24, leave out from <the> to end of line 25 and insert <, in respect of
the offence, the offender is or has been—
    (  ) sentenced to a term of imprisonment, or
    (  ) admitted to a hospital.>

Kenny MacAskill

113 In schedule 4, page 52, line 27, leave out from <the> to end of line 28 and insert <, in respect of
the offence, the offender is or has been—
    (  ) sentenced to a term of imprisonment, or
    (  ) admitted to a hospital.>

Kenny MacAskill

114 In schedule 4, page 52, line 35, leave out <“59ZE”> and insert <“59ZF”>

Kenny MacAskill

115 In schedule 4, page 53, line 6, leave out paragraph 7
Schedule 5

Kenny MacAskill

123 In schedule 5, page 54, line 8, column 2, leave out <13(1), (2), (5) to (8A)> and insert <13(1) to (8A), (10)>

Kenny MacAskill

116 In schedule 5, page 54, line 8, column 2, leave out <(11)(a)> and insert <(11)>

Kenny MacAskill

117 In schedule 5, page 54, line 11, column 2, leave out <paragraphs (vii), (xx) and (xxi)> and insert <paragraph (vii)>

Kenny MacAskill

118 In schedule 5, page 54, leave out lines 22 to 24

Kenny MacAskill

119 In schedule 5, page 55, leave out lines 5 and 6
Groupings of Amendments for Stage 3

This document provides procedural information which will assist in preparing for and following proceedings on the above Bill. The information provided is as follows:

- the list of groupings (that is, the order in which amendments will be debated). Any procedural points relevant to each group are noted;
- the text of amendments to be debated during Stage 3 consideration, set out in the order in which they will be debated. **THIS LIST DOES NOT REPLACE THE MARSHALLED LIST, WHICH SETS OUT THE AMENDMENTS IN THE ORDER IN WHICH THEY WILL BE DISPOSED OF.**

Groupings of amendments

**Note:** The time limits indicated are those set out in the timetabling motion to be considered by the Parliament before the Stage 3 proceedings begin. If that motion is agreed to, debate on the groups above each line must be concluded by the time indicated, although the amendments in those groups may still be moved formally and disposed of later in the proceedings.

**Group 1:** Circumstances in which conduct takes place without free agreement

1

**Group 2:** Belief as to child’s age and relevant sexual offences

2, 10, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 69, 70, 71

**Group 3:** Special provisions as regards failure to establish age of child

3, 4, 5, 6, 7, 8, 9, 11, 12

**Group 4:** Children: requirement to undertake an information and publicity campaign

120

**Group 5:** Offences by non-natural persons

13, 14, 19

Debate to end no later than 35 minutes after proceedings begin

**Group 6:** Penalties

121, 122, 124, 125

**Group 7:** Alternative offences

15, 16, 17, 18, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68
Group 8: Ancillary provision: parliamentary procedure
20

Group 9: Sexual assault by penetration, voyeurism, sexual exposure etc.: consequential amendments
72, 76, 77, 78, 79, 80, 81, 82, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98

Debate to end no later than 55 minutes after proceedings begin

Group 10: Criminal Law (Consolidation) (Scotland) Act 1995: male prostitution
73, 74, 75, 123, 116

Group 11: Notification of defence of consent
83, 118

99, 115, 117, 119

Group 13: Sexual offender notification requirements

Debate to end no later than 70 minutes after proceedings begin
Sexual Offences (Scotland) Bill: Bruce Crawford, on behalf of the Parliamentary Bureau, moved S3M-4330—That the Parliament agrees that, during Stage 3 of the Sexual Offences (Scotland) Bill, debate on groups of amendments shall, subject to Rule 9.8.4A, be brought to a conclusion by the time limits indicated, each time limit being calculated from when the Stage begins and excluding any periods when other business is under consideration or when a meeting of the Parliament is suspended (other than a suspension following the first division in the Stage being called) or otherwise not in progress:

Groups 1 to 5: 35 minutes

Groups 6 to 9: 55 minutes

Groups 10 to 13: 1 hour 10 minutes.

The motion was agreed to.

Sexual Offences (Scotland) Bill - Stage 3: The Bill was considered at Stage 3.

The following amendments were agreed to without division: 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 123, 116, 117, 118 and 119

The following amendments were agreed to (by division)—

121 (For 77, Against 45, Abstentions 0)

122 (For 77, Against 44, Abstentions 0)

124 (For 77, Against 43, Abstentions 0)

125 (For 78, Against 45, Abstentions 0)
Amendment 120 was moved and, with the agreement of the Parliament, withdrawn.

The Presiding Officer extended the time-limits under Rules 9.8.4A (a) and (c).

Motion without Notice: Bruce Crawford moved without notice that, under Rule 9.8.5A, the debate on Groups 6 to 9 be extended by 15 minutes.

The motion was agreed to.

Motion without Notice: Fergus Ewing moved without notice that, under Rule 9.8.5A, the debate on Groups 10 to 13 be extended by a further 15 minutes.

The motion was agreed to.

**Sexual Offences (Scotland) Bill** – Stage 3: The Cabinet Secretary for Justice (Kenny MacAskill) moved S3M-4057—That the Parliament agrees that the Sexual Offences (Scotland) Bill be passed.

After debate, the motion was agreed to ((DT) by division: For 121, Against 0, Abstentions 1).
Sexual Offences (Scotland) Bill: Stage 3

14:45

The Presiding Officer (Alex Fergusson): The next item of business is stage 3 proceedings on the Sexual Offences (Scotland) Bill. Members should have with them the bill as amended at stage 2—that is, Scottish Parliament bill 11A; the marshalled list—that is, SP bill 11A-ML; and the groupings, which I, as Presiding Officer, have agreed. The division bell will sound and proceedings will be suspended for five minutes for the first division of the afternoon. The period of voting for the first division will be 30 seconds. Thereafter, I will allow a voting period of one minute for the first division after a debate, and 30 seconds for all other divisions. I remind members that, if they wish to speak to any grouping, they should press their request-to-speak buttons when the group is announced.

Section 10—Circumstances in which conduct takes place without free agreement

The Presiding Officer: We start with group 1. Amendment 1, in the name of Margaret Curran, is the only amendment in the group.

Margaret Curran (Glasgow Bannside) (Lab): Amendment 1 is an important amendment that seeks to close a significant loophole in the bill. I express my thanks to Central Scotland Rape Crisis and Sexual Abuse Centre, Scottish Women’s Aid and the Equality and Human Rights Commission for their guidance and support towards the lodging of amendment 1.

It is important to remember the context in which I lodged amendment 1. Scotland’s conviction rate for rape of 3.7 per cent, which is a welcome improvement, is nonetheless still appalling and still the lowest across Europe; no doubt that will be welcomed by all. However, amendment 1 is necessary because it addresses the issue of prior consent. Just as it is not permissible to argue that consent was given when the victim was incapable of doing that, my amendment prohibits a defence that consent was given earlier. If, at the time of sexual activity, consent is not forthcoming, the activity is non-consensual. Amendment 1 ensures that there are no get-out clauses; the argument can no longer be made that consent was given earlier.

As members reflect on my amendment in reaching a decision on it, I ask them to consider the evidence from Rape Crisis Scotland. As we heard, some men go to bars and clubs to target, deliberately, women who are very drunk. We must close any loophole that such men can exploit. Furthermore, as Rape Crisis Scotland argued, the notion that someone can give advance consent to sex at 6 pm and that that consent should still apply at 1 o’clock in the morning when they are incapable of giving meaningful consent is absurd.

I welcome the support that has been expressed for amendment 1. I make it clear that in no way does it change the burden of proof; indeed, even with the provision, the burden of proof that the Crown must discharge is very high. As the Scottish Parliament information centre briefing indicates, amendment 1 is a significant amendment. I am sure that it will gain support across the chamber.

I move amendment 1.

Robert Brown (Glasgow) (LD): I know where Margaret Curran is coming from and I sympathise with what she is trying to do, but I want to be sure that she has got right this notoriously difficult area. She is rightly concerned about the principle of sexual autonomy and the problem of men who target drunk women for sex—indeed, all situations in which people take advantage of those who are inebriated. My fear is that, if we are not careful, her amendment may water down the overriding principle of sexual autonomy.

My understanding of the proposed definition is that it applies not only to rape but to sexual assaults of all types—it goes beyond the rape issue. I refer not only to sexual intercourse, but to sexual touching or physical contact of a sexual kind. An indictable crime would be committed when someone is incapable of consenting at the time of the activity because of the effect of alcohol or other substances. The effect of amendment 1 will be that free agreement to sexual activity is absent. It seems to do away with the overriding necessity for the Crown to establish that no consent was given to sex. If amendment 1 is agreed to, it will be a serious crime, always and in every circumstance, to have sex or sexual contact with a person who is drunk. That may be right; it is a possible alternative to what exists at present.

My question for Margaret Curran is this: am I right in believing that, when a husband and wife go out for the evening to celebrate their wedding anniversary and overdo the wine to the extent that one of them is drunk and incapable, the other commits the serious crime of rape if sex takes place? Could even an intimate cuddle in bed
amount to sexual assault because the drunk partner is legally incapable of giving consent? I am serious in making the point; it is an important one.

The proposal goes beyond the recommendation of the Scottish Law Commission. I accept that there is a possible qualification, given that section 10(1) states:

“free agreement to conduct is absent in the circumstances”

that are described, but it says, too, that is

"without prejudice to the generality of"

section 9, which is where the definition of free consent is given. I am not entirely clear about the effect of all that, but it may be to retain the need for the Crown to prove the absence of free agreement.

I have three questions for Margaret Curran and, more particularly, for the Cabinet Secretary for Justice. First, is it the intention that sexual intercourse, including sexual contact and touching, when one party is drunk and incapable, will be a
criminal offence in all circumstances whatever? That seems to be the effect of amendment 1. Secondly, will juries find it easier to convict on the basis of incapacity than on the basis of lack of consent? No definition of incapacity is given. Thirdly, is the overriding principle of free agreement still contained in the bill? What is the effect of the qualification in section 10(1) that all this is

"without prejudice to the generality of"

section 9? In short, does amendment 1 close the loophole that Margaret Curran thinks she has identified? If so, does it do that in a way that will not create more complexity and confusion in this difficult area?

Like others, Liberal Democrats are concerned that people who commit rape and other serious sexual crimes should be convicted. If we are reassured on these matters, we are prepared to support amendment 1. However, we have some doubts over the effect of amendment 1, as set out by Margaret Curran.

**Richard Baker (North East Scotland) (Lab):**

Clearly, the vast majority of the amendments that we will consider are non-controversial. Margaret Curran’s amendment 1 is important. We, on this side of the chamber, are very pleased that the Scottish Government will accept it.

As Robert Brown said, Margaret Curran’s amendment deals with the vexed issue of prior consent. I welcome whole-heartedly the fact that the cabinet secretary listened to the concerns that were raised not only by Margaret Curran in lodging the amendment, but by Rape Crisis Scotland and other organisations. They support the intention to, as the cabinet secretary himself put it,

“provide greater protection from unwanted sexual activity to those lacking the capacity to consent.”

That is an important principle, which amendment 1 guarantees. It will be for Margaret Curran and the cabinet secretary to answer Robert Brown’s questions directly, but we think that the amendment strikes the right balance.

I am not convinced that amendment 1 will have the effect on the bill that Robert Brown says it will have. It will still be available to prosecutors to make the most sensible decision. I think that we are reaching a consensus that the amendment is the right way forward. The issue is difficult, and I am pleased that the cabinet secretary sees the amendment as the best balance to strike. In the past few weeks, I have not exactly been fulsome in my praise for the cabinet secretary, but his approach to the bill has been constructive and his approach to the amendment has been the right one. Labour supports amendment 1 enthusiastically, and the amendment is also supported by Rape Crisis Scotland and the other organisations that have taken a great interest in the detail of the bill and its effect. I hope that it will receive support throughout Parliament today.

**Bill Aitken (Glasgow) (Con):** At this stage, the Conservatives have some reservations about amendment 1. However, perhaps for the first time in her life, Margaret Curran has the opportunity to persuade me. We will listen carefully to what she says when she winds up on the amendment.

Part 2 of the bill deals with consent and the circumstances in which conduct takes place without free agreement. The list of circumstances is not exhaustive; nor, for the purposes of simplicity, should it be, as that could result in loopholes being discovered in the act—we are all anxious to avoid that.

A great deal of time and effort has been expended on the bill in general and on this part in particular; I know that Margaret Curran accepts that. All members wish to ensure that the maximum protection is available, but if there is a loophole that requires to be plugged, it has not been effectively identified by the Scots Law Commission, the Scottish Government or the Justice Committee. The matter was certainly not canvassed at stage 2. If the law is to be successful—and we all hope that the bill, when passed into law, will be successful—we must ensure that it is workable and not unnecessarily complicated. The Conservatives wish to ensure that that is the case.

As Margaret Curran suggests, there are some people—usually men, I have to concede—who behave in a highly predatory manner and who
home in on women who are drunk or who are incapable because of drugs. The bill is clear that were such a person to home in on a particular woman, to take that woman to their home or even to premises outside, and to have sexual intercourse with her, that would be rape. The law, as outlined in the bill, is especially clear on that. What I suggest—and I seek reassurance from Margaret Curran on this point—is that, basically, the law would not revert back to the issue whereby the woman was incapable of giving consent. Therefore, what is the problem? The Crown can seek a conviction. The wording of the bill is clear that if the woman is incapable of consent because of drink or drugs, it is a case of rape or sexual assault, as defined in part 1.

At the same time, we must look in other directions and anticipate the difficulties. There are some difficulties that we will not overcome, for example juries; I will turn to that issue in the wider debate. We must be careful. The defence of reasonable belief, which is dealt with in part 2, would cover the danger of any injustices.

My initial view was that the law as defined in the bill is adequate. It is no great issue, perhaps, but I seek reassurance from Margaret Curran that our agreement to amendment 1 will not have the unintended consequence of making something a little bit more complicated than it needs to be.

Robert Brown: Mr Aitken suggests that section 12, which relates to reasonable belief, would be an overriding defence that would exist notwithstanding amendment 1. However, I am not sure that that is right. This is not about knowledge, or about consent in the normal sense of the word; this is about the key issue being the incapacity of a person at the time. There is at least a question mark over whether section 12 would apply.

15:00

Bill Aitken: That is an arguable point that, as well as the degree of incapacity of the person, will have to be determined by the court. I acknowledge the point, but I am reasonably relaxed about it. I look to Margaret Curran for wider reassurance.

Patrick Harvie (Glasgow) (Green): Like Margaret Curran, I acknowledge that certain men target, very deliberately and in a predatory way, individuals who are drunk and incapable. If the scope of amendment 1 is only in relation to sexual assault and rape, I agree that it is proportionate. However, like Robert Brown, I would like to ask a couple of questions that I hope Margaret Curran and the Cabinet Secretary for Justice will be able to address.

I am new to the bill, but it seems to me that the definition of circumstances in which free agreement is absent, which will be changed by amendment 1, relates to the whole of part 1 of the bill. That will include not only rape and sexual assault but sexual communication and other less serious issues. Am I correct in saying that amendment 1 will change the definition of consent in relation to sexual communication or the operation of recording equipment? Such things might be entirely appropriate and none of the law’s business in the context of an established relationship but might subsequently be the subject of a complaint if the relationship broke down. I am simply concerned about the scope of amendment 1 and about what its full impact will be if we agree to it.

The Cabinet Secretary for Justice (Kenny MacAskill): We are grateful to Margaret Curran for making her valuable points and for lodging amendment 1. We support the amendment. We acknowledge that this is a complicated area of law, and Mr Brown, Mr Harvie and Mr Aitken have acknowledged that too. However, we believe that the amendment is proportionate and balanced.

The central principle of the bill is that people should have the autonomy to give their consent but also to withdraw it. A person might be incapable because of alcohol or another substance, or because they are asleep, and the law should make it clear that the person cannot give consent while in that state. That is how the law operates at present, and it is our clear intention that there should be no lessening of the protection afforded to people who are incapable of giving consent.

Rape Crisis Scotland and others have expressed concern that the bill fails to protect the sexual autonomy of people who are incapable of consenting to sexual activity because of the effects of alcohol or any other substance. The Government agrees that the law should protect the vulnerable. Amendment 1 will amend section 10(2)(a) so that there can be no consent to sexual activity if the conduct occurs when the complainer is incapable of consent because of the effects of alcohol or any other substance. The Government agrees with that.

Furthermore, we consider that amendment 1 will bring greater clarity to the law. It will send a simple message: that sexual activity with a person who is so intoxicated that they are not capable of giving consent is criminal.

We are not suggesting that anyone who has consumed alcohol, or even anyone who is quite drunk, cannot consent to sexual activity. The provision that we are discussing is concerned only with protecting people who are so intoxicated as to have lost the capacity to choose whether to engage in sexual activity.

Patrick Harvie: Am I correct in thinking that amendment 1 changes the definition of consent in
relation to the sending of sexual communications, including text messages and phone calls? Will it become a criminal offence to send such messages, under section 6 in part 1, if the recipient is drunk?

Kenny MacAskill: That is a separate matter, and not the one that Margaret Curran has correctly raised. The convener of the Justice Committee rightly suggested that there was a lacuna. The issue was raised by Rape Crisis Scotland and it has been pursued by Margaret Curran. This is about protecting intoxicated people from what might happen to them in their vulnerability.

Text messaging and other matters are dealt with in the bill because we realise that sexual offences come in a variety of forms other than rape and sexual activities. However, what we are dealing with here relates specifically to consent to sexual activity. I cannot foresee any circumstances in which sending a text message to somebody who was comatose, for whatever reason, would be relevant to that. The amendment tidies up one specific matter. Mr Harvie raises issues of concern that are dealt with elsewhere in the bill but not in the amendment, which deals with other specific matters.

The purpose of the amendment is to protect those who are unable to consent. It is not to interfere with people’s opportunity to do whatever they choose when they have had too much to drink. Nevertheless, there are some people—as Mr Harvie has said—who target people and seek to use alcohol or other substances to get people into a state in which they cannot consent. Therefore, we fully agree with Margaret Curran.

Bill Aitken: Does the cabinet secretary agree that there is already a safety net in the bill and that the fact that a woman was incapable of making a decision is picked up earlier in the bill, so there is no requirement for the amendment?

Kenny MacAskill: We are having belt and braces, to be frank. Yes, there are other aspects of the bill that provide other protections, but the amendment deals with the specific matter of somebody being so incapable that they cannot consent. There are other protections in the bill relating to a myriad of matters from text messaging to the abuse of children, but we believe that Margaret Curran has made an important point and we are happy to support the amendment.

The Presiding Officer: I call Margaret Curran to wind up the debate on amendment 1.

Margaret Curran: I do not know whether it will be an achievement or a disaster if I persuade Bill Aitken to agree to the amendment, but I will give it a go anyway. I thank members for their comments on the amendment.

I should have said during my opening remarks that I pay tribute to the Justice Committee, the Government and all who have been involved with the bill. The process has been very thorough, and it is a tribute to that process that, at stage 3, we can still listen to people who have considerable expertise in the subject. I genuinely respect the thorough work that has been done by Bill Aitken and my colleagues on the committee. I also appreciate the work of the Government on the issue. I know from experience the thorough work that is done by bill teams to ensure that we do not agree to amendments that have unintended consequences such as those that Robert Brown and Bill Aitken were, quite properly, concerned about.

I think that the amendment is more narrowly drawn than Robert Brown has suggested. It deals with the very significant principle of consent to sexual activity. Even within marriage, people cannot assume that any kind of sexual activity is a given. That is the principle that I am trying to protect. The principle behind the amendment is that, if someone is so incapable that they cannot give their consent, it cannot be argued that prior consent applies. That is the core argument on which I ask members to focus their minds.

I take it that members have had the opportunity to look at the SPICe briefing, which I interpret as supporting my amendment. It sets out that my amendment is trying to make explicit what we intend the legislation to do. Judging by what I have heard from all members in the debate, none of us wants a get-out clause that would allow prior consent to be used as an excuse even by a very small minority of exploitative people. The amendment makes that explicit and ensures that there is no doubt about that.

I agree with what the minister said in response to Patrick Harvie’s questions. I cannot understand the circumstances in which text messaging would be used to cut across the amendment. I hope that I can offer reassurance on that.

Robert Brown: Will Margaret Curran respond to the practical question of what the Crown will have to prove if the amendment is agreed to? Will it still have to prove the absence of free agreement, or will the need for it to do that be taken away entirely by the amendment?

Margaret Curran: As I understand it, the Crown will still have to prove that free consent is not there. What my amendment does is disallow a defence of prior consent. I hope that that clarifies the matter.

Amendment 1 agreed to.
Section 20—Belief that child had attained the age of 13 years

The Presiding Officer: Amendment 2, in the name of the minister, is grouped with amendments 10, 21 to 47 and 69 to 71.

Kenny MacAskill: The amendments in the group deal with restrictions on the defence of mistaken belief as to age, which can be a defence to offences against children. Amendment 2 provides that section 20, which states that it shall not be a defence to an offence against a young child that the accused believed the child to have attained the age of 13 years, shall apply to the new offences against young children that were introduced at stage 2.

Amendment 10 is a technical amendment that is intended to ensure consistency in the wording of the provision in section 29. Amendments 21 to 47 amend schedule 1Z to add other sexual offences to the list of relevant sexual offences. If an accused person has previously been charged by the police with such an offence, that will preclude an accused from claiming the defence of reasonable mistaken belief as to age, when they are charged with an offence against an older child. The amendments have been lodged to take account of the commencement of the Sexual Offences (Northern Ireland) Order 2008 and to ensure that the schedule covers all sexual offences against children in Scotland, England and Wales and Northern Ireland, both current and historical.

Amendments 69 to 71 make consequential amendment to section 9 of the Criminal Law (Consolidation) (Scotland) Act 1995, which makes it an offence to permit a girl to use premises for intercourse. Section 9 of the 1995 act provides that an accused can make use of a defence of reasonable mistaken belief as to age, and sets out the restrictions on making use of that defence. The amendments provide that the defence under section 9 of the 1995 act cannot be used if an accused person has previously been charged by the police with a relevant sexual offence, or is subject to a risk of sexual harm order. That was done to make the defence in section 9 of the 1995 act subject to the same restrictions that are placed on the equivalent defence in section 29 of the bill.

I move amendment 2.

Bill Aitken: It is important to stress that a great deal of time was spent on consideration of this matter in respect of the way in which offences could be carried out against young people.

The amendments in this group simply highlight changes that the Government thought about making. In particular, I underline the point that the defence of mistaken belief is one that has to be fairly tight—one can make a mistake in these matters once; it is stretching credibility somewhat to say that the mistake can be made more frequently than that.

Amendment 2 agreed to.

Section 21—Having intercourse with an older child

The Deputy Presiding Officer (Trish Godman): Amendment 3, in the name of the minister, is grouped with amendments 4 to 9, 11 and 12.

Kenny MacAskill: These amendments are technical amendments to the provisions at section 30 and 30A concerning circumstances in which it is not possible to establish beyond doubt whether a child had or had not attained a particular age at the time when an offence was committed. Those amendments extend those deeming-of-age provisions to the new offences that were introduced at stage 2. The amendments also make minor changes to the drafting of the provisions for clarity and brevity, but they do not have a substantive effect on how the provisions will operate.

I move amendment 3.

Amendment 3 agreed to.

Section 21A—Engaging in penetrative sexual activity with or towards an older child

Amendment 4 moved—[Kenny MacAskill]—and agreed to.

Section 22—Engaging in sexual activity with or towards an older child

Amendment 5 moved—[Kenny MacAskill]—and agreed to.

Section 23—Causing an older child to participate in a sexual activity

Amendment 6 moved—[Kenny MacAskill]—and agreed to.

Section 24—Causing an older child to be present during a sexual activity

Amendment 7 moved—[Kenny MacAskill]—and agreed to.

Section 25—Causing an older child to look at a sexual image

Amendment 8 moved—[Kenny MacAskill]—and agreed to.

Section 26—Communicating indecently with an older child etc

Amendment 9 moved—[Kenny MacAskill]—and agreed to.
Section 29—Defences in relation to offences against older children

Amendment 10 moved—[Kenny MacAskill]—and agreed to.

Section 30—Special provision as regards failure to establish whether child has or has not attained certain ages

Amendments 11 and 12 moved—[Kenny MacAskill]—and agreed to.

After section 30A

15:15

The Deputy Presiding Officer: Group 4 is on a requirement to undertake an information and publicity campaign for children. Amendment 120, in the name of Robert Brown, is the only amendment in the group.

Robert Brown: Amendment 120 echoes an amendment that I lodged at stage 2 and withdrew on the condition that I would have discussions with the minister before stage 3.

Members will recall that the second half of part 4 of the bill is on sexual activity by or with older children—that is, those aged between 13 and 16. Members of all parties and many knowledgeable organisations and individuals who gave evidence on the bill were concerned, as we all are, about the high and increasing levels of underage sexual activity and pregnancy, the risk to sexual health that that involves, and the need for sound relationships that support stable and supportive families in the future. It is thought that one young person in three is sexually active before the age of 16, and there is a strong link between teenage pregnancy and levels of deprivation and vulnerability.

The background to the amendment is the fact that, when the Government prepared the bill, it did not consult young people to find out their views and attitudes on the matters that it covers, despite the obvious necessity for policy to be closely informed by what young people tend to think, how they react, and what circumstances have led to the issues being more problematic in Scotland than they are in most other European countries. Those criticisms were echoed by Scotland’s Commissioner for Children and Young People and a number of children’s organisations.

The Government responded to those criticisms, to a degree, at stage 2. The purpose of amendment 120 is to push the cabinet secretary a little further than he went before. The Government has undertaken to implement an age-appropriate information and publicity campaign about the bill, and the cabinet secretary said that the campaign will link in with plans to increase drop-in services for young people throughout Scotland. That is all well and good, although it would be helpful to hear more detail about that.

I am less satisfied with the further commitment that the cabinet secretary made at stage 2, which sounded more promising at the time than it reads on the record. He said that the Government would consult young people on the best way in which to communicate with them. That misses the point. The aim of the Justice Committee and, I hope, of the Parliament is to make a difference—to equip young people to make responsible choices about sex, to influence and if possible delay the age at which sexual activity begins, and to ensure that there is good access to services, perhaps with an emphasis on the needs of more vulnerable families. Everyone agrees that sexual relations under 16 are not a good thing and that they raise all sorts of difficult issues. The process must be informed by knowledge of young people’s attitudes to the bill and the motivation and drivers that influence them.

Johann Lamont (Glasgow Pollok) (Lab): Does the member agree that any such campaign should identify the distinctive experiences of boys and girls, and young women and young men? There is some evidence that young women are inappropriately pressured into being involved in sexual activity. Does the member agree that any such campaign must have at its heart an understanding of proper respect between boys and girls?

Robert Brown: I recognise that entirely. I thank Johann Lamont for making that point, which emphasises the main point that I am trying to make, which is that it is important to know what drives young men and women towards particular actions and situations.

The Terrence Higgins Trust expressed to me its fear that the change that the bill brings about in the liability to criminal prosecution of girls under 16 might send out mixed messages to young girls and discourage them from accessing services. That view was also expressed to the committee in evidence from witnesses.

Any information and communication campaign on such matters must be informed by the views of young people. We should consult them not just on the slightly condescending aspect of how to communicate with them but on the substantive matter of what they think about the issues. That is essential if the campaign is to be focused, targeted and successful. I will be happy to seek to withdraw the amendment if the cabinet secretary can assure me on that specific point.

I move amendment 120.
Richard Baker: We support Robert Brown’s proposal. The requirement to undertake an information and publicity campaign for children on their attitudes to part 4 of the bill was raised in the Justice Committee and in its report, not least by my colleague Cathie Craigie. I accept that the cabinet secretary has made a commitment to undertake such a campaign and to provide age-appropriate materials, but amendment 120 is still beneficial. If it leads to further reassurances on the point and more detail on the Scottish Government’s plans for a campaign, that will be welcome.

The issue is particularly important because there was such a focus on it during the committee’s deliberations and in the stage 1 debate, as Robert Brown pointed out in some detail, and members throughout the chamber have stressed that young people need education and support on the issues. Notwithstanding the questions that the cabinet secretary raised in his letter to Margaret Curran, about the detail of implementation of the amendment, it is pretty clear how its intention would be achieved.

I do not doubt that such a campaign will be forthcoming, but I am sure that the chamber will be further reassured by details of what it will cover and when it will take place. At this stage, though, we are minded to support amendment 120, which addresses a particular concern for the committee.

The Deputy Presiding Officer: Before I call Bill Aitken, I propose to exercise my power under rule 9.8.4A(a) and (c) to extend the time limit for debating groups 1 to 5 to allow this group to be debated and to allow members to speak to the amendments in group 5.

Bill Aitken: As Robert Brown stated, he quite properly canvassed this issue at stage 2, although he did not press his amendment at the time.

Mr Brown makes an arguable case. It is clear that the wider we consult on and publicise this matter, the better, given, as he has pointed out, Scotland’s significant problem of underage pregnancies and sexually transmitted disease. Unfortunately, when one looks at the practicalities of the matter, it is difficult to see how any kind of balanced consultation and information exchange could be carried out. We also have to bear in mind the cost factor.

Although the case for amendment 120 is arguable, I do not think that at the end of the day it would be workable, and we are not inclined to support it.

Cathie Craigie (Cumbernauld and Kilsyth) (Lab): The Parliament will be aware of the Justice Committee’s concerns about the consultation process for this bill, particularly the lack of consultation with young people. How the Government has gone about this surely cannot be in line with best practice or meet the requirements of the United Nations Convention on the Rights of the Child, to which the Scottish Government claims to be committed. When, during the bill’s committee stages, I asked the cabinet secretary to consult young people and perhaps to extend the time between stages 2 and 3 to allow such a consultation to take place, he declined.

Amendment 120, which I am minded to support, is the second-best option, given that the consultation has not been carried out before we pass the bill. However, it is important that we consult young people in an age-appropriate way. After all, we will never know what encourages some young people to engage in underage sex and others to delay sexual activity unless we ask them about it.

Stewart Maxwell (West of Scotland) (SNP): I have no objection to consulting young people; indeed, I think that the whole chamber agrees with such a move. However, does the member not recall that, at stage 2, Robert Brown decided to withdraw his amendment and reconsider the matter for stage 3 when the cabinet secretary made a commitment to consult young people? I think that that is the appropriate way of dealing with this issue. Surely putting a provision in the bill without any financial commitment or even context does not set a helpful precedent.

Cathie Craigie: I realise that amendment 120 is not the best way of proceeding with this matter, but we are in this situation because the Government failed to consult young people. I remind Mr Maxwell that, although the Scottish Government is committed to the UN Convention on the Rights of the Child, it did not meet that commitment. I am therefore concerned that its commitment to consult young people will also not be met. Amendment 120 might ensure that the Government carries out this consultation, gets to the bottom of young people’s needs and tackles the very difficult situations that arise not only for young people but for their families as a result of underage sex.

Kenny MacAskill: I fully appreciate Robert Brown’s comments and will do my best to reassure him that the issue that has been raised is a matter of concern and that how we address and discuss it with our young people is important.

However, Stewart Maxwell has made an appropriate point. It is difficult to deal with the matter in the bill, when we are dealing with specific matters relating to sexual offences, or even for me to be able to provide a reassurance in the heat of a debate. However, I can give a general view on the Government’s general direction of travel, which is that we will ensure that we deal with the matter.
Amendment 120 seeks to impose two obligations on the Government that it would require to discharge before part 4 of the bill is commenced. The first obligation would be to consult under-18s on their attitudes to part 4 of the bill; the second would be to “undertake an information and publicity campaign about this Part.”

Both obligations must be carried out before part 4 of the bill is commenced. The motive behind the amendment is to be applauded, but there are considerable flaws in both those aspects, which is why we urge members to vote against the amendment.

Robert Brown: The minister makes valid points, but can he give me any reassurance that young people’s attitudes will be considered as part of the information campaign that he will undertake? We need to understand such things; that is the motivation behind the amendment. If the minister can give me a degree of satisfaction that young people’s attitudes will be considered in his consultation, that will be satisfactory.

Kenny MacAskill: Absolutely. I hope that Robert Brown will take what I am going to say in the spirit in which it is meant. A requirement to consult children on their attitudes to part 4 of the bill after it has passed into law seems to be of very limited value. We agree that it would be helpful to consult children and young people to help us to decide how best we should progress the bill, but their attitudes to part 4 should not be the focus. It would be much more productive to engage with children and young people on how best we can communicate with them about the issues that the bill deals with—certainly in part 4, but not exclusively in that part. The bill deals with other issues that will be relevant to children and young people, particularly its provisions on consent and positions of trust.

Margo MacDonald (Lothians) (Ind): Before the minister proceeds to the next issue, can he assure me that the Government has done what it can do to engage the makers of videos, the literature that young people read and so on? Those things carry the culture that the Government is seeking to change with a piece of legislation.

Kenny MacAskill: We are doing what we can. The Government has made it clear that we believe that the bill, as amended by Margaret Curran, Bill Aitken and perhaps by others, is appropriate and that we should have an appropriate legislative base. However, we would delude ourselves if we thought that the problem in Scotland would be entirely solved by the legislative base. We must change the culture and attitudes that are prevalent among far too many people, albeit that those people represent a minority of our population. It is a journey.

Johann Lamont: I again raise the point that I raised with Robert Brown. Will the cabinet secretary confirm that any such campaign will recognise the distinctive experiences of boys and girls and that some attitudes of young men towards young girls must be addressed? If girls are to be kept safe, some boys’ attitudes that have perhaps been prevalent in the past must be challenged.

Kenny MacAskill: Absolutely. There is a requirement on the Government under the European convention on human rights to make aspects of the law gender neutral. Equally, it is clear that young females face different problems. The pressure that has been mentioned is clearly one matter. The issue is how to implement things—through the police, the prosecution or the health service, for example. We need to raise awareness, change attitudes, do what we can to protect the vulnerable, and have the legislative basis to ensure that we can prosecute predators and those who act against the will of our Parliament and our laws.

As I explained when Mr Brown lodged his amendment at stage 2, our response to the committee’s stage 1 report on the bill confirmed that “The Government intends to undertake an information and publicity campaign following enactment of the Bill and that this will include age-appropriate material aimed at young people.”

I am happy to confirm that that continues to be our intention. As I have said previously, as part of our planning for that campaign, we intend to consult children and young people on the most effective way in which to communicate with them on the important issues that the bill deals with and, indeed, on other matters that are, as Margo MacDonald suggested, equally important in terms of getting the message across.

I am happy to repeat our earlier commitment that the Government will undertake a publicity campaign before commencement of part 4 of the bill. I am also happy to reiterate our commitment that children and young people will be consulted on the best way for that campaign to communicate with children on part 4.

Finally, we consider that there are technical defects in the drafting of amendment 120. It does not make clear what kind of consultation with children and young people is required. It is also unclear whether ministers are required to consult every child under 18 in Scotland. If they are, can very young children be said to have formed attitudes about the content of part 4? If the intention is that consultation should be limited to
certain age groups, the amendment does not set a lower age limit on children who should be consulted.

15:30

The requirement for “appropriate” consultation does not appear unreasonable, but it does not answer the question of what appropriate consultation is. In addition, amendment 120 does not set out what ministers should do following such a consultation. In effect, that means that the duty to consult is somewhat meaningless. As mentioned, a statutory requirement to consult children before the commencement of part 4 would not appear to serve any purpose, in light of the fact that the law, which reflects the will of the Parliament, will already have been passed.

I acknowledge the points that Robert Brown and other members have made. What matters is that we communicate to our young people and children, whether they are being pressured to engage in such activity or are doing it out of foolhardiness or whatever. We need to get that right. I give Robert Brown the undertaking that we will seek to ensure that the communication is age appropriate. That is perhaps not best dealt with by me. We have people who are better qualified to ensure that we have the appropriate vehicles and mechanisms. However, I give Robert Brown that reassurance.

Robert Brown: I confess to being a bit disappointed with the cabinet secretary’s response. I went out of my way to say that we must not simply consult young people but must have a bit of input from them. The process should be not only about us telling them but about them telling us and informing the communications that then take place. Unfortunately, I did not get a sense from the cabinet secretary that that is the intention. I accept that the detail of the campaign will be worked out by people who are more expert in the field than he is. I take that as a reasonable assurance on the matter. There is an element of good will.

I accept Stewart Maxwell’s point—perhaps not for general application, but in the context of the bill—that including measures on an information and publicity campaign is not ultimately the appropriate approach. That campaign should take place before the commencement of the act. I take note of that point.

Against that background, I seek to withdraw my amendment, but I do so with reluctance, as I had hoped to get a little more out of the cabinet secretary. I hope that he will reflect on the debate and discuss with his advisers some of the points that have been made in it. I hope that he takes account of the views of the children’s groups and others who know about the issues. They know how important it is that the Government does not simply communicate to young people, but hears their voice.

Amendment 120, by agreement, withdrawn.

Section 37—Penalties

The Deputy Presiding Officer (Trish Godman): Group 5 is on offences by non-natural persons. Amendment 13, in the name of the minister, is grouped with amendments 14 and 19.

Kenny MacAskill: Amendments 13, 14 and 19 deal with offences by non-natural persons, that is, companies. Although the nature of the offences in the bill are such that they cannot normally be committed by a non-natural person as the principal actor, a non-natural person could be found guilty of aiding and abetting or indeed conspiring to commit the offences that are contained in the bill. For example, as sexual offences against children are extra-territorial in extent, a company that is involved in the arrangement or facilitation of child sex tourism might be art and part guilty of offences in the bill. The amendments will ensure that we are fully compliant with our international obligations to establish the liability of persons, including non-natural persons, who are guilty of certain behaviour concerning the exploitation and abuse of children.

It is not possible to imprison or impose a community penalty on a non-natural person. Amendments 13 and 14 will ensure that it will be possible to impose a fine on a non-natural person, such as a corporate body or partnership, that is convicted of an offence for which a fine cannot be the sole penalty that is imposed on an individual. Amendment 19 provides that, if any offence in the bill is committed by a non-natural person with the consent or connivance of—or because of neglect on the part of—any director, manager, secretary, partner in a partnership, trustee of a trust, member of an unincorporated association or other similar non-natural person, including any person who purports to act in that capacity, that individual, as well as the non-natural person, commits the offence and may be liable to be prosecuted and punished accordingly.

I move amendment 13.

Amendment 13 agreed to.

The Deputy Presiding Officer: We come to group 6, which is on penalties. Amendment 121, in the name of Robert Brown, is grouped with amendments 122, 124 and 125.

Robert Brown: These amendments are intended to deal with a loophole that was inadvertently created at stage 2 and identified in the SPIce briefing on the matter. At stage 2, the
Justice Committee rightly took the view that the penalty on conviction of a rape or serious sexual assault could not conceivably include the option of a fine by itself. Accordingly, the option of a fine was removed for rape, sexual assault with an implement and sexual assault, following conviction on indictment. A fine still remains possible for a more minor summary conviction in the sheriff court for sexual assault, that is entirely right, because sexual assault covers a wide range of situations from extremely serious and harrowing attacks to more trivial matters.

**Paul Martin (Glasgow Springburn) (Lab):** Will Robert Brown confirm what he means by “trivial matters” in relation to sexual assault?

**Robert Brown:** I will deal with that in a second.

Another situation might occasionally occur. Someone who is indicted before a jury on a serious sexual assault charge, or charges, which if proved, would justify a prison sentence might be acquitted of the serious aspects of the charge, or the serious charges, and convicted only of a relatively minor matter. In that event, a fine might indeed be an appropriate disposal. If we fail to give the court that option, the judge or sheriff might in practice be left in the invidious position of either imposing a prison sentence, which is clearly inappropriate for the offence, or admonishing the individual.

I will provide an example to answer Paul Martin’s question. Suppose that a 21-year-old man is indicted before a jury for a significant sexual assault on an 18-year-old girl at a party. In the event that the evidence does not stand up fully and he is convicted only of kissing the girl against her will to her considerable upset, a fine might be manifestly the proper penalty. I am sure that no one in the chamber—I hope not even Paul Martin—believes that that should lead to a prison sentence. Equally, however, I do not think that anyone in the chamber would think that such a person should get off scot-free.

Similar considerations could apply to a 17-year-old convicted in similar circumstances of an offence against a 15-year-old, which is why the same principle would be applied, by amendment 122, to the offence of sexual assault on a child.

Let me be absolutely clear that I am not suggesting—I am not imposing this on anybody—that a fine should be the outcome for one of the situations that I have described. I am saying that there should be a judicial option of a fine in a situation in which a fine would have been available if the individual had been charged summarily in the first place. It should be exactly the same when a person is convicted of a more minor offence. Such situations will not occur often, but they will occur and the court has to have the appropriate tools to deal with them if justice is to be done.

I reiterate that, if the option of a fine was not put back into the bill, the judge could possibly have only the option of a prison sentence or an admonition and absolute discharge. I am sure that that was not the intention of the member who moved the stage 2 amendment.

**Paul Martin:** During stage 2, I said that I thought that the Government had got it right by lodging amendments to ensure that a fine may not be imposed as the sole penalty when an accused is convicted of rape, sexual assault or sexual assault by penetration or rape of a young child. I do not say this often, but the Government got it right on that occasion, and we were satisfied with its approach during stage 2.

Robert Brown’s attempt to reverse that, which the Government supports, is wrong. In effect, those who have been charged on indictment with sexually assaulting a child could get a fine, which is beyond belief.

**Robert Brown:** Paul Martin asked me for an example and I gave him the example of a 17-year-old girl being forcibly kissed by a man at a party. In that case, the conviction would be for sexual assault of a child. Does he believe that there ought to be a mandatory prison sentence as a consequence of such a conviction?

**Paul Martin:** I think that that is a serious offence. It is sexual assault and it demeans the girl. Robert Brown provides a minor example of something that can be a serious sexual assault, for which the possibility of a sentence and a fine is required. I do not think that Robert Brown has provided a very clear example. We believe that we should proceed on the basis of the amendments that were agreed to at stage 2.

**The Deputy Presiding Officer:** I must again exercise my power under rule 9.8.4A (a) and (c) of standing orders to extend the next time limit, to allow this group to be debated and to allow members who are entitled to speak on the next group to do so.

**Bill Aitken:** After the bill is passed at 5 o’clock, as I am certain it will be, the Crown’s attitude will be more and more to prosecute offences under the new act. Much of the relevant common law will no longer apply. Under existing common law, the full gamut of court disposals is available for such offences, including a fine. The fact is that—sadly—we got it wrong at stage 2. I confess that I should perhaps have been clearer about the unintended consequence, which is precisely as described by Robert Brown.

**Richard Baker:** Will the member take an intervention?
Bill Aitken: Unfortunately, I do not have time to take an intervention.

In the vast majority of cases that are indicted for such offences, a lengthy prison sentence will be the only appropriate disposal. However, when the judge or the jury shreds the indictment so that only a minuscule part of it is left, the ability to impose a monetary penalty will be important. The amendments will allow that disposal to be available, which is appropriate.

The Deputy Presiding Officer: I prevented Mr Baker from speaking, so he can have one second for an intervention, to which Mr Aitken can respond.

Richard Baker: The key point for us is that, whatever the intention behind the amendments, they would have the effect that conviction for a sexual assault or a sexual assault on a child that was prosecuted on indictment could result in the imposition of a fine. We feel strongly that that would be unsatisfactory.

Bill Aitken: The answer is straightforward. When an indictment is served, it could concern a serious matter for which only imprisonment would be appropriate. The issue is what would happen when only a minor part of the indictment was left. At that stage, a fine would be appropriate.

Kenny MacAskill: I thank Robert Brown for explaining his purpose in lodging amendments 121, 122, 124 and 125, and the Justice Committee’s convener for his lucid explanation. I am sure that every member agrees with the committee’s stage 1 report that a fine is not an appropriate sole penalty for a person who is convicted of a serious sexual offence. That is why we lodged stage 2 amendments to ensure that conviction for a serious sexual offence, the option of a fine alone will continue to result in a tough sentence and not just in a fine.

We seek to address the situation, which Mr Brown dealt with lucidly. The intention is to make sentencing options available to the court, as under the current common law. The bill will consolidate and improve the law on sexual offences and will deal with the matter that Margaret Curran raised. We do not want the law of unintended consequences, which was raised in relation to Margaret Curran’s amendment 1.

If the amendments in the group were not agreed to, we would allow the unintended consequence of not making the option of a fine available, as elucidated by Mr Aitken and Mr Brown. Jail will be available and should be the option in most instances for those who are tried on indictment. However, when the offence is reduced and when the wisdom of hindsight shows that it should have been dealt with in summary proceedings, the court should be in the position that currently applies.

Bill Aitken: I make it clear that the bill will give the High Court the power to jail for life anyone whom a jury convicts of rape or sexual assault. We would expect any conviction for a serious sexual assault to result in a tough sentence and not just in a fine. It is simply the case that no substantive evidence suggests that that will not happen.

Paul Martin: I will raise a technical point. If Robert Brown’s amendments were agreed to, would it be possible for a sexual assault on a child to result in only a fine?

Kenny MacAskill: The position is clear. For the avoidance of doubt, I will run through again the list that I gave earlier—it relates to convictions of persons tried on indictment for rape, rape of a young child, sexual assault by penetration, sexual assault on a young child by penetration, sexual assault and sexual assault on a young child.

We seek to address the situation, which Mr Brown dealt with lucidly. The intention is to make sentencing options available to the court, as under the current common law. The bill will consolidate and improve the law on sexual offences and will deal with the matter that Margaret Curran raised. We do not want the law of unintended consequences, which was raised in relation to Margaret Curran’s amendment 1.

If the amendments in the group were not agreed to, we would allow the unintended consequence of not making the option of a fine available, as elucidated by Mr Aitken and Mr Brown. Jail will be available and should be the option in most instances for those who are tried on indictment. However, when the offence is reduced and when the wisdom of hindsight shows that it should have been dealt with in summary proceedings, the court should be in the position that currently applies.

15:45

The Deputy Presiding Officer: In winding up the debate, Robert Brown should state whether he will press or withdraw amendment 121.

Robert Brown: Let me say immediately that amendment 121 deals not with an issue that I have invented at the back of my mind but with a loophole that was identified—and rightly so—by parliamentary researchers. Across the parties in the chamber—apart from, amazingly, the Labour Party—there is broad acceptance that the amendment is necessary. Let me also say that the amendment would make no change to the position that was agreed to at stage 2 regarding rape or sexual assault with an implement. For such offences, the option of a fine alone will continue to be available.

I thought that I had given a clear example, which even the smallest mind could understand, of the sort of offence that should not result in a prison sentence. I gave that example to illustrate why it is important that the option of a fine should be
available to our judges. Amendment 121 would not require judges to impose such a sentence. In the limited circumstances in which the conviction before the High Court or the sheriff court with a jury—

Bill Aitken: Does Robert Brown agree that, in the circumstances that pertain today, the common law under which such offences are indicted provides for the facility of a fine? Does he agree, therefore, that the amendment would in effect result in no change?

Robert Brown: I agree absolutely, although I point out that it will not now be possible to impose a fine alone for rape or sexual assault with an implement.

All members accept that sexual assault can range from extremely serious offences, for which long prison sentences are manifestly appropriate, to relatively much more trivial and insubstantial offences, which are nevertheless criminal and so must be marked by a penalty, for which a fine should be one option that is available to the court. I am not sure whether Paul Martin understands that the options that will be available to the court—

Paul Martin rose—

Robert Brown: Let me finish the point, if I may.

If amendment 121 is not agreed to, the options available to the court will be limited to prison, probation, community penalties, or admonition and absolute discharge. The court will be able to admonish an accused. Amendment 121 will add to those options the much more relevant option of imposing a fine.

As I said before, few people would consider a custodial sentence appropriate for minor offences such as a boy kissing a girl against her will at a party. Under the bill as it stands, the only option would be to send such an offender to prison or to let him off scot-free. There will be cases in which those found guilty of such minor sexual assaults deserve more than a slap on the wrist, but prison might not be the right punishment. People who commit minor sexual assaults can develop into those who commit more serious sex crimes later in life, so it must be clear to offenders that sex crime will be punished. That should act as a deterrent. That is why we are pushing for fines to be available as a separate penalty.

Paul Martin: Robert Brown raises a genuine challenge in highlighting the issue of the forcible kiss that he referred to, but we should also look at the other end of the spectrum. If amendment 121 is agreed to, it will be technically possible for the sexual assault of a child to result in a fine. Surely we should deal with that loophole, which would clearly exist.

Robert Brown: It is also technically possible for someone who is charged on indictment with a serious assault—sexual or otherwise—to end up with an admonition. That is the point that is being made.

It is very important that our judges are provided with the appropriate penalties and are not unduly restricted in the sentencing options for those who are found guilty of sexual assault. Amendment 121 will deal with a loophole that needs to be closed.

I have some difficulty in understanding where the Labour Party is coming from on the issue. I know that Labour members have been briefing the press all through the night about the issue, on which they seem to be very exercised for some reason. The reality is that amendment 121 is a reasonable, technical, sensible amendment that will put a conviction on indictment in those limited circumstances in the same position as a conviction on summary charge for the offence of sexual assault or sexual assault on a child. Having been given some good examples, I think that members can now make up their own minds about the matter.

I insist on amendment 121.

The Deputy Presiding Officer: The question is, that amendment 121 be agreed to. Are we agreed?

Members: No.

The Deputy Presiding Officer: There will be a division. As this is the first division, there will be a five-minute suspension.

15:49

Meeting suspended.

15:54

On resuming—

The Deputy Presiding Officer: We move to the division on amendment 121.

For

Adam, Brian (Aberdeen North) (SNP)
Aitken, Bill (Glasgow) (Con)
Allan, Alasdair (Western Isles) (SNP)
Brocklebank, Ted (Mid Scotland and Fife) (Con)
Brown, Gavin (Lothians) (Con)
Brown, Keith (Ochil) (SNP)
Brown, Robert (Glasgow) (LD)
Brownlee, Derek (South of Scotland) (Con)
Campbell, Aileen (South of Scotland) (SNP)
Carlaw, Jackson (West of Scotland) (Con)
Coffey, Willie (Kilmarnock and Loudoun) (SNP)
Constance, Angela (Livingston) (SNP)
Crawford, Bruce (Stirling) (SNP)
Cunningham, Roseanna (Perth) (SNP)
Don, Nigel (North East Scotland) (SNP)
Doris, Bob (Glasgow) (SNP)
Ewing, Fergus (Inverness East, Nairn and Lochaber) (SNP)
Amendment 121 agreed to.

The Deputy Presiding Officer: I invite a motion without notice to extend the time limit for the next debate by 15 minutes, to allow proceedings on amendments to be concluded and to allow discussion on this important bill.

Motion moved,

That, under Rule 9.8.5A, the debate on Groups 6 to 9 be extended by 15 minutes.—[Bruce Crawford.]

Motion agreed to.

Amendment 122 moved—[Robert Brown].

The Deputy Presiding Officer: The question is, that amendment 122 be agreed to. Are we agreed?

Members: No.

The Deputy Presiding Officer: There will be a division.

FOR

Adam, Brian (Aberdeen North) (SNP)
Aitken, Bill (Glasgow) (Con)
Allan, Alasdair (Western Isles) (SNP)
Brocklebank, Ted (Mid Scotland and Fife) (Con)
Brown, Gavin (Lothians) (Con)
Brown, Keith (Ochil) (SNP)

AGAINST

Alexander, Ms Wendy (Paisley North) (Lab)
Bailie, Jackie (Dumbarton) (Lab)
Baker, Claire (Mid Scotland and Fife) (Lab)
Baker, Richard (North East Scotland) (Lab)
Boyack, Sarah (Edinburgh Central) (Lab)
Brankin, Rhona (Midlothian) (Lab)
Butler, Bill (Glasgow Anniesland) (Lab)
Chisholm, Malcolm (Edinburgh North and Leith) (Lab)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Curran, Margaret (Glasgow Baillieston) (Lab)
Eadie, Helen (Dunfermline East) (Lab)
Ferguson, Patricia (Glasgow Maryhill) (Lab)
Foulkes, George (Lothians) (Lab)
Gillon, Karen (Clydesdale) (Lab)
Gien, Marilyn (North East Scotland) (Lab)
Gordon, Charlie (Glasgow Cathcart) (Lab)
Grant, Rhoda (Highlands and Islands) (Lab)
Gray, Iain (East Lothian) (Lab)
Henry, Hugh (Paisley South) (Lab)
Jamieson, Cathy (Carrick, Cumnock and Doon Valley) (Lab)
Kelly, James (Glasgow Rutherglen) (Lab)
Kerr, Andy (East Kilbride) (Lab)
Lamont, Johann (Glasgow Pollok) (Lab)
Livingstone, Marilyn (Kirkcaldy) (Lab)
MacDonald, Lewis (Aberdeen Central) (Lab)
Macintosh, Ken (Eastwood) (Lab)
Martin, Paul (Glasgow Springburn) (Lab)
McAveety, Mr Frank (Glasgow Shettleston) (Lab)
McCabe, Tom (Hamilton South) (Lab)
McConnell, Jack (Motherwell and Wishaw) (Lab)
McManus, Michael (Hamilton North and Bellshill) (SNP)
McNeil, Duncan (Greenock and Inverclyde) (Lab)
McNeill, Pauline (Glasgow Kelvin) (Lab)
McNulty, Des (Clydebank and Milngavie) (Lab)
Mulligan, Mary (Linlithgow) (Lab)
Murray, Elaine (Dumfries) (Lab)
Oldfather, Irene (Cunninghame South) (Lab)
Park, John (Mid Scotland and Fife) (Lab)
Peacock, Peter (Highlands and Islands) (Lab)
Peatte, Cathy (Falkirk East) (Lab)
Simpson, Dr Richard (Mid Scotland and Fife) (Lab)
Smith, Elaine (Coatbridge and Chryston) (Lab)
Stewart, David (Highlands and Islands) (Lab)
Whitefield, Karen (Airdrie and Shotts) (Lab)
Brown, Robert (Glasgow) (LD)
Brownlee, Derek (South of Scotland) (Con)
Campbell, Aileen (South of Scotland) (SNP)
Carlaw, Jackson (West of Scotland) (Con)
Coffey, Willie (Kilmarnock and Loudoun) (SNP)
Constance, Angela (Livingston) (SNP)
Crawford, Bruce (Stirling) (SNP)
Cunningham, Roseanna (Perth) (SNP)
Don, Nigel (North East Scotland) (SNP)
Doris, Bob (Glasgow) (SNP)
Ewing, Fergus (Inverness East, Nairn and Lochaber) (SNP)
Fabian, Linda (Central Scotland) (SNP)
Finnie, Ross (West of Scotland) (LD)
FitzPatrick, Joe (Dundee West) (SNP)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Gibson, Kenneth (Cunninghame North) (SNP)
Gibson, Rob (Highlands and Islands) (SNP)
Goldie, Annabel (West of Scotland) (Con)
Graeme, Christine (South of Scotland) (SNP)
Harper, Robin (Lothians) (Green)
Harvie, Christopher (Mid Scotland and Fife) (SNP)
Harvie, Patrick (Glasgow) (Green)
Hepburn, Jamie (Central Scotland) (SNP)
Hume, Jim (South of Scotland) (LD)
Hyslop, Fiona (Lothians) (SNP)
Ingram, Adam (South of Scotland) (SNP)
Johnstone, Alex (North East Scotland) (Con)
Kidd, Bill (Glasgow) (SNP)
Lamont, John (Roxburgh and Berwickshire) (Con)
Lochhead, Richard (Moray) (SNP)
MacAskill, Kenny (Edinburgh East and Musselburgh) (SNP)
MacDonald, Margo (Lothians) (Ind)
Marwick, Tricia (Central Fife) (SNP)
Mather, Jim (Argyll and Bute) (SNP)
Matheson, Michael (Falkirk West) (SNP)
Maxwell, Stewart (West of Scotland) (SNP)
Mcmynnes, Alison (North East Scotland) (LD)
Mckee, Ian (Lothians) (SNP)
McKelvie, Christina (Central Scotland) (SNP)
McLaughlin, Anne (Glasgow) (SNP)
McLetchie, David (Edinburgh Pentlands) (Con)
McMillan, Stuart (West of Scotland) (SNP)
Milne, Nanette (North East Scotland) (Con)
Mitchell, Margaret (Central Scotland) (Con)
Neil, Alex (Central Scotland) (SNP)
O'Donnell, Hugh (Central Scotland) (LD)
Paterson, Gill (West of Scotland) (SNP)
Pringle, Mike (Edinburgh South) (LD)
Purvis, Jeremy (Tweeddale, Ettrick and Lauderdale) (LD)
Robison, Shona (Dundee East) (SNP)
Rumbles, Mike (West Aberdeenshire and Kincardine) (LD)
Russell, Michael (South of Scotland) (SNP)
Scanlon, Mary (Highlands and Islands) (Con)
Scott, John (Ayr) (Con)
Scott, Tavish (Shetland) (LD)
Smith, Elizabeth (Mid Scotland and Fife) (Con)
Smith, Iain (North East Fife) (LD)
Smith, Margaret (Edinburgh West) (LD)
Somerville, Shirley-Anne (Lothians) (SNP)
Stephen, Nicol (Aberdeen South) (LD)
Stevenson, Stewart (Banff and Buchan) (SNP)
Stone, Jamie (Caithness, Sutherland and Easter Ross) (LD)
Sturgeon, Nicola (Glasgow Govan) (SNP)
Swinney, John (North Tayside) (SNP)
Thompson, Dave (Highlands and Islands) (SNP)
Tolson, Jim (Dunfermline West) (LD)
Watt, Maureen (North East Scotland) (SNP)
Welsh, Andrew (Angus) (SNP)
White, Sandra (Glasgow) (SNP)
Wilson, Bill (West of Scotland) (SNP)
Wilson, John (Central Scotland) (SNP)

AGAINST
Alexander, Mrs Wendy (Paisley North) (Lab)
Bailie, Jackie (Dumbarton) (Lab)
Baker, Claire (Mid Scotland and Fife) (Lab)
Baker, Richard (North East Scotland) (Lab)
Boyack, Sarah (Edinburgh Central) (Lab)
Brankin, Rhona (Midlothian) (Lab)
Butler, Bill (Glasgow Anniesland) (Lab)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Carruthers, Margaret (Glasgow Baillieston) (Lab)
Craig, Helen (Dunfermline East) (Lab)
Ferguson, Patricia (Glasgow Maryhill) (Lab)
Fouke, George (Lothians) (Lab)
Gillon, Karen (Clydesdale) (Lab)
Glen, Marilyn (North East Scotland) (Lab)
Gordon, Charlie (Glasgow Cathcart) (Lab)
Grant, Rhoda (Highlands and Islands) (Lab)
Gray, Iain (East Lothian) (Lab)
Henry, Hugh (Paisley South) (Lab)
Jamieson, Cathy (Carrick, Cumnock and Doon Valley) (Lab)
Kelly, James (Glasgow Rutherglen) (Lab)
Kerr, Andy (East Kilbride) (Lab)
Lamont, Johann (Glasgow Pollok) (Lab)
Livingston, Marilyn (Kirkcaldy) (Lab)
Macdonald, Lewis (Aberdeen Central) (Lab)
Macintosh, Ken (Eastwood) (Lab)
Martin, Paul (Glasgow Springburn) (Lab)
McAveety, Mr Frank (Glasgow Shettleston) (Lab)
McCabe, Tom (Hamilton South) (Lab)
McConnell, Jack (Motherwell and Wishaw) (Lab)
McGrigor, Jamie (Highlands and Islands) (Con)
McMahon, Michael (Hamilton North and Bellshill) (Lab)
McNeill, Pauline (Glasgow Kelvin) (Lab)
McIntyre, Des (Clydebank and Milngavie) (Lab)
Mulligan, Mary (Linlithgow) (Lab)
Murray, Elaine (Dumfries) (Lab)
Oldfather, Irene (Cunninghame South) (Lab)
Park, John (Mid Scotland and Fife) (Lab)
Peacock, Peter (Highlands and Islands) (Lab)
Peattie, Cathy (Falkirk East) (Lab)
Simpson, Dr Richard (Mid Scotland and Fife) (Lab)
Smith, Elaine (Coatbridge and Chryston) (Lab)
Stewart, David (Highlands and Islands) (Lab)
Whitefield, Karen (Airdrie and Shotts) (Lab)
Whitton, David (Strathkelvin and Bearsden) (Lab)

The Deputy Presiding Officer: The result of the division is: For 77, Against 44, Abstentions 0.
Amendment 122 agreed to.
Amendment 14 moved—[Kenny MacAskill]—and agreed to.

Section 38—Power to convict for offence other than that charged

The Deputy Presiding Officer: Group 7 is on alternative offences. Amendment 15, in the name of the minister, is grouped with amendments 16 to 18 and 48 to 68.

Kenny MacAskill: The amendments in this group are minor, technical amendments that are consequential to changes that were made to the bill at stage 2. Amendments 15 to 18 will amend the provisions in section 38, which provide a court with powers to convict an accused of an offence other than that charged, to take account of the
new offences that were introduced at stage 2. Amendments 48 to 68 will amend schedule 2, which lists the alternative verdicts that are available in respect of the offences that are contained in the bill, again in consequence of the new offences that were introduced at stage 2.

I move amendment 15.

The Deputy Presiding Officer: May I ask Mr Tom McCabe why he pressed his request-to-speak button? I cannot see him in the chamber.

Tom McCabe (Hamilton South) (Lab): I did not know that I had pressed it.

The Deputy Presiding Officer: Mr Tom McCabe made a mistake and then sat with the Tories, which was very helpful of him. [Laughter.]

Amendment 15 agreed to.

Amendments 16 to 18 moved—[Kenny MacAskill]—and agreed to.

Before section 45

Amendment 19 moved—[Kenny MacAskill]—and agreed to.

Section 46—Orders

The Deputy Presiding Officer: Group 8 is on ancillary provision and parliamentary procedure. Amendment 20, in the name of the minister, is the only amendment in the group.

16:00

Kenny MacAskill: Amendment 20 is intended to address concerns that the Subordinate Legislation Committee expressed in its stage 1 report. It provides that any order made under the ancillary order-making power at section 45, which contains supplemental, consequential or incidental provision, will attract affirmative procedure, and that an order that makes transitional, transitory or savings provision will be subject to negative procedure. That means that a higher level of scrutiny will be afforded in relation to ancillary provision that contains supplemental, consequential or incidental provision, because affirmative procedure will apply, whether or not such provision will modify primary legislation.

We proposed the change because we recognised that special circumstances apply to the subject matter of the bill, because it replaces the common law and deals with the sensitive area of sexual offences. Therefore, the higher level of scrutiny that affirmative procedure affords is appropriate in the circumstances.

Any ancillary order that makes transitional, transitory or saving provision will be subject to negative procedure irrespective of whether it modifies primary legislation. That is considered to be the appropriate level of scrutiny for provisions of that nature. The transitional provisions that are required for the bill—in particular, those that relate to criminal trials—are significant. As a consequence, we have included the necessary provisions in the bill, which means that they have already been subject to parliamentary scrutiny. The Subordinate Legislation Committee indicated at its meeting on 2 June that it is content with the approach that we have proposed.

I move amendment 20.

Amendment 20 agreed to.

Schedule 1Z

RELEVANT SEXUAL OFFENCES

Amendments 21 to 47 moved—[Kenny MacAskill]—and agreed to.

Schedule 1

PENALTIES

Amendment 124 moved—[Robert Brown].

The Deputy Presiding Officer: The question is, that amendment 124 be agreed to. Are we agreed?

Members: No.

The Deputy Presiding Officer: There will be a division.
The Deputy Presiding Officer: The result of the division is: For 77, Against 43, Abstentions 0.
Amendment 124 agreed to.
Amendment 125 moved—[Robert Brown].

The Deputy Presiding Officer: The question is, that amendment 125 be agreed to. Are we agreed?

Members: No.

The Deputy Presiding Officer: There will be a division.

For
Adam, Brian (Aberdeen North) (SNP)
Aitken, Bill (Glasgow) (Con)
Allan, Alasdair (Westminister Isles) (SNP)
Brocklebank, Ted (Mid Scotland and Fife) (Con)
Brown, Gavin (Lothians) (Con)
Brown, Keith (Ochil) (SNP)
Brown, Robert (Glasgow) (LD)
Brownlee, Derek (South of Scotland) (Con)
Campbell, Aileen (South of Scotland) (SNP)
Carlaw, Jackson (West of Scotland) (Con)
Coffey, Willie (Kilmarnock and Loudoun) (SNP)
Constance, Angela (Livingston) (SNP)
Crawford, Bruce (Stirling) (SNP)
Cunningham, Roseanna (Perth) (SNP)
Don, Nigel (North East Scotland) (SNP)
Doris, Bob (Glasgow) (SNP)
Ewing, Fergus (Inverness East, Nairn and Lochaber) (SNP)
Fabiani, Linda (Aberdeen Central) (SNP)
Finnie, Ross (West of Scotland) (LD)
FitzPatrick, Joe (Dundee West) (SNP)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Gibson, Kenneth (Cunninghame North) (SNP)
Gibson, Rob (Highlands and Islands) (SNP)
Goldie, Annabel (West of Scotland) (Con)
Graham, Christine (South of Scotland) (SNP)
Harper, Robin (Lothians) (Green)
Harvie, Christopher (Mid Scotland and Fife) (SNP)
Harvie, Patrick (Glasgow) (Green)
Hepburn, Jamie (Central Scotland) (SNP)
Hume, Jim (South of Scotland) (LD)
Hyslop, Fiona (Lothians) (SNP)
Ingram, Adam (South of Scotland) (SNP)
Johnstone, Alex (North East Scotland) (Con)
Kid, Bill (Glasgow) (SNP)
Lamont, John (Roxburgh and Berwickshire) (Con)

Against
Bailie, Jackie (Dumbarton) (Lab)
Baker, Claire (Mid Scotland and Fife) (Lab)
Baker, Richard (North East Scotland) (Lab)
Boyack, Sarah (Edinburgh Central) (Lab)
Brankin, Rhona (Midlothian) (Lab)
Butler, Bill (Glasgow Anniesland) (Lab)
Chisholm, Malcolm (Edinburgh North and Leith) (Lab)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Curran, Margaret (Glasgow Baillieston) (Lab)
Currie, Helen (Balloch and Dunbarton) (Lab)
Currie, John (Mid Scotland and Fife) (Lab)
Davies, John (Mid Scotland and Fife) (Lab)
Dickson, Henry (Glasgow拎) (Lab)
Duffy, Patrick (Alloa and Falkirk) (Lab)
Eadie, Helen (Dunfermline West) (Lab)
Edmondson, William (Bucksburn and Banff) (Lab)
Fair, Richard (Kirkcaldy) (Lab)
Field, John (Mid Scotland and Fife) (Lab)
FitzPatrick, Joe (Dundee West) (SNP)
Fraser, Murdo (Mid Scotland and Fife) (SNP)
Gibson, Kenneth (Cunninghame North) (SNP)
Gibson, Rob (Highlands and Islands) (SNP)
Goldie, Annabel (West of Scotland) (Con)
Graham, Christine (South of Scotland) (SNP)
Harper, Robin (Lothians) (Green)
Harvie, Christopher (Mid Scotland and Fife) (SNP)
Harvie, Patrick (Glasgow) (Green)
Hepburn, Jamie (Central Scotland) (SNP)
Hume, Jim (South of Scotland) (LD)
Hyslop, Fiona (Lothians) (SNP)
Ingram, Adam (South of Scotland) (SNP)
Johnstone, Alex (North East Scotland) (Con)
Kid, Bill (Glasgow) (SNP)
Lamont, John (Roxburgh and Berwickshire) (Con)
Amendments 48 to 68 moved—[Kenny MacAskill] and agreed to.

Schedule 4

MINOR AND CONSEQUENTIAL AMENDMENTS

Amendments 69 to 71 moved—[Kenny MacAskill] and agreed to.

The Deputy Presiding Officer: Group 9 is consequential amendments on sexual assault by penetration, voyeurism, sexual exposure etc. Amendment 72 is grouped with amendments 76 to 82 and 84 to 98.

Kenny MacAskill: This group is a series of minor technical amendments, most of which are consequential on changes made to the bill at stage 2. Amendment 72 amends the consequential amendment to section 10 of the Criminal Law (Consolidation) (Scotland) Act 1995 to take account of the introduction of new offences at stage 2.

Amendment 76 ensures that paragraph 2(3) of schedule 4 is amended to ensure that the description of section 7(8)(b)(i) of the Criminal Procedure (Scotland) Act 1995 reflects the fact that district courts are to be replaced with justice of the peace courts.

Amendments 77 to 82, and 84 to 98 are consequential on the introduction of the new offence provisions at stage 2. They extend amendments to the 1995 act concerning the retention of DNA samples of violent and sex offenders; powers to impose extended sentences for sex and violent offenders; prohibition on
personal conduct of defence in cases of certain sexual offences; and provisions concerning offences against children under 17 years of age to which special provisions apply as to when a person can be brought into custody without a warrant, so that they cover the new offences introduced at stage 2.

I move amendment 72.

Amendment 72 agreed to.

The Deputy Presiding Officer (Alasdair Morgan): We come now to group 10, on the Criminal Law (Consolidation) (Scotland) Act 1995. Amendment 73, in the name of the minister, is grouped with amendments 74, 75, 123 and 116.

Kenny MacAskill: During stage 2, Robert Brown MSP lodged amendments that were intended to clarify that the remaining offence provisions in section 13 of the Criminal Law (Consolidation) (Scotland) Act 1995 are concerned solely with male prostitution. I am grateful to Mr Brown for raising that issue during stage 2. He pointed out that section 13(9) of the 1995 act contains an offence of soliciting or importuning to procure the commission of a homosexual act, but that it is not clear that the offence is restricted to male prostitution. I agree that the offence as drafted goes wider, but I am informed by the Crown Office and Procurator Fiscal Service that it is no longer to prosecute behaviour other than that of those who live off the earnings of male prostitution. However, the offences at section 46 of the Civic Government (Scotland) Act 1982 and section 1 of the Prostitution (Public Places) (Scotland) Act 2007 criminalise soliciting or loitering in any public place for the purpose of engaging in prostitution, by a male or female. As such, we consider that the element of section 13(9) to which I referred is not required to deal with male prostitution activity. Amendment 75 therefore repeals that element of the offence. That leaves the remaining offence at section 13, which is concerned solely with activity relating to male prostitution.

Amendment 74 amends the title of section 13 to “Living on earnings of another from male prostitution”, as this is all that the remaining offence provision at section 13(9) is concerned with.

Amendments 73 and 116 repeal and replicate section 13(10) of the 1995 act to provide that, for the purpose of offences at sections 11(5) and 12 of the 1995 act, a premises shall be treated as a brothel if it is resorted to for homosexual acts in circumstances in which resort thereto for heterosexual practices would have led to its being treated as a brothel for the purposes of those sections. The amendments also include a definition of a homosexual act in new section 12A and consequently repeal section 13(4) of the 1995 act.

Amendment 123 amends schedule 5, to make further consequential repeals to section 13 of the 1995 act.

I move amendment 73.

Amendment 73 agreed to.

Amendments 74 to 82 moved—[Kenny MacAskill]—and agreed to.

The Deputy Presiding Officer: We come to group 11, on notification of the defence of consent. Amendment 83, in the name of the minister, is grouped with amendment 118.

Kenny MacAskill: These amendments are consequential on the amendment made at stage 2 to retain the existing provisions requiring an accused to give advance notice to the Crown if he or she intends to claim in defence that the complainer consented to the conduct to which the charge relates. The Scottish Law Commission had provided for the repeal of those provisions, considering them redundant as the offences are now defined in terms of the absence of consent and, as such, that is an element of the crime that the Crown would always have to prove. However, the Crown Office and Rape Crisis Scotland are both of the view that the provisions are valuable in providing advance notice to the complainer of the accused’s intent to claim that sexual activity did occur but that the complainer consented to the act, and that the bill’s provisions do not change that fact. Amendments 83 and 118 delete the repeals that were consequential on the repeal of these provisions.

I move amendment 83.

Amendment 83 agreed to.

Amendments 84 to 98 moved—[Kenny MacAskill]—and agreed to.

The Deputy Presiding Officer: Group 12 is on consequential amendments to the Protection of Children (Scotland) Act 2003 and the Protection of Vulnerable Groups (Scotland) Act 2007. Amendment 99, in the name of the minister, is grouped with amendments 115, 117 and 119.

Kenny MacAskill: Amendment 99 amends schedule 1 to the Protection of Children (Scotland) Act 2003. It adds the offences that are contained in the bill to the list of offences against children, conviction for which will lead to an offender being listed as unsuitable to work with children.

Amendments 115 and 119 reverse the amendments to the Protection of Vulnerable Groups (Scotland) Act 2007 on the offences that will lead to the offender being listed as unsuitable to work with children and protected adults.
provisions have not been commenced as yet and a wider consultation will be held later in the year. The question of the treatment of the offences that are contained in the bill will be considered as part of that wider consultation exercise.

Amendment 117 ensures that offences of sexual abuse of trust and non-consensual sexual acts with a person with a mental disorder, which the bill repeals, will continue to be considered as sexual offences for the purpose of section 210A of the Criminal Procedure (Scotland) Act 1995. The effect is to enable extended sentences to be imposed.

Richard Baker: I seek reassurance from the cabinet secretary on the list of offences for which conviction results in an automatic listing as unsuitable to work with children. Will not the absence of the provisions in the schedule allow unsuitable people to work with children in the period until the consultation on the list of offences is concluded? I seek further detail on that and the timescale for the consultation.

Kenny MacAskill: The measures will remain in place. Clearly, protection of our children is fundamental. The purpose of the consultation is to ensure that we get right the Protection of Vulnerable Groups (Scotland) Act 2007. The member has my assurance that measures will remain in place to ensure the protection of our children. We will consult as widely as we can. I am more than happy to discuss with him at some future juncture how to ensure that we get that right. Our current protection remains in place. We will ensure that we enhance protection in future.

Amendment 99 agreed to.

The Deputy Presiding Officer: I am minded to take a motion without notice to extend the debate by up to 15 minutes.

Motion moved,

That, under Rule 9.8.5A, the debate on Groups 10 to 13 be extended by a further 15 minutes.—[Fergus Ewing.]

Motion agreed to.

The Deputy Presiding Officer: If it is any comfort, we will probably not need it.

Group 13 is on sexual offender notification requirements. Amendment 100, in the name of the minister, is grouped with amendments 101 to 114.

Kenny MacAskill: Amendment 100 deals with shameless indecency and public indecency. It addresses an issue that has arisen as a consequence of the decision in the Webster v Dominick case in 2003 that certain conduct that had previously been prosecuted as “shameless indecency” should in future be prosecuted as “public indecency”. The amendment provides that an offender will be subject to sex offender notification requirements when convicted of public indecency in the same circumstances as would have applied had he or she been convicted of shameless indecency prior to the Webster decision.

Amendments 101 to 113 ensure that, in circumstances where an offender would be subject to the sex offender notification requirements on imprisonment, the offender will also be subject to the notification requirements if he or she is detained in hospital due to having been found insane in bar of trial, or not guilty by reason of insanity.

Amendment 114 is a technical amendment that preserves the general power to make offenders subject to sex offender notification requirements where there is a significant sexual element to their offending and even where the offence is not otherwise specified in schedule 3.

I move amendment 100.

Amendment 100 agreed to.

Amendments 101 to 115 moved—[Kenny MacAskill]—and agreed to.

Schedule 5

Repeals

Amendments 123 and 116 to 119 moved—[Kenny MacAskill]—and agreed to.

The Deputy Presiding Officer: That ends consideration of amendments.
Sexual Offences (Scotland) Bill

The Deputy Presiding Officer (Alasdair Morgan): The next item of business is a debate on motion S3M-4057, in the name of Kenny MacAskill, on the Sexual Offences (Scotland) Bill. Because we are running a bit behind schedule, I will cut one minute off the time that every member expected to have.

16:15

The Cabinet Secretary for Justice (Kenny MacAskill): It is a pleasure to open this debate on a landmark piece of legislation. [Interruption.]

The Deputy Presiding Officer: Order. Members must leave the chamber if they are not staying for the debate and must not carry on conversations—that applies even to ministers.

Kenny MacAskill: In reforming the law on rape and sexual offences, the bill will modernise and clarify a complex and sometimes confusing patchwork of common law and statutory provision, sweep away outmoded attitudes and terminology, and put sexual offences law on a statutory footing for the first time. It will provide Scotland with the clear, modern and robust legal framework that is required to ensure that victims are protected and offenders punished.

We should take a moment to recognise that the bill also represents a major step forward for the Parliament. For the first time, an entire area of Scots common law is being codified—in other words, placed on the statute book. The primacy of Parliament in determining the law of the land is one of the hallmarks of democracy, and I regard the bill as a landmark that is worthy to mark the 10th anniversary of devolution.

Although the common law has been in place for hundreds of years, it has of course changed over time. It was only 20 years ago that it changed to recognise that a man could rape his wife. Until then, a woman was deemed on marriage to have given her irrevocable consent. It was only in 2001, following an appeal by the then Lord Advocate, that Scots law formally recognised that rape occurs when sexual intercourse takes place without a woman’s consent, regardless of whether force is used to overcome her will.

The bill consolidates those advances in the law and builds on them. In particular, it provides, for the first time, a statutory definition of consent. That is important because consent is central to the definition of sexual offences—sexual activity without consent is criminal. It is important that the law in this area is clear and easily understood, not only by specialist lawyers, but by ordinary members of the public. The bill defines consent as “free agreement”, which is a term that can be easily understood by all.

The bill widens the present definition of rape, which, as the Lord Advocate has said, is one of the most restrictive definitions of rape in the western world. There is no doubt that other forms of attack, including male rape, are perceived by their victims as rape, and it is right that the law recognises that.

At stage 2, we amended the bill to respond to the Justice Committee’s view that there should be a specific offence of sexual assault by penetration. Such assaults can be particularly horrific for their victims, and the witnesses who gave evidence to the committee made strong arguments for distinguishing such behaviour from other forms of sexual assault.

Despite those and other improvements, we must recognise that legislation cannot be the justice system’s only response to rape and other sexual offending. That is why the Crown Office’s work to improve the investigation and prosecution of rape and serious sexual offences is vital. In 2006, it published a report that made 50 recommendations on the reform of the investigation and prosecution of serious sexual offences, and it is now well on its way to implementing them all, thereby improving the way in which such offences are prosecuted.

I take the opportunity to thank the Lord Advocate, who has long championed reform of the way in which the Scottish justice system deals with rape and other sexual offences. Her commitment has been instrumental in driving forward the reform of the substantive law and the modernisation and improvement of the way in which the Crown Office investigates and prosecutes such offences.

It is crucial that steps are taken to change public attitudes and to challenge misconceptions. Rape Crisis Scotland has been at the forefront of that work. It has striven to change attitudes and to challenge the significant minority who are still too willing to blame the victim rather than the perpetrator. That is why we provided the organisation with funding for its hard-hitting campaign, “This is not an invitation to rape me”, which sets out to challenge the myths and misconceptions about rape and to change the culture that exists in our country. It is vital that we challenge myths, assumptions and unacceptable attitudes if the legislative reforms and the changes that are being made to the prosecution of such offences are to be fully effective. We are on a journey that is not simply about legislation, but is about Scotland becoming a modern and progressive country in which the position of women is recognised and they are treated with the respect to which they are entitled.
The Government remains committed to doing all that it can to strengthen the justice system’s response to those who commit these appalling crimes, and to making Scotland a stronger and safer place for all. This bill will provide a solid basis for that work, setting out a clear, modern and robust framework within which to prosecute these appalling and despicable crimes.

This is only the beginning of what will be a long road, but I believe that we have made a good start. I am sure that Parliament will continue to take a close interest in the law as it develops in practice.

We need to ensure that, as well as providing the legislative basis, we help the nation to make cultural and attitudinal changes. It gives me great pleasure to move,

That the Parliament agrees that the Sexual Offences (Scotland) Bill be passed.

16:21

Paul Martin (Glasgow Springburn) (Lab): I think that many other members of the Justice Committee would agree that we have successfully interrogated a number of the challenges that we faced during the progress of this bill. It is important to put on record our appreciation of the clerks who have provided us with support during the process, and our appreciation of the Scottish Parliament information centre, which provided information to Robert Brown that allowed him to further his interrogation of issues that we discussed earlier.

I also want to put on record our appreciation of the Lord Advocate, who has played a crucial role in the modernisation of our legal system in relation to this issue. On many occasions she has been a champion who has ensured that victims and their experiences are considered very carefully. That has been important.

Robert Brown was right to raise the issue of consulting young people on the effects that this bill will have on their lives. I hope that he has been successful. A key theme during our interrogation of this bill was that young people were key stakeholders. A trend has appeared, not only in the Scottish Parliament but in various organisations that are responsible for implementing legislation, of talking at young people and not listening carefully to the points that they raise. I hope that Robert Brown’s points will be taken on board. They were constructive, and I welcomed the Government’s response. The committee acknowledged the issue and recommended the need for a meaningful and age-appropriate response to providing young people with the information that they require. I believe strongly that we have to encourage young people to pursue positive lifestyle changes. That can only be achieved by our working with them. Johann Lamont gave a very positive example of that.

Earlier, we discussed Robert Brown’s amendment 125. I have no doubt that every member of this chamber wants to protect the welfare of every child in Scotland, and I understand some of the points that Robert Brown raised. However, I make no apology for considering the other end of the spectrum. I am not saying that the possibility is not remote, but the technical possibility remains that the sexual assault of a child could result in a fine. That is unacceptable. I appreciate that other members feel that it could not happen and that there would be an appeal, but it remains technically possible. We have received information that the sexual assault of a child could result in a fine. That is unacceptable, and it is quite right for the Labour Party to interrogate the issue. It is also right for Robert Brown to raise his particular example. However, we have to have the debate, because sometimes we are not quick to represent possible victims. As a result of amendment 125, children could be at risk.

Nigel Don (North East Scotland) (SNP): I understand the member’s point, but does he not accept that, with the law as it was, the only alternative would have been an admonition?

Sandra White (Glasgow) (SNP): That is right.

Paul Martin: It is all very well for members to say, “That is right” from a sedentary position. It is also right to say that it is technically possible for the sexual assault of a child to result in a fine. Members may shake their heads, but that was made clear in the information that was provided to the committee. If members take the time to read the Official Report and the responses that we received from Professor Maher and the Lord Advocate, they will see that nobody disputes that is the current position. As I said repeatedly throughout the three stages of the bill, that is unacceptable. It is important to make that point.

There have been many positive aspects to the bill. We have successfully interrogated every aspect of this complex bill, and I hope that members will support it at decision time.

16:25

Bill Aitken (Glasgow) (Con): Some five years ago, the previous Scottish Executive realised—and there was a general parliamentary view—that the existing law of sexual assault was no longer fit for purpose. Since then, we have followed a fairly lengthy route, but one that has arrived at a successful conclusion. I pay tribute to all those who were involved in the bill: the Scottish Government; the members of the Justice Committee, who put in a tremendous amount of
The definition of rape, which was defined in somewhat narrow terms over centuries, has been widened to include, as the minister said, rape with an implement, sodomy and male rape. In our contemporary society, those are necessary and appropriate changes. We have also disregarded, to some extent, the siren voices of those who believe that our young people should be exposed to a degree of risk. In that respect, the Justice Committee arrived at a measured and correct conclusion, which has been fully supported by the Scottish Government and the wider Parliament today.

There are some outstanding matters, regarding public attitudes, that are not really for the Parliament. We will have to wait and see what effect those will have. Courts will be required to determine what terms such as “free agreement” and “incapable” mean in common usage. Nevertheless, we are now further down the road, which will enable those determinations to take place, and we can be sure that there will be the widest possible protection for the potential victims of rape.

For the first time in almost 11 years, Margaret Curran has been able to persuade me to support her case. I trust that that will not render her too uncomfortable.

This has been a good piece of work. We may sometimes be frustrated at the limitations of what we can do. People sometimes behave foolishly and even irresponsibly. However, it is our duty to ensure, as far as is possible, that they are protected against their own actions. The bill is a clear illustration of what can happen when our albeit limited intellects operate in a combined way to produce legislation that is worthy of the Parliament.

16:29
Robert Brown (Glasgow) (LD): I join colleagues in thanking my fellow members of the Justice Committee, the clerking and other parliamentary staff, and the cabinet secretary and his staff for their professional and helpful attitude during consideration of the bill. I also thank the witnesses who gave us written and oral evidence during its passage, not least the Lord Advocate.

The bill addresses many difficult and sensitive areas, some of which are potentially controversial and provoke strong feelings in people. Not for the first time, the Parliament’s committee system has unravelled and analysed many of the issues with great skill—corporately, not individually—so that we have ended up with a bill that will command wide consent and a sense that individual views have contributed to the end result—as, indeed, they have.

The most controversial and difficult area relates to the age of consent, in respect of which the Government departed from the Scottish Law Commission’s recommendation. That was the right decision, not least because it sends out a clear and easily understood message to young people, but it raised issues about whether the provision might deter young people, not least girls, from accessing sexual health and other services at the right time. That was one of the reasons why Liberal Democrats and others made such an issue of the importance of finding out young people’s views and attitudes so that those views, as opposed to our assumptions about their views, could inform the bill and its implementation. It has been a useful debate.

Any age limit is arbitrary to a degree, but there is a big difference between the position of young children under 13, who have no capacity to consent to sexual relations and who require clear and unambiguous legal protection, and the position of young people from the ages of 13 to 16, who also need protection, advice, support and guidance but who should not normally be criminalised for consensual activities with young people of roughly their own age.

The other major difficulty relates to the concept of consent in cases involving rape and other sexual offences. Matters of sexual relationships are unusual in being criminal and highly reprehensible when conducted against the will of one party, particularly in a brutal or violent way, but an entirely legitimate part of ordinary life—and, dare I say it, necessary for the continuation of the species—when conducted via consent. That underlying principle, elegantly explained in the Law Commission’s report, is joined together with the concept of sexual autonomy.

The bill is a progressive one, modernising the law and putting heterosexual and same-sex issues on the same basis. It provides protection and sanctions in cases in which men are the victims of nasty and brutal sexual attacks, as well as when women are the victims. The tidying up of outdated phraseology relating to male prostitution is also welcome, having been agreed to by the Government, at the suggestion of the Justice Committee, at stage 2.

The bill replaces the common law, and it should provide greater clarity and certainty and a more modern definition in some important areas. As a whole, it provides what we hope will be a modern statute, fit for purpose in the 21st century, playing its part in deterring crime and securing justice for the victims of serious crimes of a sexual nature.
I am glad to add my support and the support of the Liberal Democrats to the passage of the Sexual Offences (Scotland) Bill.

16:32

Sandra White (Glasgow) (SNP): I also thank the Justice Committee, its clerks and the Cabinet Secretary for Justice for the hard work that they have done. They listened to everyone and produced an important bill.

I am pleased to be able to speak on this bill. As I said, I do not think that it is the most important bill in the Parliament, but it is certainly one of the bills that I have spoken about and I feel is important. It is also historic. Lots of bodies have raised issues regarding the subject of the bill, as have the public and academia, because they have felt that Scots law is out of date in relation to rape and sexual offences. I thank the previous and present Governments for taking those issues seriously and enabling the Parliament to pass this bill in a consensual manner. We must remember that, whatever decisions we make in this Parliament, the rights of victims and the protection of the most vulnerable in our society must be what we focus on.

I am pleased that Margaret Curran’s amendment 1 was accepted, as I believe that the defence of prior consent has been used far too often in rape and sexual assault cases involving intoxication.

I am sorry that Paul Martin and the Labour Party appear not to understand exactly what Robert Brown’s amendments 121 to 125 mean. I think that Robert Brown explained the position, but I will try again to make it clear. The accepting of the amendments means the addition of fines, whereas Paul Martin is advocating that the accused be admonished—I wish that he would accept that point. We all agree that any sexual offence is a terrible indictment of human society. I would like Paul Martin to clarify in his own mind the fact that the fines would be an additional disposal and that the alternative is that the accused would merely be admonished. I wish that he would listen to that point.

My only regret involves the issue of consensual sex between young people of between 13 and 15 years of age and the threat that those young people might end up with a criminal record, which Robert Brown touched on. The matter might be outwith the remit of the Scottish Government, but I hope that we can return to it, as it is important, and that it will be part of the consultation with young people that the Cabinet Secretary for Justice mentioned. The issue might be controversial, but it is an important issue for the 21st century, and I think that young people should have an opportunity to speak about it.

16:34

Johann Lamont (Glasgow Pollok) (Lab): I am not sure that I agree with Sandra White that the Sexual Offences (Scotland) Bill is not one of the most important bills to go through the Scottish Parliament. It is among the most important, in my view, because it speaks to something very deep in our society—the experience of women who face violence and the fact that somebody would choose to use their power to violate somebody in a sexual way.

It is telling that the First Minister has chosen to be absent and not to participate in this afternoon’s critical debate. It is a symbolic as well as a political matter for our First Minister to choose to participate in a political stunt with his Conservative colleagues at Westminster rather than recognise what politics is actually about. People are alienated from the brouhaha of politics, but the bill is an example of what we can do together when we examine important issues. Today, we have an opportunity to support a bill that is radical in its intention and will have significant consequences for women. Our First Minister should be here to recognise the importance of that kind of politics.

The debate is not an easy one. The reality at its heart is that there is still a view that, if a woman is raped, it is somehow her fault. Through time, that justification has changed, but it remains instructive to make the point that people look not to the crime or the alleged criminal but to the victim. That can overwhelm us, and the fact that the conviction rate is as low as it is can lead to despair, but today we are taking a significant step forward. We know that there has been progress, but more has to be done to meet further challenges.

In the early stages of the Scottish Parliament, action was taken to address the need to support survivors, to make agencies responsive, and to recognise that the legal system revictimises women who go through the process. The Abernethy ruling seems a long time ago. Robert Brown spoke earlier about small brains, but we must reflect that, at that time, big brains told us, “You cannot do this.” They said that we could not protect women from the people against whom they complain in relation to sexual offences. I particularly commend my ex-colleague Angus MacKay, who, as Deputy Minister for Justice at that time, had the courage to take on the establishment who said, “These things cannot be done.” We are now moving from that place to liberating and progressive legislation.

At one time, no one believed that there could be rape inside marriage. There has been progress, and we have to hold on to that. We must commit ourselves to ensuring that we have sustained support services for survivors, and we must challenge attitudes, starting in schools, and...
liberate boys and girls from the expectations that are placed on them. If we do not understand how gender roles are applied, we will not change those attitudes. If anything can give us confidence in the shared journey on the legislation, it is to understand the progress that has come because of the powerful role of Rape Crisis Scotland and women’s organisations who have given voice to women’s experience—

The Deputy Presiding Officer: The member must conclude now.

Johann Lamont: We must allow that experience to shape our legislation on sexual offences, and we must learn from it in other legislation.

16:38

Nigel Don (North East Scotland) (SNP): I would like to comment—briefly, under the circumstances—on the process of getting to where we are today.

I reflect that anybody who has picked up a book on Scots criminal law knows that it is particularly unsatisfactory in the area that we are discussing this afternoon. The Lord Advocate’s reference of 2001 and McKearney v Her Majesty’s Advocate in 2004 made it clear that the law was unsatisfactory, and at that point the Scottish Law Commission got involved. The commission was mentioned earlier, but I pay particular tribute to it because, despite the huge number of small amendments that have been made to the bill, it is by and large the bill that the commission proposed after serious consideration of the issues in 2007.

We should congratulate it on a good piece of work. I am sure that it will be pleased that the bill has gone through the Parliament, and I am sure that the authors of standard textbooks will also be delighted with what has happened today.

I reflect on the principles, as enunciated by the Scottish Law Commission, that the law should be clear; that it should respect sexual autonomy, which is the basis on which consent came into the bill; that it should recognise the protective principle and those in our society who need to be protected by the law because they cannot protect themselves; and that there should be no distinction on the basis of sexual orientation or gender, which is, of course, where we have got to in the 21st century.

I too thank and pay tribute to my Justice Committee colleagues. Our consideration of the bill was an extraordinary bit of teamwork and, as a relative new boy to parliamentary politics, I found it a great pleasure to witness the way in which the committee worked so well together.

That said, certain issues outwith the scope of the bill still have to be addressed. First, the bill does not change the fact that women in particular remain unlikely to report rape. Not only will the Government have to continue its work on this issue but, as others have mentioned, society itself will have to work on such attitudes.

Secondly, during its consideration of the bill, the committee reflected on the way in which reported cases were dropped while being investigated by the police and considered for prosecution. I believe that we agreed to call for an attrition study on the matter. In any case, it is hugely important that we understand the process that cases go through; otherwise, the passing of better law will not necessarily lead to better results.

Finally, we do not know very much about how juries work. The committee realised that it could not address that matter immediately, but it is a real issue and work really needs to be carried out on that part of the process.

16:41

Margaret Curran (Glasgow Baillieston) (Lab): I concur with other members on the significance of this legislation but, notwithstanding Robert Brown’s very important comments about the bill’s breadth, I will focus on the issue of rape.

The bill represents another step in our many efforts over the lifetime of the Parliament to tackle the appalling levels of conviction for reported rape. It is indeed distressing that Scotland has the lowest rape conviction rate in Europe. Research from Rape Crisis Scotland has established beyond any doubt that complainers find the trial process traumatic, degrading and humiliating, and I would never recommend that a woman put herself through the process. However, I believe that there is a will in all quarters of the Parliament to tackle not only that factor but the others that contribute to the low conviction rate to which Nigel Don referred.

This legislation, which represents a key and very welcome step, broadens the definition of rape and sets out for the first time a definition of consent. I pay tribute to the cabinet secretary and his team for the way in which they have conducted themselves and to the Justice Committee, which has served the Parliament very well.

That said, we should not get too complacent and start congratulating ourselves or believing that this legislation is enough. Despite earlier changes to the use of sexual history and character in court, seven out of 10 women who give evidence are almost guaranteed to be asked about those aspects. Increasingly, defence lawyers have sought complainers’ medical records and frequently cited, for example, periods of
depression as relevant to the trial. That is certainly a concern and will obviously influence a woman’s decision to proceed with her case.

Rape is a vile and violent crime. Although it largely affects women, we know that everyone is revolted by this kind of grievous assault and its consequences. Reporting rape demands courage and fortitude, and I have no doubt that women and men throughout Scotland understand that and want a sensitive and effective judicial system that delivers truth and justice.

That is why I have to tell the Parliament that the absence of the First Minister represents a glaring omission of leadership—it is a breach of our normal approach in this Parliament when we are reaching across party divides to ensure that there is leadership and that we deliver on such important issues.

This legislation is an important milestone, but the work does not stop here, and I ask the minister to address other key issues such as the use of sexual history and medical records in court and the growing campaign for independent legal representation for rape victims in the trial process. We need to ensure that rape crimes are investigated and prosecuted and that victims receive the proper support. The bill’s provisions will assist us in that process, but this is only the beginning, not the end.

Mike Pringle (Edinburgh South) (LD): I welcome today’s debate. Although the Liberal Democrats fully support what this vital piece of legislation is trying to achieve, the law on sexual offences is by its nature a sensitive topic and should be scrutinised thoroughly.

Many members have remarked today that Scotland’s low rape conviction rate is nothing short of a national shame, and I welcome the fact that further legislative steps are being taken to address that pressing problem. In particular, I acknowledge the importance of new provisions that define consent in law and include the abuse of males in the definition of rape. I also state my support for the introduction of new statutory offences for anyone spiking drinks for sexual purposes and coercive sexual conduct.

Any legislative provision must be backed up by a radical change in the way in which our society views and supports victims. That point has been well made by the minister and other members during this short debate. Rape is the only crime in which we, as a society, denigrate and blame the victim, and any legislative effort is at risk of being rendered ineffective unless there is widespread cultural change. Tackling the stigma of being a rape victim is, in many ways, equally important to securing convictions.

I will also comment on the matter of underage sexual relations. Everyone agrees that sexual relations by persons under the age of 16 are not a good thing, with regard to emotional and physical maturity as well as to sexual health, but that does not take away from the fact that a significant minority of youngsters engage in underage sexual relationships. It is of vital importance that legislation fully acknowledges that. A blanket approach runs the risk of ignoring underlying issues rather than establishing how the law can be most beneficial in influencing young people.

Professor Kathleen Marshall, formerly Scotland’s Commissioner for Children and Young People, expressed concern that the bill was “proceeding on the basis of insufficient information”—[Official Report, Justice Committee, 4 November 2008; c 1277.] as far as the views of young people were concerned. That raised legitimate concerns regarding the bill’s future effectiveness, and—as my colleague Robert Brown has said—it is regrettable that the Scottish National Party did not carry out more consultation with young people before the bill started its passage. That is why Liberal Democrats have pushed the Government to undertake appropriate consultation with children and young people about their attitudes towards part 4 of the bill prior to its commencement. We have also called for a publicity and information campaign to inform children and young people about changes to the law that directly affect them, so that the system of rules is equally clear to young people, parents and the police.

The bill has been widely acknowledged by ministers and campaign groups as an historic opportunity. Like other members, I congratulate the Lord Advocate; I know that the issue is close to her heart. I hope that the Parliament can seize the opportunity and deliver a Sexual Offences (Scotland) Bill that is capable of addressing the sensitive and important matters at hand. I support the bill.

John Lamont ( Roxburgh and Berwickshire) (Con): Like other members, I begin by welcoming the progress of the bill to stage 3. The quality of evidence throughout and the measured and reasonable contributions from witnesses during the bill’s earlier stages are to be commended.

The bill provides important clarification in a number of complex and delicate areas relating to sexual offences and the law of rape. The law on rape and other sexual offences has been long overdue for clarification and updating. As Nigel
Don said, academics and petitioners have been critical of the Scots law on rape for many years.

The bill undoubtedly modernises the law on rape and sexual offences. Creating a non-gendered approach to rape and widening its definition will, we hope, create a more supportive environment in which victims can come forward. The inclusion in the bill of other forms of sexual penetration, including the use of an implement, is appropriate, and that will be seen as an important step in the evolution of the law on rape and sexual offences.

By addressing offences committed on mentally disordered persons and children and offences committed by people who are deemed to be in a position of trust, the bill provides a voice for vulnerable sections of society who are less able to speak out for themselves. Although we acknowledge that children are maturing earlier, it is right that the age of consent has been kept at 16 and that there will be legal consequences for those who do not abide by that law. That view is supported by church groups and others, and it was appropriate for the Scottish Government to retain in the bill the option of criminal prosecution for consensual penitent sexual conduct between older children.

Once it is enacted, the bill will go a long way to addressing and changing the blame culture that surrounds rape and sexual offences in our society. The view that women might invite rape by wearing revealing clothes or by being flirtatious, or if they are drunk, must be completely rejected—a point that was made by Johann Lamont.

Some problems in this area of law will remain harder to solve. For example, the definition of consent as “free agreement” does not eliminate the issue that the line between true consent and submission is still somewhat elusive. It is likely that problems will always occur in this complex area of the law. The bill is a step in the right direction, clarifying definitions and providing support for a wider range of victims, but it is important to acknowledge that more is to be done outside the legal arena to tackle attitudes towards the victims of rape. We look forward to supporting the bill at decision time.

16:49

Richard Baker (North East Scotland) (Lab):

All members want Scotland to have the most robust legal framework possible in relation to sexual offences. The impact that such offences have on their victims makes it all the more important that we have the right laws to deal appropriately with those who commit such offences and that we deal in a fair and informed way with the sensitive issue of what constitutes a sexual offence.

As members have said, we have dealt with the issues against the backdrop of what remains a worryingly low conviction rate for rape. Reports today suggest that the conviction rate is going up, but it nevertheless stood at only 3.7 per cent in 2007-08. The Lord Advocate rightly pointed out in evidence to the Justice Committee that there is no panacea for the problem and that the bill is not specifically about improving conviction rates. We require further detailed research into the system of investigation and prosecution of cases. A package of measures will be required, so that people have more confidence to come forward and report rape, which still too often goes unreported.

Robert Brown: Does Richard Baker acknowledge that the problem lies further back? The Lord Advocate said that, after an indictment or charge, 70 to 80 per cent of cases result in conviction.

Richard Baker: That is a valid point, but the crucial point that I am making is that the perpetrators of such crimes should not expect to go unpunished and should face severe penalties for their actions.

The understanding of consent to sexual activity has also been debated. Margaret Curran’s successful amendment will ensure that someone who is incapable of giving their consent to sexual activity cannot be deemed to have consented simply because of earlier statements. That move forward provides greater protection from unwanted sexual activity to those who lack the capacity to consent. That has helped to make the bill better.

Another key debate was on consensual sexual relationships between 13 to 16-year-olds. Like John Lamont, I believe that the retention of the status quo is right. However, it is important that we consider the welfare issues that have been raised in connection with that, particularly by many organisations that work with children and young people. It is important to implement the Justice Committee’s recommendation that multi-agency co-operation should provide effective support to children who are involved in underage sexual activity. Consultation with young people on the impact of the bill is important, too. My colleague Cathie Craigie raised that issue on several occasions.

We are not happy with Robert Brown’s amendments on penalties that were agreed to today. We believe that, in minor cases of sexual assault or sexual assault on a child, it is for prosecutors to ensure that cases are prosecuted effectively. However, we are not comfortable with the fact that sexual assault or sexual assault on a child that is prosecuted under the solemn procedure could result in only a fine. The issue is not about an additional disposal. People have talked about the status quo, but we are discussing
how the law should be modernised. I fail to see why Robert Brown cannot understand, in whatever size brain he has, why we feel it was more appropriate to maintain the status quo after stage 2, in which sexual assault or sexual assault on a young child, when prosecuted under the solemn procedure, could not result in simply a fine. I thought that Bill Aitken would be with me on that, given his attitude on the general issue. A fine is the most unsatisfactory outcome. Robert Brown mentioned community sentences, which would be a more appropriate disposal. However, we are where we are.

The vast majority of the process has been consensual. It is important to give credit for the hard work that has been done on the bill. Ministers, the committee, the clerks and civil servants deserve great credit for reaching a broad consensus on difficult issues. It is of great importance that we do all that we can to protect people in our country from harm and that we have effective and modern laws on sexual offences.

16:53

The Minister for Community Safety (Fergus Ewing): I am pleased that we have had the opportunity to debate the Sexual Offences (Scotland) Bill, which will bring much-needed clarity and consistency to the law on sexual offences. I thank all those who contributed to the bill’s development.

The previous Administration asked the Scottish Law Commission to review the law on rape and other sexual offences in 2004. The Scottish Law Commission’s carefully considered “Report on Rape and Other Sexual Offences” and its draft bill provided a solid foundation on which to work in making progress on the reform of the law. We are fortunate to have the Scottish law commissioners and their staff. Their excellent work helps to provide a useful foundation for our legislative work.

I also thank all those who took the time to share their experience and expertise on these difficult issues in response to the Scottish Law Commission’s discussion paper of 2006 or our consultation on the commission’s final report prior to introducing the bill into Parliament, or in giving written and oral evidence to the Justice Committee as part of its consultation on the bill. That wide and informed input was invaluable in helping us and the Justice Committee to identify ways in which the bill could be strengthened and improved.

I pay tribute to the Justice Committee, under the avuncular convenership of Bill Aitken, whose stage 1 report on the bill was carefully considered and balanced and identified a number of ways in which the bill could be improved. The Government worked closely with all committee members to lodge amendments at stage 2 to address the points that they raised and to deal with issues of concern to the Government that had not been the focus of the debate. I put on record the Government’s thanks to the committee and its clerks for their careful work in scrutinising the bill’s provisions and, more generally, for the balanced and constructive way in which they approached their work on the bill. It is truly appropriate that we have found a modus operandi on the part of the Government, in working with the committee, that is entirely co-operative and not at all adversarial. What more appropriate topic of legislation could there be for such an approach, if one thinks about it?

Almost all members have paid tribute to the Lord Advocate. Elish Angiolini has been a long-standing supporter of reform of the law. Her formidable leadership on this issue and her steely commitment to improving the way in which the Scottish justice system deals with rape and other sexual offending were of huge importance in progressing the bill.

I thank all those members who contributed during the passage of the bill. We welcome Margaret Curran’s amendment to the provisions concerning capacity to consent and intoxication, which brings greater clarity to the law by sending the simple message that sexual activity with a person who is so intoxicated that they are not capable of giving consent is criminal.

Sandra White raised concerns about the possible adverse consequences of criminalising girls for engaging in consensual sex while under the age of consent. I understand those concerns and I believe that it is vital that the law distinguishes clearly between the victim of an offence and the perpetrator and treats them differently. However, when we are talking about an offence that is committed by two people acting consensually, it must be right that the law treats them in the same way. It is important that the policy is seen in the context of our broader policy on children who commit offences. In all but the most exceptional circumstances, children would be dealt with through the children’s hearings system, with the emphasis on the welfare of the child, rather than being subject to criminal prosecution.

We lodged amendments at stage 2 to deal with prior consent and sleep. The new section 10A replicates our understanding of the current law by providing that someone who is asleep or unconscious cannot give consent while in that state. Although the new section provides that consent cannot be given in such circumstances, it does not exclude the possibility of a reasonable belief in consent, nor does it place any specific
restrictions on how such a reasonable belief may arise. In practice, it will be for the court to decide whether any claim of reasonable belief in consent on the part of the accused is credible in cases in which such circumstances arise. It is highly unlikely that a court would regard a belief that a victim gave consent while he or she was incapable of giving consent as a reasonable belief.

The cabinet secretary said earlier that the Government agrees that it would be helpful to consult children and young people to help us to decide how we can best take forward the bill. I mention that specifically because of the comments that Robert Brown and Mike Pringle made in their speeches. I therefore echo the cabinet secretary’s assurances in that regard.

I thank all members for their contributions. The passage of the bill has demonstrated that the Government and MSPs can work across party boundaries to agree important legal reforms in a complex and sensitive area of public policy. I hope that the Parliament will vote unanimously to pass the bill.
Decision Time

17:02

The Presiding Officer (Alex Fergusson): There are just two questions to be put as a result of today’s business. The first question is, that motion S3M-4057, in the name of Kenny MacAskill, on the Sexual Offences (Scotland) Bill, be agreed to. Are we agreed?

Members: No.

The Presiding Officer: There will be a division.

For
Adam, Brian (Aberdeen North) (SNP)
Aitken, Bill (Glasgow) (Con)
Alexander, Ms Wendy (Paisley North) (Lab)
Allan, Alasdair (Western Isles) (SNP)
Bailie, Jackie (Dumbarton) (Lab)
Baker, Claire (Mid Scotland and Fife) (Lab)
Baker, Richard (North East Scotland) (Lab)
Boyack, Sarah (Edinburgh Central) (Lab)
Brankin, Rhona (Midlothian) (Lab)
Brocklebank, Ted (Mid Scotland and Fife) (Con)
Brown, Gavin (Lothians) (Con)
Brown, Keith (Ochil) (SNP)
Brown, Robert (Glasgow) (LD)
Brownlee, Derek (South of Scotland) (Con)
Butler, Bill (Glasgow Anniesland) (Lab)
Campbell, Aileen (South of Scotland) (SNP)
Carlaw, Jackson (West of Scotland) (Con)
Chisholm, Malcolm (Edinburgh North and Leith) (Lab)
Coffey, Willie (Kilmarnock and Loudoun) (SNP)
Constance, Angela (Livingston) (SNP)
Craige, Cathie (Cumbernauld and Kilsyth) (Lab)
Crawford, Bruce (Stirling) (SNP)
Cunningham, Roseanna (Perth) (SNP)
Curran, Margaret (Glasgow Baillieston) (Lab)
Don, Nigel (North East Scotland) (SNP)
Doris, Bob (Glasgow) (SNP)
Eadie, Helen (Dunfermline East) (Lab)
Ewing, Fergus (Inverness East, Nairn and Lochaber) (SNP)
Fabiani, Linda (Central Scotland) (SNP)
Ferguson, Patricia (Glasgow Maryhill) (Lab)
Finnie, Ross (West of Scotland) (LD)
FitzPatrick, Joe (Dundee West) (SNP)
Foulkes, George (Lothians) (Lab)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Gibson, Kenneth (Cunninghame North) (SNP)
Gibson, Rob (Highlands and Islands) (SNP)
Gillon, Karen (Clydesdale) (Lab)
Glen, Marlyn (North East Scotland) (Lab)
Godman, Trish (West Renfrewshire) (Lab)
Goldie, Annabel (West of Scotland) (Con)
Gordon, Charlie (Glasgow Cathcart) (Lab)
Grahame, Christine (South of Scotland) (SNP)
Grant, Rhoda (Highlands and Islands) (Lab)
Gray, Iain (East Lothian) (Lab)
Harvie, Christopher (Mid Scotland and Fife) (SNP)
Henry, Hugh (Paisley South) (Lab)
Hepburn, Jamie (Central Scotland) (SNP)
Hume, Jim (South of Scotland) (LD)
Hyslop, Fiona (Lothians) (SNP)
Ingram, Adam (South of Scotland) (SNP)
Jamieson, Cathy (Carrick, Cumnock and Doon Valley) (Lab)
Johnstone, Alex (North East Scotland) (Con)
Kelly, James (Glasgow Rutherglen) (Lab)
The Presiding Officer: The result of the division is: For 121, Against 0, Abstentions 1.

Motion agreed to,

That the Parliament agrees that the Sexual Offences (Scotland) Bill be passed.
Sexual Offences (Scotland) Bill
[AS PASSED]

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Sexual Offences (Scotland) Bill

[AS PASSED]

An Act of the Scottish Parliament to make new provision about sexual offences, and for connected purposes.

PART 1

RAPE ETC.

Rape

1 Rape

(1) If a person (“A”), with A’s penis—
   (a) without another person (“B”) consenting, and
   (b) without any reasonable belief that B consents,

   penetrates to any extent, either intending to do so or reckless as to whether there is penetration, the vagina, anus or mouth of B then A commits an offence, to be known as the offence of rape.

(2) For the purposes of this section, penetration is a continuing act from entry until withdrawal of the penis; but this subsection is subject to subsection (3).

(3) In a case where penetration is initially consented to but at some point of time the consent is withdrawn, subsection (2) is to be construed as if the reference in it to a continuing act from entry were a reference to a continuing act from that point of time.

(4) In this Act—

   “penis” includes a surgically constructed penis if it forms part of A, having been created in the course of surgical treatment, and

   “vagina” includes—
   (a) the vulva, and
   (b) a surgically constructed vagina (together with any surgically constructed vulva), if it forms part of B, having been created in the course of such treatment.
Sexual assault by penetration

1A Sexual assault by penetration

(1) If a person (“A”), with any part of A’s body or anything else—
   (a) without another person (“B”) consenting, and
   (b) without any reasonable belief that B consents,
penetrates sexually to any extent, either intending to do so or reckless as to whether there is penetration, the vagina or anus of B then A commits an offence, to be known as the offence of sexual assault by penetration.

(2) For the purposes of this section, penetration is a continuing act from entry to withdrawal of whatever is intruded; but this subsection is subject to subsection (3).

(3) In a case where penetration is initially consented to but at some point of time the consent is withdrawn, subsection (2) is to be construed as if the reference in it to a continuing act from entry were a reference to a continuing act from that point of time.

(4) Without prejudice to the generality of subsection (1), the reference in that subsection to penetration with any part of A’s body is to be construed as including a reference to penetration with A’s penis.

Sexual assault and other sexual offences

2 Sexual assault

(1) If a person (“A”)—
   (a) without another person (“B”) consenting, and
   (b) without any reasonable belief that B consents,
does any of the things mentioned in subsection (2), then A commits an offence, to be known as the offence of sexual assault.

(2) Those things are, that A—
   (a) penetrates sexually, by any means and to any extent, either intending to do so or reckless as to whether there is penetration, the vagina, anus or mouth of B,
   (b) intentionally or recklessly touches B sexually,
   (c) engages in any other form of sexual activity in which A, intentionally or recklessly, has physical contact (whether bodily contact or contact by means of an implement and whether or not through clothing) with B,
   (d) intentionally or recklessly ejaculates semen onto B,
   (e) intentionally or recklessly emits urine or saliva onto B sexually.

(4) For the purposes of paragraph (a) of subsection (2), penetration is a continuing act from entry until withdrawal of whatever is intruded; but this subsection is subject to subsection (5).

(5) In a case where penetration is initially consented to but at some point of time the consent is withdrawn, subsection (4) is to be construed as if the reference in it to a continuing act from entry were a reference to a continuing act from that point of time.
(6) Without prejudice to the generality of paragraph (a) of subsection (2), the reference in
the paragraph to penetration by any means is to be construed as including a reference to
penetration with A’s penis.

3 Sexual coercion

If a person (“A”)—
(a) without another person (“B”) consenting to participate in a sexual activity, and
(b) without any reasonable belief that B consents to participating in that activity,
intentionally causes B to participate in that activity, then A commits an offence, to be
known as the offence of sexual coercion.

4 Coercing a person into being present during a sexual activity

(1) If a person (“A”)—
(a) without another person (“B”) consenting, and
(b) without any reasonable belief that B consents,
either intentionally engages in a sexual activity and for a purpose mentioned in
subsection (2) does so in the presence of B or intentionally and for a purpose mentioned
in that subsection causes B to be present while a third person engages in such an
activity, then A commits an offence, to be known as the offence of coercing a person
into being present during a sexual activity.

(2) The purposes are—
(a) obtaining sexual gratification,
(b) humiliating, distressing or alarming B.

(4) Without prejudice to the generality of subsection (1), the reference in that subsection—
(a) to A engaging in a sexual activity in the presence of B, includes a reference to A
engaging in it in a place in which A can be observed by B other than by B looking
at an image, and
(b) to B being present while a third person engages in such an activity, includes a
reference to B being in a place from which the third person can be so observed by
B.

5 Coercing a person into looking at a sexual image

(1) If a person (“A”) intentionally and for a purpose mentioned in subsection (2) causes
another person (“B”)—
(a) without B consenting, and
(b) without any reasonable belief that B consents,
to look at a sexual image, then A commits an offence, to be known as the offence of
coercing a person into looking at a sexual image.

(2) The purposes are—
(a) obtaining sexual gratification,
(b) humiliating, distressing or alarming B.
(2A) For the purposes of subsection (1), a sexual image is an image (produced by whatever means and whether or not a moving image) of—

(a) A engaging in a sexual activity or of a third person or imaginary person so engaging,

(b) A’s genitals or the genitals of a third person or imaginary person.

6 Communicating indecently etc.

(1) If a person (“A”), intentionally and for a purpose mentioned in subsection (3), sends, by whatever means, a sexual written communication to or directs, by whatever means, a sexual verbal communication at, another person (“B”—

(a) without B consenting to its being so sent or directed, and

(b) without any reasonable belief that B consents to its being so sent or directed,

then A commits an offence, to be known as the offence of communicating indecently.

(2) If, in circumstances other than are as mentioned in subsection (1), a person (“A”), intentionally and for a purpose mentioned in subsection (3), causes another person (“B”) to see or hear, by whatever means, a sexual written communication or sexual verbal communication—

(a) without B consenting to seeing or as the case may be hearing it, and

(b) without any reasonable belief that B consents to seeing or as the case may be hearing it,

then A commits an offence, to be known as the offence of causing a person to see or hear an indecent communication.

(3) The purposes are—

(a) obtaining sexual gratification,

(b) humiliating, distressing or alarming B.

(4) In this section—

“written communication” means a communication in whatever written form, and without prejudice to that generality includes a communication which comprises writings of a person other than A (as for example a passage in a book or magazine), and

“verbal communication” means a communication in whatever verbal form, and without prejudice to that generality includes—

(a) a communication which comprises sounds of sexual activity (whether actual or simulated), and

(b) a communication by means of sign language.

7 Sexual exposure

(1) If a person (“A”)—

(a) without another person (“B”) consenting, and

(b) without any reasonable belief that B consents,
intentionally and for a purpose mentioned in subsection (1A), exposes A’s genitals in a sexual manner to B with the intention that B will see them, then A commits an offence, to be known as the offence of sexual exposure.

(1A) The purposes are—

(a) obtaining sexual gratification,
(b) humiliating, distressing or alarming B.

7A Voyeurism

(1) A person (“A”) commits an offence, to be known as the offence of voyeurism, if A does any of the things mentioned in subsections (2) to (5).

(2) The first thing is that A—

(a) without another person (“B”) consenting, and
(b) without any reasonable belief that B consents,

for a purpose mentioned in subsection (6) observes B doing a private act.

(3) The second thing is that A—

(a) without another person (“B”) consenting, and
(b) without any reasonable belief that B consents,

operates equipment with the intention of enabling A or another person (“C”), for a purpose mentioned in subsection (7), to observe B doing a private act.

(4) The third thing is that A—

(a) without another person (“B”) consenting, and
(b) without any reasonable belief that B consents,

records B doing a private act with the intention that A or another person (“C”), for a purpose mentioned in subsection (7), will look at an image of B doing the act.

(5) The fourth thing is that A—

(a) installs equipment, or
(b) constructs or adapts a structure or part of a structure with the intention of enabling A or another person to do an act referred to in subsection (2), (3) or (4).

(6) The purposes referred to in subsection (2) are—

(a) obtaining sexual gratification,
(b) humiliating, distressing or alarming B.

(7) The purposes referred to in subsections (3) and (4) are—

(a) obtaining sexual gratification (whether for A or C),
(b) humiliating, distressing or alarming B.
7B Interpretation of section 7A

(1) For the purposes of section 7A, a person is doing a private act if the person is in a place which in the circumstances would reasonably be expected to provide privacy, and—

(a) the person’s genitals, buttocks or breasts are exposed or covered only with underwear,
(b) the person is using a lavatory, or
(c) the person is doing a sexual act that is not of a kind ordinarily done in public.

(2) For the purposes of section 7A(3), operating equipment includes enabling or securing its activation by another person without that person’s knowledge.

(3) In section 7A(5), “structure” includes a tent, vehicle or vessel or other temporary or movable structure.

8 Administering a substance for sexual purposes

(1) If a person (“A”) intentionally administers a substance to, or causes a substance to be taken by, another person (“B”)—

(a) without B knowing, and
(b) without any reasonable belief that B knows,
and does so for the purpose of stupefying or overpowering B, so as to enable any person to engage in a sexual activity which involves B, then A commits an offence, to be known as the offence of administering a substance for sexual purposes.

(2) For the purposes of subsection (1), if A, whether by act or omission, induces in B a reasonable belief that the substance administered or taken is (either or both)—

(a) of a substantially lesser strength, or
(b) in a substantially lesser quantity,

than it is, any knowledge which B has (or belief as to knowledge which B has) that it is being administered or taken is to be disregarded.

PART 2
CONSENT AND REASONABLE BELIEF

Consent

9 Meaning of “consent” and related expressions

In Parts 1 and 3, “consent” means free agreement (and related expressions are to be construed accordingly).

10 Circumstances in which conduct takes place without free agreement

(1) For the purposes of section 9, but without prejudice to the generality of that section, free agreement to conduct is absent in the circumstances set out in subsection (2).

(2) Those circumstances are—

(a) where the conduct occurs at a time when B is incapable because of the effect of alcohol or any other substance of consenting to it,
(c) where B agrees or submits to the conduct because of violence used against B or any other person, or because of threats of violence made against B or any other person,

(d) where B agrees or submits to the conduct because B is unlawfully detained by A,

(e) where B agrees or submits to the conduct because B is mistaken, as a result of deception by A, as to the nature or purpose of the conduct,

(f) where B agrees or submits to the conduct because A induces B to agree or submit to the conduct by impersonating a person known personally to B, or

(g) where the only expression or indication of agreement to the conduct is from a person other than B.

(3) References in this section to A and to B are to be construed in accordance with sections 1 to 7A.

10A Consent: capacity while asleep or unconscious

(1) This section applies in relation to sections 1 to 7A.

(2) A person is incapable, while asleep or unconscious, of consenting to any conduct.

11 Consent: scope and withdrawal

(1) This section applies in relation to sections 1 to 7A.

(2) Consent to conduct does not of itself imply consent to any other conduct.

(3) Consent to conduct may be withdrawn at any time before, or in the case of continuing conduct, during, the conduct.

(4) If the conduct takes place, or continues to take place, after consent has been withdrawn, it takes place, or continues to take place, without consent.

Reasonable belief

12 Reasonable belief

In determining, for the purposes of Part 1, whether a person’s belief as to consent or knowledge was reasonable, regard is to be had to whether the person took any steps to ascertain whether there was consent or, as the case may be, knowledge; and if so, to what those steps were.

PART 3

MENTALLY DISORDERED PERSONS

Mentally disordered persons

13 Capacity to consent

(1) This section applies in relation to sections 1 to 7A.

(2) A mentally disordered person is incapable of consenting to conduct where, by reason of mental disorder, the person is unable to do one or more of the following—

(a) understand what the conduct is,
(b) form a decision as to whether to engage in the conduct (or as to whether the conduct should take place),
(c) communicate any such decision.

(3) In this Act, “mental disorder” has the same meaning as in section 328 of the Mental Health (Care and Treatment) (Scotland) Act 2003 (asp 13) (and related expressions are to be construed accordingly).

PART 4
CHILDREN

Young children

14 Rape of a young child
If a person (“A”), with A’s penis, penetrates to any extent, either intending to do so or reckless as to whether there is penetration, the vagina, anus or mouth of a child (“B”) who has not attained the age of 13 years, then A commits an offence, to be known as the offence of rape of a young child.

14A Sexual assault on a young child by penetration
(1) If a person (“A”), with any part of A’s body or anything else, penetrates sexually to any extent, either intending to do so or reckless as to whether there is penetration, the vagina or anus of a child (“B”) who has not attained the age of 13 years, then A commits an offence, to be known as the offence of sexual assault on a young child by penetration.
(2) Without prejudice to the generality of subsection (1), the reference in that subsection to penetration with any part of A’s body is to be construed as including a reference to penetration with A’s penis.

15 Sexual assault on a young child
(1) If a person (“A”) does any of the things mentioned in subsection (2) (“B” being in each case a child who has not attained the age of 13 years), then A commits an offence, to be known as the offence of sexual assault on a young child.
(2) Those things are, that A—
(a) penetrates sexually, by any means and to any extent, either intending to do so or reckless as to whether there is penetration, the vagina, anus or mouth of B,
(b) intentionally or recklessly touches B sexually,
(c) engages in any other form of sexual activity in which A, intentionally or recklessly, has physical contact (whether bodily contact or contact by means of an implement and whether or not through clothing) with B,
(d) intentionally or recklessly ejaculates semen onto B,
(e) intentionally or recklessly emits urine or saliva onto B sexually.
(4) Without prejudice to the generality of paragraph (a) of subsection (2), the reference in the paragraph to penetration by any means is to be construed as including a reference to penetration with A’s penis.
16 Causing a young child to participate in a sexual activity

If a person (“A”) intentionally causes a child (“B”) who has not attained the age of 13 years to participate in a sexual activity, then A commits an offence, to be known as the offence of causing a young child to participate in a sexual activity.

17 Causing a young child to be present during a sexual activity

(1) If a person (“A”) either—

(a) intentionally engages in a sexual activity and for a purpose mentioned in subsection (2) does so in the presence of a child (“B”) who has not attained the age of 13 years, or

(b) intentionally and for a purpose mentioned in subsection (2) causes B to be present while a third person engages in such an activity,

then A commits an offence, to be known as the offence of causing a young child to be present during a sexual activity.

(2) The purposes are—

(a) obtaining sexual gratification,

(b) humiliating, distressing or alarming B.

(4) Without prejudice to the generality of subsection (1), the reference—

(a) in paragraph (a) of that subsection to A engaging in a sexual activity in the presence of B, includes a reference to A engaging in it in a place in which A can be observed by B other than by B looking at an image, and

(b) in paragraph (b) of that subsection to B being present while a third person engages in such an activity, includes a reference to B being in a place from which the third person can be so observed by B.

18 Causing a young child to look at a sexual image

(1) If a person (“A”) intentionally and for a purpose mentioned in subsection (2) causes a child (“B”) who has not attained the age of 13 years to look at a sexual image, then A commits an offence, to be known as the offence of causing a young child to look at a sexual image.

(2) The purposes are—

(a) obtaining sexual gratification,

(b) humiliating, distressing or alarming B.

(2A) For the purposes of subsection (1), a sexual image is an image (produced by whatever means and whether or not a moving image) of—

(a) A engaging in a sexual activity or of a third person or imaginary person so engaging,

(b) A’s genitals or the genitals of a third person or imaginary person.

19 Communicating indecently with a young child etc.

(1) If a person (“A”), intentionally and for a purpose mentioned in subsection (3)—

(a) sends, by whatever means, a sexual written communication to, or
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(b) directs, by whatever means, a sexual verbal communication at,
a child (“B”) who has not attained the age of 13 years, then A commits an offence, to be
known as the offence of communicating indecently with a young child.

(2) If, in circumstances other than are as mentioned in subsection (1), a person (“A”),
intentionally and for a purpose mentioned in subsection (3) causes a child (“B”) who has
not attained the age of 13 years to see or hear, by whatever means, a sexual written
communication or sexual verbal communication, then A commits an offence, to be
known as the offence of causing a young child to see or hear an indecent
communication.

(3) The purposes are—
(a) obtaining sexual gratification,
(b) humiliating, distressing or alarming B.

(4) In this section—
“written communication” means a communication in whatever written form, and
without prejudice to that generality includes a communication which comprises
writings of a person other than A (as for example a passage in a book or
magazine), and

“verbal communication” means a communication in whatever verbal form, and
without prejudice to that generality includes—

(a) a communication which comprises sounds of sexual activity (whether
actual or simulated), and
(b) a communication by means of sign language.

19A Sexual exposure to a young child

(1) If a person (“A”) intentionally and for a purpose mentioned in subsection (2) exposes
A’s genitals in a sexual manner to a child (“B”) who has not attained the age of 13
years, with the intention that B will see them, then A commits an offence, to be known
as the offence of sexual exposure to a young child.

(2) The purposes are—
(a) obtaining sexual gratification,
(b) humiliating, distressing or alarming B.

19B Voyeurism towards a young child

(1) If a person (“A”) does any of the things mentioned in subsections (2) to (5) in relation to
a child (“B”) who has not attained the age of 13 years, then A commits an offence, to be
known as the offence of voyeurism towards a young child.

(2) The first thing is that A, for a purpose mentioned in subsection (6), observes B doing a
private act.

(3) The second thing is that A operates equipment with the intention of enabling A or
another person (“C”), for a purpose mentioned in subsection (7), to observe B doing a
private act.
(4) The third thing is that A records B doing a private act with the intention that A or another person (“C”), for a purpose mentioned in subsection (7), will look at an image of B doing the act.

(5) The fourth thing is that A—
   (a) installs equipment, or
   (b) constructs or adapts a structure or part of a structure with the intention of enabling A or another person to do an act referred to in subsection (2), (3) or (4).

(6) The purposes referred to in subsection (2) are—
   (a) obtaining sexual gratification,
   (b) humiliating, distressing or alarming B.

(7) The purposes referred to in subsections (3) and (4) are—
   (a) obtaining sexual gratification (whether for A or C),
   (b) humiliating, distressing or alarming B.

(8) Section 7B applies for the purposes of this section as it applies for the purposes of section 7A (the references in that section to section 7A(3) and (5) being construed as references to subsections (3) and (5) of this section).

20 Belief that child had attained the age of 13 years

It is not a defence to a charge in proceedings under any of sections 14 to 19B that A believed that B had attained the age of 13 years.

21 Older children

21 Having intercourse with an older child

If a person (“A”), who has attained the age of 16 years, with A’s penis, penetrates to any extent, either intending to do so or reckless as to whether there is penetration, the vagina, anus or mouth of a child (“B”), who—

(a) has attained the age of 13 years, but
(b) has not attained the age of 16 years,

then A commits an offence, to be known as the offence of having intercourse with an older child.

21A Engaging in penetrative sexual activity with or towards an older child

(1) If a person (“A”), who has attained the age of 16 years, with any part of A’s body or anything else penetrates sexually to any extent, either intending to do so or reckless as to whether there is penetration, the vagina or anus of a child (“B”) who—

(a) has attained the age of 13 years, but
(b) has not attained the age of 16 years,

then A commits an offence, to be known as the offence of engaging in penetrative sexual activity with or towards an older child.
(2) Without prejudice to the generality of subsection (1), the reference in that paragraph to penetration with any part of A’s body is to be construed as including a reference to penetration with A’s penis.

**22 Engaging in sexual activity with or towards an older child**

(1) If a person (“A”), who has attained the age of 16 years, does any of the things mentioned in subsection (2), “B” being in each case a child who—

- has attained the age of 13 years, but
- has not attained the age of 16 years,

then A commits an offence, to be known as the offence of engaging in sexual activity with or towards an older child.

(2) Those things are, that A—

- penetrates sexually, by any means and to any extent, either intending to do so or recklessly as to whether there is penetration, the vagina, anus or mouth of B,
- intentionally or recklessly touches B sexually,
- engages in any other form of sexual activity in which A, intentionally or recklessly, has physical contact (whether bodily contact or contact by means of an implement and whether or not through clothing) with B,
- intentionally or recklessly ejaculates semen onto B,
- intentionally or recklessly emits urine or saliva onto B sexually.

(4) Without prejudice to the generality of paragraph (a) of subsection (2), the reference in the paragraph to penetration by any means is to be construed as including a reference to penetration with A’s penis.

**23 Causing an older child to participate in a sexual activity**

If a person (“A”), who has attained the age of 16 years, intentionally causes a child (“B”), who—

- has attained the age of 13 years, but
- has not attained the age of 16 years,

to participate in a sexual activity, then A commits an offence, to be known as the offence of causing an older child to participate in a sexual activity.

**24 Causing an older child to be present during a sexual activity**

(1) If a person (“A”), who has attained the age of 16 years either—

- intentionally engages in a sexual activity and for a purpose mentioned in subsection (2) does so in the presence of a child (“B”), who—
  - has attained the age of 13 years, but
  - has not attained the age of 16 years, or
(b) intentionally, and for a purpose mentioned in subsection (2) causes B to be present while a third person engages in such an activity,
then A commits an offence, to be known as the offence of causing an older child to be present during a sexual activity.

(2) The purposes are—
(a) obtaining sexual gratification,
(b) humiliating, distressing or alarming B.

(4) Without prejudice to the generality of subsection (1), the reference—
(a) in paragraph (a) of that subsection to A engaging in a sexual activity in the presence of B, includes a reference to A engaging in it in a place in which A can be observed by B other than by B looking at an image, and
(b) in paragraph (b) of that subsection to B being present while a third person engages in such an activity, includes a reference to B being in a place from which the third person can be so observed by B.

25 Causing an older child to look at a sexual image

(1) If a person (“A”), who has attained the age of 16 years, intentionally and for a purpose mentioned in subsection (2) causes a child (“B”), who—
(a) has attained the age of 13 years, but
(b) has not attained the age of 16 years,
to look at a sexual image, then A commits an offence, to be known as the offence of causing an older child to look at a sexual image.

(2) The purposes are—
(a) obtaining sexual gratification,
(b) humiliating, distressing or alarming B.

(2A) For the purposes of subsection (1), a sexual image is an image (produced by whatever means and whether or not a moving image) of—
(a) A engaging in a sexual activity or of a third person or imaginary person so engaging,
(b) A’s genitals or the genitals of a third person or imaginary person.

26 Communicating indecently with an older child etc.

(1) If a person (“A”), who has attained the age of 16 years, intentionally and for a purpose mentioned in subsection (3), sends, by whatever means, a sexual written communication to or directs, by whatever means, a sexual verbal communication at, a child (“B”) who—
(a) has attained the age of 13 years, but
(b) has not attained the age of 16 years,
then A commits an offence, to be known as the offence of communicating indecently with an older child.
(2) If, in circumstances other than are as mentioned in subsection (1), a person ("A"), who has attained the age of 16 years, intentionally and for a purpose mentioned in subsection (3), causes another person ("B") who is a child described in paragraphs (a) and (b) of subsection (1) to see or hear, by whatever means, a sexual written communication or sexual verbal communication, then A commits an offence, to be known as the offence of causing an older child to see or hear an indecent communication.

(3) The purposes are—
(a) obtaining sexual gratification,
(b) humiliating, distressing or alarming B.

(4) In this section—
"written communication" means a communication in whatever written form, and without prejudice to that generality includes a communication which comprises writings of a person other than A (as for example a passage in a book or magazine), and
"verbal communication" means a communication in whatever verbal form, and without prejudice to that generality includes—
(a) a communication which comprises sounds of sexual activity (whether actual or simulated), and
(b) a communication by means of sign language.

26A Sexual exposure to an older child

(1) If a person ("A"), who has attained the age of 16 years, intentionally and for a purpose mentioned in subsection (2) exposes A’s genitals in a sexual manner to a child ("B") who—
(a) has attained the age of 13 years, but
(b) has not attained the age of 16 years,
with the intention that B will see them, then A commits an offence, to be known as the offence of sexual exposure to an older child.

(2) The purposes are—
(a) obtaining sexual gratification,
(b) humiliating, distressing or alarming B.

26B Voyeurism towards an older child

(1) If a person ("A"), who has attained the age of 16 years, does any of the things mentioned in subsections (2) to (5) in relation to a child ("B") who—
(a) has attained the age of 13 years, but
(b) has not attained the age of 16 years,
then A commits an offence, to be known as the offence of voyeurism towards an older child.

(2) The first thing is that A, for a purpose mentioned in subsection (6), observes B doing a private act.
(3) The second thing is that A operates equipment with the intention of enabling A or another person (“C”), for a purpose mentioned in subsection (7), to observe B doing a private act.

(4) The third thing is that A records B doing a private act with the intention that A or another person (“C”), for a purpose mentioned in subsection (7), will look at an image of B doing the act.

(5) The fourth thing is that A—
   (a) installs equipment, or
   (b) constructs or adapts a structure or part of a structure with the intention of enabling A or another person to do an act referred to in subsection (2), (3) or (4).

(6) The purposes referred to in subsection (2) are—
   (a) obtaining sexual gratification,
   (b) humiliating, distressing or alarming B.

(7) The purposes referred to in subsections (3) and (4) are—
   (a) obtaining sexual gratification (whether for A or C),
   (b) humiliating, distressing or alarming B.

(8) Section 7B applies for the purposes of this section as it applies for the purposes of section 7A (the references in that section to section 7A(3) and (5) being construed as references to subsections (3) and (5) of this section).

20 **Older children engaging in sexual conduct with each other**

(1) If a child (“A”), being a child mentioned in subsection (2), does any of the things mentioned in subsection (3), “B” being in each case a child mentioned in subsection (2), then A commits an offence, to be known as the offence of engaging while an older child in sexual conduct with or towards another older child.

(2) The child is a child who—
   (a) has attained the age of 13 years, but
   (b) has not attained the age of 16 years.

(3) The things are that A—
   (a) penetrates sexually, with A’s penis and to any extent, either intending to do so or reckless as to whether there is penetration, the vagina, anus or mouth of B,
   (b) intentionally or recklessly touches the vagina, anus or penis of B sexually with A’s mouth.

(4) In the circumstances specified in subsection (1), if B engages by consent in the conduct in question, then B commits an offence, to be known as the offence of engaging while an older child in consensual sexual conduct with another older child.

(6) In paragraph (b) of subsection (3), the reference to A’s mouth is to be construed as including a reference to A’s tongue or teeth.

28 **Penetration and consent for the purposes of section 27**

(1) This section applies for the purposes of section 27.
(3) Penetration is a continuing act from entry until withdrawal of whatever is intruded.

(4) “Consent” means free agreement (and related expressions are to be construed accordingly).

(5) Without prejudice to the generality of subsection (4), free agreement to conduct is absent in the circumstances set out in section 10(2) (references in that section to A and B being construed in accordance with section 27).

(5A) A person is incapable, while asleep or unconscious, of consenting to any conduct.

(6) Consent to conduct does not of itself imply consent to any other conduct.

(7) Consent to conduct may be withdrawn at any time before, or in the case of continuing conduct, during, the conduct.

(8) If the conduct takes place, or continues to take place, after consent has been withdrawn, it takes place, or continues to take place, without consent.

29 **Defences in relation to offences against older children**

(1) It is a defence to a charge in proceedings—

(a) against A under any of sections 21 to 27(1) that A reasonably believed that B had attained the age of 16 years,

(b) against B under section 27(4) that B reasonably believed that A had attained the age of 16 years.

(2) But—

(a) the defence under subsection (1)(a) is not available to A—

(i) if A has previously been charged by the police with a relevant sexual offence, or

(ii) if there is in force in respect of A a risk of sexual harm order,

(b) the defence under subsection (1)(b) is not available to B—

(i) if B has previously been charged by the police with a relevant sexual offence, or

(ii) if there is in force in respect of B a risk of sexual harm order.

(3) It is a defence to a charge in proceedings under any of the sections mentioned in subsection (4) that at the time when the conduct to which the charge relates took place, the difference between A’s age and B’s age did not exceed 2 years.

(4) Those sections are—

(b) section 22(2)(a), but not in so far as the charge is founded on—

(i) penetration of B’s vagina, anus or mouth with A’s penis,

(ii) penetration of B’s vagina or anus with A’s mouth, tongue or teeth,

(ba) section 22(2)(b) or (c), but not in so far as the charge is founded on sexual touching or other physical activity involving—

(i) B’s vagina, anus or penis being touched sexually by A’s mouth,

(ii) A’s vagina, anus or mouth being penetrated by B’s penis,

(iii) A’s vagina,anus or penis being touched sexually by B’s mouth,
(bb) section 22(2)(d),
(c) any of sections 23 to 26B.

(5) In paragraphs (a) and (b) of subsection (2)—

(a) “a relevant sexual offence” means an offence listed in schedule 1Z,
(b) “a risk of sexual harm order” means an order under section 2 of the Protection of Children and Prevention of Sexual Offences (Scotland) Act 2005 (asp 9) or section 123 of the Sexual Offences Act 2003 (c.42).

(5A) The Scottish Ministers may by order modify schedule 1Z so as to add an offence against a child which involves sexual conduct or delete an offence listed there.

(6) It is not a defence to a charge in—

(a) proceedings under any of sections 21 to 27(1) against A that A believed that B had not attained the age of 13 years,
(b) proceedings under section 27(4) against B that B believed that A had not attained the age of 13 years.

General

30 Special provision as regards failure to establish whether child has or has not attained certain ages

(1) Deeming provision 1 applies to a trial where—

(a) A is charged with an offence under any of sections 21 to 26B or 27(1),
(b) there is a failure to establish beyond reasonable doubt that B was a child who had attained the age of 13 years at the relevant time, and
(c) the court or, in the case of a trial of an indictment, the jury is satisfied it is established beyond reasonable doubt that B had not attained the age of 16 years at the time.

(2) Deeming provision 2 applies to a trial where—

(a) B is charged with an offence under section 27(4),
(b) there is a failure to establish beyond reasonable doubt that A was a child who had attained the age of 13 years at the relevant time, and
(c) the court or, in the case of a trial of an indictment, the jury is satisfied it is established beyond reasonable doubt that A had not attained the age of 16 years at the time.

(3) Deeming provision 3 applies to a trial where—

(a) A is charged with an offence under section 27(1),
(b) there is a failure to establish beyond reasonable doubt that A was a child who had not attained the age of 16 years at the relevant time, and
(c) the court or, in the case of a trial of an indictment, the jury is satisfied it is established beyond reasonable doubt that A had attained the age of 13 years at the time.

(4) Deeming provision 4 applies to a trial where—

(a) B is charged with an offence under section 27(4),
(b) there is a failure to establish beyond reasonable doubt that B was a child who had not attained the age of 16 years at the relevant time, and

(c) the court or, in the case of a trial of an indictment, the jury is satisfied it is established beyond reasonable doubt that B had attained the age of 13 years at the time.

(4A) Where any of the deeming provisions apply, references in sections 21 to 27 to A or B having or not having attained a particular age are to be construed in accordance with this section and section 30A.

(5) In this section and section 30A, the “relevant time” is when the conduct to which the proceedings relate occurred.

30A **Special provision as regards age: deeming provisions**

The deeming provisions are—

*Deeming provision 1*  
B is to be deemed for the purposes of the proceedings to be a person who has attained the age of 13 years at the relevant time.

*Deeming provision 2*  
A is to be deemed for the purposes of the proceedings to be a person who has attained the age of 13 years at the relevant time.

*Deeming provision 3*  
A is to be deemed for the purposes of the proceedings to be a child who has not attained the age of 16 years at the relevant time.

*Deeming provision 4*  
B is to be deemed for the purposes of the proceedings to be a person who has not attained the age of 16 years at the relevant time.

**PART 5**

**ABUSE OF POSITION OF TRUST**

**Children**

**31 Sexual abuse of trust**

If a person (“A”) who has attained the age of 18 years—

(a) intentionally engages in a sexual activity with or directed towards another person (“B”) who is under 18, and

(b) is in a position of trust in relation to B,

then A commits an offence, to be known as the offence of sexual abuse of trust.

**32 Positions of trust**

(1) For the purposes of section 31, a person (“A”) is in a position of trust in relation to another person (“B”) if any of the five conditions set out below is fulfilled.

(2) The first condition is that B is detained by virtue of an order of court or under an enactment in an institution and A looks after persons under 18 in that institution.
The second condition is that B is resident in a home or other place in which accommodation is provided by a local authority under section 26(1) of the Children (Scotland) Act 1995 (c.36) and A looks after persons under 18 in that place.

The third condition is that B is accommodated and cared for in—

(a) a hospital,
(b) accommodation provided by an independent health care service,
(c) accommodation provided by a care home service,
(d) a residential establishment, or
(e) accommodation provided by a school care accommodation service or a secure accommodation service,

and A looks after persons under 18 in that place.

The fourth condition is that B is receiving education at—

(a) a school and A looks after persons under 18 in that school, or
(b) a further or higher education institution and A looks after B in that institution.

The fifth condition is that A—

(a) has any parental responsibilities or parental rights in respect of B,
(b) fulfils any such responsibilities or exercises any such rights under arrangement with a person who has such responsibilities or rights,
(c) had any such responsibilities or rights but no longer has such responsibilities or rights, or
(d) treats B as a child of A’s family,

and B is a member of the same household as A.

A looks after a person for the purposes of this section if A regularly cares for, teaches, trains, supervises, or is in sole charge of the person.

The Scottish Ministers may by order modify this section (other than this subsection) and section 33 so as to add, delete or amend a condition.

Interpretation of section 32

In section 32—

“care home service” has the meaning given by section 2(3) of the Regulation of Care (Scotland) Act 2001 (asp 8) (“the 2001 Act”),

“further or higher education institution” means a body listed in schedule 2 to the Further and Higher Education (Scotland) Act 2005 (asp 6),

“hospital” means a health service hospital (as defined in section 108(1) of the National Health Service (Scotland) Act 1978 (c.29)),

“independent health care service” has the meaning given by section 2(5) of the 2001 Act,

“local authority” means a council constituted under section 2 of the Local Government etc. (Scotland) Act 1994 (c.39),
“parental responsibilities” and “parental rights” have the same meanings as in the Children (Scotland) Act 1995 (c.36),
“residential establishment” has the meaning given by section 93(1)(a) of that Act of 1995,
“school” has the same meaning as in the Education (Scotland) Act 1980 (c.44),
“school care accommodation service” has the meaning given by section 2(4) of the 2001 Act, and
“secure accommodation service” has the meaning given by section 2(9) of the 2001 Act.

34 Sexual abuse of trust: defences

(1) It is a defence to a charge in proceedings under section 31 that A reasonably believed—
(a) that B had attained the age of 18, or
(b) that B was not a person in relation to whom A was in a position of trust.

(2) It is a defence to a charge in proceedings under section 31—
(a) that B was A’s spouse or civil partner, or
(b) that immediately before the position of trust came into being, a sexual relationship existed between A and B.

(3) Subsection (2) does not apply if A was in a position of trust in relation to B by virtue of section 32(6).

35 Mentally disordered persons

35 Sexual abuse of trust of a mentally disordered person

(1) If a person (“A”)—
(a) intentionally engages in a sexual activity with or directed towards a mentally disordered person (“B”), and
(b) is a person mentioned in subsection (2),
then A commits an offence, to be known as sexual abuse of trust of a mentally disordered person.

(2) Those persons are—
(a) a person providing care services to B,
(b) a person who—
(i) is an individual employed in, or contracted to provide services in or to, or
(ii) not being the Scottish Ministers, is a manager of,
a hospital, independent health care service or state hospital in which B is being given medical treatment.

(4) References in this section to the provision of care services are references to anything done by way of such services—
(a) by,
(b) by an employee of, or
(c) in the course of a service provided or supplied by,

a care service, whether by virtue of a contract of employment or any other contract or in such other circumstances as may be specified in an order made by the Scottish Ministers.

5   (5) In this section—

“care service” has the meaning given by subsection (1)(a), (b), (e), (g), (h), (k) and (n) as read with subsections (2), (3), (6), (9), (10), (16) and (27) of section 2 of the Regulation of Care (Scotland) Act 2001 (asp 8),

“hospital” and “independent health care service” have the meanings given in section 33, and

“state hospital” means a hospital provided under section 102(1) of the National Health Service (Scotland) Act 1978 (c. 29).

36 Sexual abuse of trust of a mentally disordered person: defences

(1) It is a defence to a charge in proceedings under section 35 that A reasonably believed—

(a) that B did not have a mental disorder, or

(b) that A was not a person specified in section 35(2).

(2) It is a defence to a charge in proceedings under section 35—

(a) that B was A’s spouse or civil partner, or

(b) in a case where A was—

(i) a person specified in section 35(2)(a), that immediately before A began to provide care services to B, a sexual relationship existed between A and B,

(ii) a person specified in section 35(2)(b), that immediately before B was admitted to the hospital (or other establishment) referred to in that provision or (where B has been admitted to that establishment more than once) was last admitted to it, such a relationship existed.

PART 6

Penalties

Penalties

37 Penalties

30 (1) A person guilty of an offence mentioned in the first column of schedule 1 is liable—

(a) on summary conviction, to the penalty mentioned in the third column,

(b) on conviction on indictment, to the penalty mentioned in the fourth column.

(2) Where an individual is convicted on indictment of rape, sexual assault by penetration, rape of a young child or sexual assault on a young child by penetration, a penalty of imprisonment without a fine may be imposed, but not a penalty of a fine alone; and the power of the court in section 199(2)(b) of the Criminal Procedure (Scotland) Act 1995 (c.20) (to substitute a fine for imprisonment) is not available.

(3) Where—
(a) a body corporate,
(b) a Scottish partnership, or
(c) an unincorporated association other than a Scottish partnership,
is convicted on indictment of an offence specified in subsection (2), a penalty of a fine
alone may be imposed.

PART 7
MISCELLANEOUS AND GENERAL

Miscellaneous

37A Establishment of purpose for the purposes of sections 4 to 7A, 17 to 19B and 24 to 26B

(1) For the purposes of sections 4 to 7A, 17 to 19B and 24 to 26B, A’s purpose was—

(a) obtaining sexual gratification, or
(b) humiliating, distressing or alarming B,

if in all the circumstances of the case it may reasonably be inferred A was doing the
thing for the purpose in question.

(2) In applying subsection (1) to determine A’s purpose, it is irrelevant whether or not B
was in fact humiliated, distressed or alarmed by the thing done by A.

38 Power to convict for offence other than that charged

(1) If, in a trial—

(a) on an indictment for an offence mentioned in the first column of schedule 2 the
jury are not satisfied that the accused committed the offence charged but are
satisfied that the accused committed the alternative offence (or as the case may be
one of the alternative offences) mentioned in the third column, they may, or

(b) in summary proceedings for an offence mentioned in the first column of that
schedule the court is not satisfied that the accused committed the offence charged
but is satisfied that the accused committed the alternative offence (or as the case
may be one of the alternative offences) mentioned in the third column, it may,

acquit the accused of the charge but find the accused guilty of the alternative offence in
respect of which so satisfied (the accused then being liable to be punished accordingly).

(1A) Where either of conditions 1 or 2 apply in a trial, the court or jury may acquit the
accused of the charge but find the accused guilty of the alternative older child offence
(the accused then being liable to be punished accordingly).

(1B) Condition 1 is that—

(a) A is charged with an offence under sections 14 to 19B, and
(b) but for a failure to establish beyond reasonable doubt that B had attained the age
of 13 years at the relevant time, a court or jury would, by virtue of subsection (1),
find that A committed an offence (“the alternative older child offence”) of—

(i) having intercourse with an older child,
(ia) engaging in penetrative sexual activity with or towards an older child,
(ii) engaging in sexual activity with or towards an older child,
(iii) causing an older child to participate in a sexual activity,
(iv) causing an older child to be present during a sexual activity,
(v) causing an older child to look at a sexual image,
(vi) communicating indecently with an older child,
(vii) causing an older child to see or hear an indecent communication,
(viia) sexual exposure to an older child,
(viib) voyeurism towards an older child,
(viii) engaging while an older child in sexual conduct with or towards another older child,
(ix) engaging while an older child in consensual sexual conduct with another older child.

(1C) Condition 2 is that—
(a) A is charged with an offence under section 21, 21A or 22, and
(b) but for a failure to establish beyond reasonable doubt that A had not attained the age of 16 years at the relevant time, a court or jury would, by virtue of subsection (1), find that A committed an offence (“the alternative older child offence”) of—
(i) engaging while an older child in sexual conduct with or towards another older child,
(ii) engaging while an older child in consensual sexual conduct with another older child.

(1D) In this section, the “relevant time” is when the conduct to which the proceedings relate occurred.

(5) A reference in this section to an offence includes a reference to—
(a) an attempt to commit,
(b) incitement to commit,
(c) counselling or procuring the commission of, and
(d) involvement art and part in,
an offence.

39 Exceptions to inciting or being involved art and part in offences under Part 4 or 5
A person (“X”) is not guilty of inciting, or being involved art and part in, an offence under Part 4 or 5 if, as regards another person (“Y”), X acts—
(a) for the purpose of—
(i) protecting Y from sexually transmitted infection,
(ii) protecting the physical safety of Y,
(iii) preventing Y from becoming pregnant, or
(iv) promoting Y’s emotional well-being by the giving of advice, and
(b) not for the purpose of—
   (i) obtaining sexual gratification,
   (ii) humiliating, distressing or alarming Y, or
   (iii) causing or encouraging the activity constituting the offence or Y’s participation in it.

40  **Common law offences**

For all purposes not relating to offences committed before the coming into force of this section—

(a) the common law offences of—
   (i) rape,
   (ii) clandestine injury to women,
   (iii) lewd, indecent or libidinous practice or behaviour, and
   (iv) sodomy,
   are abolished, and

(b) without prejudice to paragraph (a), in so far as the provisions of this Act regulate any conduct they replace any rule of law regulating that conduct.

41  **Continuity of law on sexual offences**

(1) This section applies where, in any trial—

   (a) the accused is charged in respect of the same conduct both with an offence under this Act (“the new offence”) and with an offence specified in subsection (2) (“the existing offence”),

   (b) there is a failure to establish beyond reasonable doubt that—

      (i) the time when the conduct took place was after the coming into force of the provision providing for the new offence, and

      (ii) the time when the conduct took place was before the abolishment or replacement of or, as the case may be, the coming into force of the repeal of the enactment providing for, the existing offence, and

   (c) the court (or, in the case of a trial of an indictment, the jury) is satisfied in every other respect that the accused committed the offences charged.

(2) The offences referred to in subsection (1)(a) are—

   (a) rape (at common law),

   (b) clandestine injury to women,

   (c) lewd, indecent or libidinous practice or behaviour,

   (d) any other common law offence which is replaced by an offence under this Act,

   (e) an offence under section 3 of the Criminal Law (Consolidation) (Scotland) Act 1995 (c.39) (intercourse of person in position of trust with child under 16),

   (f) an offence under section 5(1), (2) or (3) (intercourse with girl under 16) or 6 (indecent behaviour towards girl between 12 and 16) of that Act,
(g) an offence under section 3 of the Sexual Offences (Amendment) Act 2000 (c.44) (abuse of position of trust).

(3) Where this section applies, the accused may be found guilty—

(a) if the maximum penalty for the existing offence is less than the maximum penalty for the new offence, of the existing offence,

(b) in any other case, of the new offence.

(4) In subsection (3) the reference, in relation to an offence, to the maximum penalty is a reference to the maximum penalty by way of imprisonment or other detention that could be imposed on the accused on conviction of the offence in the proceedings in question.

(5) A reference in this section to an offence includes a reference to—

(a) an attempt to commit an offence,

(b) incitement to commit an offence,

(c) counselling or procuring the commission of an offence,

(d) involvement art and part in an offence, and

(e) an offence as modified by section 16A or 16B of the Criminal Law (Consolidation) (Scotland) Act 1995 (c.39).

42 Incitement to commit certain sexual acts outside the United Kingdom

(1) If a person does an act in Scotland which would amount to the offence of incitement to commit a listed offence but for the fact that what the person had in view (referred to in this section as “the relevant conduct”) is intended to occur in a country outside the United Kingdom, then—

(a) the relevant conduct is to be treated as the listed offence, and

(b) the person accordingly commits the offence of incitement to commit the listed offence.

(2) However, a person who is not a UK national commits an offence by virtue of subsection (1) only if the relevant conduct would also involve the commission of an offence under the law in force in the country where the whole or any part of it was intended to take place.

(3) Conduct punishable under the law in force in the country is an offence under that law for the purposes of subsection (2) however it is described in that law.

(4) The condition specified in subsection (2) is to be taken as satisfied unless, not later than such time as may be prescribed by Act of Adjournal, the accused serves on the prosecutor a notice—

(a) stating that, on the facts as alleged with respect to the relevant conduct, the condition is not in the accused’s opinion satisfied,

(b) setting out the grounds for the accused’s opinion, and

(c) requiring the prosecutor to prove that the condition is satisfied.

(5) But the court, if it thinks fit, may permit the accused to require the prosecutor to prove that the condition is satisfied without the prior service of a notice under that subsection.

(6) In proceedings on indictment, the question whether the condition is satisfied is to be determined by the judge alone.
Any act of incitement by means of a message (however communicated) is to be treated as done in Scotland if the message is sent or received in Scotland.

In this section—

“country” includes territory,

“listed offence” means an offence listed in Part 1 of schedule 3,

“UK national” means an individual who was at the time the relevant conduct took place, or who has subsequently become—

(a) a British citizen, a British overseas territories citizen, a British National (Overseas) or a British Overseas citizen,

(b) a person who under the British Nationality Act 1981 is a British subject, or

(c) a British protected person within the meaning of that Act.

Offences committed outside the United Kingdom

(1) If a UK national does an act in a country outside the United Kingdom which would, if it had been done in Scotland, constitute a listed offence then the UK national commits that offence.

(2) If—

(a) a UK resident does an act in a country outside the United Kingdom which would, if it had been done in Scotland, constitute a listed offence, and

(b) the act constitutes an offence under the law in force in that country,

then the UK resident commits the listed offence.

(3) For the purposes of subsection (2)(b), an act punishable under the law in force in the country is an offence under that law however it is described in that law.

(4) The condition specified in subsection (2)(b) is to be taken as satisfied unless, not later than such time as may be prescribed by Act of Adjournal, the accused serves on the prosecutor a notice—

(a) stating that, on the facts as alleged with respect to the act in question, the condition is not in the accused’s opinion satisfied,

(b) setting out the grounds for the accused’s opinion, and

(c) requiring the prosecutor to prove that the condition is satisfied.

(5) But the court, if it thinks fit, may permit the accused to require the prosecutor to prove that the condition is satisfied without the prior service of a notice under that subsection.

(6) In proceedings on indictment, the question whether the condition is satisfied is to be determined by the judge alone.

(7) A person may be proceeded against, indicted, tried and punished for any offence to which this section applies—

(a) in any sheriff court district in Scotland in which the person is apprehended or is in custody, or

(b) in such sheriff court district as the Lord Advocate may determine,
as if the offence had been committed in that district; and the offence is, for all purposes incidental to or consequential on trial or punishment, to be deemed to have been committed in that district.

(8) In this section—

“country” includes territory,
“listed offence” means an offence listed in Part 2 of schedule 3,
“sheriff court district” is to be construed in accordance with section 307(1) (interpretation) of the Criminal Procedure (Scotland) Act 1995 (c.46),
“UK national” has the meaning given in section 42,
“UK resident” means an individual who was at the time the act mentioned in subsection (2) took place, or who has subsequently become, resident in the United Kingdom.

44 Continuity of law on sexual offences committed outside the United Kingdom

(1) This section applies where, in any trial—

(a) the accused is charged in respect of the same conduct both—

(i) with an offence mentioned in subsection (2) as modified by section 16B of the Criminal Law (Consolidation) (Scotland) Act 1995 (commission of certain sexual acts outside the United Kingdom), and

(ii) with that offence as modified by section 43,

(b) there is a failure to establish beyond reasonable doubt that—

(i) the time when the conduct took place was after the coming into force of section 43, and

(ii) the time when the conduct took place was before the coming into force of the repeal of section 16B of the Criminal Law (Consolidation) (Scotland) Act 1995, and

(c) the court (or, in the case of a trial of an indictment, the jury) is satisfied in every other respect that the accused committed the offences charged.

(2) The offences referred to in subsection (1)(a) are—

(a) an offence under section 52 of the Civic Government (Scotland) Act 1982 (c.45) (taking and distribution of indecent images of children),

(b) an offence under section 52A of that Act (possession of indecent images of children),

(c) an offence under section 9 of the Protection of Children and Prevention of Sexual Offences (Scotland) Act 2005 (asp 9) (paying for sexual services of a child),

(d) an offence under section 10 of that Act (causing or inciting provision by child of sexual services or pornography),

(e) an offence under section 11 of that Act (controlling a child providing sexual services or involved in pornography),

(f) an offence under section 12 of that Act (arranging or facilitating provision by child of sexual services or pornography).
(3) Where this section applies, the accused may be found guilty of the offence mentioned in subsection (2) as modified by section 16B of the Criminal Law (Consolidation) (Scotland) Act 1995.

(4) A reference in this section to an offence includes a reference to—

(a) an attempt to commit,

(b) incitement to commit,

(c) counselling or procuring the commission of, and

(d) involvement art and part in,

an offence.

General provisions

44A Offences by bodies corporate etc.

(1) Where—

(a) an offence under this Act has been committed by—

(i) a body corporate,

(ii) a Scottish partnership, or

(iii) an unincorporated association other than a Scottish partnership, and

(b) it is proved that the offence was committed with the consent or connivance of, or was attributable to any neglect on the part of—

(i) a relevant individual, or

(ii) an individual purporting to act in the capacity of a relevant individual,

that individual (as well as the body corporate, partnership or, as the case may be, unincorporated association) commits the offence and is liable to be proceeded against and punished accordingly.

(2) In subsection (1), “relevant individual” means—

(a) in relation to a body corporate (other than a limited liability partnership)—

(i) a director, manager, secretary or other similar officer of the body,

(ii) where the affairs of the body are managed by its members, a member,

(b) in relation to a limited liability partnership, a member,

(c) in relation to a Scottish partnership, a partner,

(d) in relation to an unincorporated association other than a Scottish partnership, a person who is concerned in the management or control of the association.

45 Ancillary provision

(1) The Scottish Ministers may by order make such incidental, supplemental, consequential, transitional, transitory or saving provision as they consider necessary or expedient for the purposes of, or in consequence of, or for giving full effect to, this Act or any provision of it.

(2) An order under this section may modify any enactment, instrument or document.
Orders

(1) Any power of the Scottish Ministers to make orders under this Act—
   (a) must be exercised by statutory instrument,
   (b) may be exercised so as to make different provision for different purposes,
   (c) includes power to make incidental, supplemental, consequential, transitional, transitory or saving provision.

(2) A statutory instrument containing an order made under this Act (except an order made under section 49(2)) is, subject to subsection (3), subject to annulment in pursuance of a resolution of the Parliament.

(3) A statutory instrument containing—
   (a) an order under section 29(5A) or section 32(8), or
   (b) an order under section 45 containing incidental, supplemental or consequential provision,

is not to be made unless a draft of the instrument has been laid before, and approved by resolution of, the Parliament.

Interpretation

(1) In this Act—
   “mental disorder” has the meaning given by section 13(3),
   “penis” and “vagina” have the meanings given by section 1(4).

(2) For the purposes of this Act—
   (a) penetration, touching, or any other activity,
   (b) a communication,
   (c) a manner of exposure, or
   (d) a relationship,

is sexual if a reasonable person would, in all the circumstances of the case, consider it to be sexual.

Modification of enactments

(1) Schedule 4 (which contains modifications of enactments) has effect.

(2) The enactments mentioned in the first column of schedule 5 are repealed to the extent specified in the second column of that schedule.

Short title and commencement

(1) This Act may be cited as the Sexual Offences (Scotland) Act 2009.

(2) This Act (other than sections 1(4), 13(3), 45 to 47 and this section) comes into force in accordance with provision made by the Scottish Ministers by order.
SCHEDULE 1Z

(introduced by section 29(5)(a))

RELEVANT SEXUAL OFFENCES

PART 1

OFFENCES THAT MAY CURRENTLY BE COMMITTED

1 Any of the following offences under this Act—

(a) an offence under Part 1 against a person under the age of 16,

(b) an offence under Part 4 (but not an offence of engaging while an older child in sexual conduct with or towards another older child (section 27(1)) or engaging while an older child in consensual sexual conduct with another older child (section 27(4))

(c) sexual abuse of trust (section 31) of a person under the age of 16,

(d) sexual abuse of trust of a mentally disordered person (section 35) of a person under the age of 16.

1A An offence under any of the following provisions of the Sexual Offences (Northern Ireland) Order 2008 (SI No. 1769 (N.I. 2)) against a person under the age of 16—

(a) article 5 (rape),

(b) article 6 (assault by penetration),

(c) article 7 (sexual assault),

(d) article 8 (causing a person to engage in sexual activity without consent),

(e) article 23 (abuse of position of trust: sexual activity with a child under 18),

(f) article 24 (abuse of position of trust: causing or inciting a child under 18 to engage in sexual activity),

(g) article 25 (abuse of position of trust: sexual activity in the presence of a child under 18),

(h) article 26 (abuse of position of trust: causing a child under 18 to watch a sexual act),

(i) article 32 (sexual activity with an under 18 child family member),

(j) article 33 (inciting an under 18 child family member to engage in sexual activity),

(k) article 37 (paying for sexual services of a child under 18),

(l) article 38 (causing or inciting a child under 18 to become a prostitute or to be involved in pornography),

(m) article 39 (controlling the activities of a child under 18 in relation to prostitution or involvement in pornography),

(n) article 40 (arranging or facilitating the prostitution or involvement in pornography of a child under 18),

(o) article 51 (care workers: sexual activity with a person with a mental disorder),

(p) article 52 (care workers: causing or inciting a person with a mental disorder to engage in sexual activity),
(q) article 53 (care workers: sexual activity in the presence of a person with a mental disorder),
(r) article 54 (care workers: causing a person with a mental disorder to watch a sexual act),
(s) article 65 (administering a substance with intention of stupefying etc. for sexual activity),
(t) article 70 (exposure of genitals),
(u) article 71 (voyeurism).

1B An offence under any of the following provisions of that order—

(a) article 12 (rape of a child under 13),
(b) article 13 (assault of a child under 13 by penetration),
(c) article 14 (sexual assault of a child under 13),
(d) article 15 (causing or inciting a child under 13 to engage in sexual activity),
(e) article 16 (sexual activity with a child under 16),
(f) article 17 (causing or inciting a child under 16 to engage in sexual activity),
(g) article 18 (engaging in sexual activity in the presence of a child under 16),
(h) article 19 (causing a child under 16 to watch a sexual act),
(i) article 20 (offences under articles 16 to 19 by a person under 18),
(j) article 21 (arranging or facilitating commission of an offence under articles 16 to 20),
(k) article 22 (meeting a child under 16 following sexual grooming etc.).

2 An offence under any of the following provisions of the Protection of Children and Prevention of Sexual Offences (Scotland) Act 2005 (asp 9) against a person under the age of 16—

(a) section 1 (meeting a person following certain preliminary contact with intention of engaging in unlawful sexual activity),
(b) section 9 (paying a person for sexual services),
(c) section 10 (causing or inciting provision by a person of sexual services or pornography),
(d) section 11 (controlling a person providing sexual services or involved in pornography),
(e) section 12 (arranging or facilitating provision by a person of sexual services or pornography).

3 An offence under—

(a) any of the following provisions of the Sexual Offences Act 2003 (c.42) against a person under the age of 16—

(i) section 1 (rape),
(ii) section 2 (assault by penetration),
(iii) section 3 (sexual assault),
(iiia) section 4 (causing a person to engage in sexual activity without consent),
(iiib) section 16 (abuse of position of trust: sexual activity with a child under 18),
(iiic) section 17 (abuse of position of trust: causing or inciting a child under 18 to engage in sexual activity),
(iiid) section 18 (abuse of position of trust: sexual activity in the presence of a child under 18),
(iii) section 19 (abuse of position of trust: causing a child under 18 to watch a sexual act),
(iv) section 25 (sexual activity with a family member under 18),
(v) section 26 (inciting a family member under 18 to engage in sexual activity),
(vi) section 38 (care workers: sexual activity with a person with a mental disorder),
(vii) section 39 (care workers: causing or inciting a person with a mental disorder to engage in sexual activity),
(viii) section 40 (care workers: sexual activity in the presence of a person with a mental disorder),
(ix) section 41 (care workers: causing a person with a mental disorder to watch a sexual act),
(x) section 47 (paying for sexual services of a person under 18),
(xi) section 48 (causing or inciting a child under 18 to become a prostitute or to be involved in pornography),
(xii) section 49 (controlling the activities of a child under 18 in relation to prostitution or involvement in pornography),
(xiii) section 50 (arranging or facilitating the prostitution or involvement in pornography of a child under 18),
(xiv) section 61 (administering a substance with intention of stupefying etc. for sexual activity),
(xv) section 66 (exposure of genitals),
(xvi) section 67 (voyeurism).

An offence under any of the following provisions of that Act—

(a) section 5 (rape of a child under 13),
(b) section 6 (assault of a child under 13 by penetration),
(c) section 7 (sexual assault of a child under 13),
(d) section 8 (causing or inciting a child under 13 to engage in sexual activity),
(e) section 9 (sexual activity with a child under 16),
(f) section 10 (causing or inciting a child under 16 to engage in sexual activity),
(g) section 11 (engaging in sexual activity in the presence of a child under 16),
Sexual Offences (Scotland) Bill
Schedule 1Z—Relevant sexual offences
Part 1—Offences that may currently be committed

(h) section 12 (causing a child under 16 to watch a sexual act),
(i) section 13 (sex offences against a child under 16 committed by children or young persons),
(j) section 14 (arranging or facilitating commission of a sex offence against a child under 16),
(k) section 15 (meeting a child under 16 following sexual grooming etc.).

Any of the following offences under the Criminal Law (Consolidation) (Scotland) Act 1995 (c.39)—

(za) an offence under section 1 (incest) or 2 (intercourse with a step-child) against a child under the age of 16,
(ya) an offence under section 3 (intercourse of person in position of trust with a child under 16),
(a) an offence under section 8 against a girl under the age of 16 (abduction of a woman or girl for purposes of unlawful sexual intercourse),
(aa) an offence under section 9 (permitting a girl under 16 to use premises for intercourse),
(b) an offence under section 10 (person having parental responsibilities causing or encouraging sexual activity in relation to a girl under 16).

An offence under section 160 of the Criminal Justice Act 1988 (c.33) against a person under the age of 16 (possession of indecent photographs of a person under 18).

An offence under article 15 of the Criminal Justice (Evidence, Etc.) (Northern Ireland) Order 1988 (SI No. 1847 (N.I. 17)) (possession of indecent photographs of a person under 16).

An offence under the following provisions of the Civic Government (Scotland) Act 1982 (c.45) against a person under the age of 16—

(a) section 52 (taking and distribution of indecent images of a person under 18),
(b) section 52A (possession of indecent images of a person under 18).

An offence under section 1 of the Protection of Children Act 1978 (c.37) against a person under the age of 16 (taking or distribution of indecent images of a person under 18).


An attempt, conspiracy or incitement to commit an offence in Part 1 of this schedule.

An offence under section 293(2) of the Criminal Procedure (Scotland) Act 1995 (c.46) (aiding and abetting etc. the commission of a statutory offence) relating to an offence in paragraphs 1, 2, 6 or 9 of that Part.
PART 2

OFFENCES REPLACED BY AN OFFENCE IN PART 1 OR THIS PART

16  The following common law offences against a person under the age of 16 years—
    (a) rape,
    (b) clandestine injury to women,
    (c) sexual assault,
    (d) lewd, indecent or libidinous practice or behaviour,
    (e) sodomy.

17  Rape under the common law of Northern Ireland of a person under the age of 17.

17A Any of the following offences under the Sexual Offences Act 2003, in its application to Northern Ireland—
    (a) an offence under section 15,
    (b) an offence under section 16, 17, 18, 19, 47, 48, 49, 50, 66 or 67 against a child under the age of 17.

17B An offence under article 18, 19, 20 or 21 of the Criminal Justice (Northern Ireland) Order 2003 (SI No. 1247 (N.I. 13)) against a person under the age of 17.

18  An offence under section 3 of the Sexual Offences (Amendment) Act 2000 (c.44) against a person under the age of 16.

19  An offence under section 3, 5, 6 or 13(5)(c) of the Criminal Law (Consolidation) (Scotland) Act 1995.

19A An offence under article 123 of the Mental Health (Northern Ireland) Order 1986 (SI No. 595 (N.I. 4)) against a person under the age of 17.

19B An offence under article 9 of the Criminal Justice (Northern Ireland) Order 1980 (SI No. 704 (N.I. 6)).

20  An offence under section 54 of the Criminal Law Act 1977 (c.45).

21  Any of the following offences under the Sexual Offences (Scotland) Act 1976 (c.67)—
    (a) an offence under section 2A or 2B against a person under the age of 16,
    (b) an offence under section 2C, 3, 4, 5 or 10(1).

21A An offence under section 21 or 22 of the Children and Young Persons Act (Northern Ireland) 1968 (c.34).

22  An offence under section 1 of the Indecency with Children Act 1960 (c.33).

22A An offence under section 2 of the Attempted Rape, etc., Act 1960 (Northern Ireland) (c.3) against a person under the age of 17.

23  An offence under section 1, 10, 11, 12, 14, 15 or 16 of the Sexual Offences Act 1956 (c.69) against a person under the age of 16.

24  An offence under section 5, 6 or 28 of that Act.

24A An offence under section 1 of the Punishment of Incest Act 1908 (c.45)—
    (a) in its application to England and Wales, against a girl under the age of 16,
(b) in its application to Northern Ireland, against a girl under the age of 17.

25 Any of the following offences under the Criminal Law Amendment Act 1885 (48 & 49 Vict.) (c.69)—
   (a) an offence under section 2, 3, 5, 7 or 8—
      (i) in its application to Scotland or England and Wales, against a girl under the age of 16,
      (ii) in its application to Northern Ireland, against a girl under the age of 17,
   (b) an offence under section 4 or 6.

27 Any of the following offences under the Offences Against the Person Act 1861 (24 & 25 Vict.) (c.100)—
   (a) an offence under section 52, 53 or 54—
      (i) in its application to England and Wales, against a person under the age of 16,
      (ii) in its application to Northern Ireland, against a person under the age of 17,
   (b) an offence under section 61 or 62.

28 An attempt, conspiracy or incitement to commit an offence in Part 2 of this schedule.

29 An offence under section 293(2) of the Criminal Procedure (Scotland) Act 1995 (c.46) (aiding and abetting etc. the commission of a statutory offence) relating to any of the following offences—
   (a) an offence against a person under the age of 16 under section 3 of the Sexual Offences (Amendment) Act 2000 in its application to Scotland (see paragraph 18),
   (b) an offence in paragraph 19 or 21,
   (c) an offence against a girl under the age of 16 under section 2, 3, 5, 7 or 8 of the Criminal Law Amendment Act 1885 in its application to Scotland.

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### SCHEDULE 1
(introduced by section 37)

**PENALTIES**

<table>
<thead>
<tr>
<th>Offence</th>
<th>Section introducing offence</th>
<th>Maximum penalty on summary conviction</th>
<th>Maximum penalty on conviction on indictment</th>
</tr>
</thead>
<tbody>
<tr>
<td>Rape</td>
<td>Section 1</td>
<td></td>
<td>Life imprisonment and a fine</td>
</tr>
<tr>
<td>Sexual assault by penetration</td>
<td>Section 1A</td>
<td></td>
<td>Life imprisonment and a fine</td>
</tr>
<tr>
<td>Sexual assault</td>
<td>Section 2</td>
<td>Imprisonment for a term not exceeding 12 months or a fine not exceeding the statutory maximum (or both)</td>
<td>Life imprisonment or a fine (or both)</td>
</tr>
</tbody>
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## Sexual Offences (Scotland) Bill
### Schedule 1—Penalties

<table>
<thead>
<tr>
<th>Offence</th>
<th>Section introducing offence</th>
<th>Maximum penalty on summary conviction</th>
<th>Maximum penalty on conviction on indictment</th>
</tr>
</thead>
<tbody>
<tr>
<td>Sexual coercion</td>
<td>Section 3</td>
<td>Imprisonment for a term not exceeding 12 months or a fine not exceeding the statutory maximum (or both)</td>
<td>Life imprisonment or a fine (or both)</td>
</tr>
<tr>
<td>Coercing a person into being present during a sexual activity</td>
<td>Section 4</td>
<td>Imprisonment for a term not exceeding 12 months or a fine not exceeding the statutory maximum (or both)</td>
<td>Imprisonment for a term not exceeding 10 years or a fine (or both)</td>
</tr>
<tr>
<td>Coercing a person into looking at a sexual image</td>
<td>Section 5</td>
<td>Imprisonment for a term not exceeding 12 months or a fine not exceeding the statutory maximum (or both)</td>
<td>Imprisonment for a term not exceeding 10 years or a fine (or both)</td>
</tr>
<tr>
<td>Communicating indecently</td>
<td>Section 6(1)</td>
<td>Imprisonment for a term not exceeding 12 months or a fine not exceeding the statutory maximum (or both)</td>
<td>Imprisonment for a term not exceeding 10 years or a fine (or both)</td>
</tr>
<tr>
<td>Causing a person to see or hear an indecent communication</td>
<td>Section 6(2)</td>
<td>Imprisonment for a term not exceeding 12 months or a fine not exceeding the statutory maximum (or both)</td>
<td>Imprisonment for a term not exceeding 10 years or a fine (or both)</td>
</tr>
<tr>
<td>Sexual exposure</td>
<td>Section 7</td>
<td>Imprisonment for a term not exceeding 12 months or a fine not exceeding the statutory maximum (or both)</td>
<td>Imprisonment for a term not exceeding 5 years or a fine (or both)</td>
</tr>
<tr>
<td>Voyeurism</td>
<td>Section 7A</td>
<td>Imprisonment for a term not exceeding 12 months or a fine not exceeding the statutory maximum (or both)</td>
<td>Imprisonment for a term not exceeding 5 years or a fine (or both)</td>
</tr>
<tr>
<td>Administering a substance for sexual purposes</td>
<td>Section 8</td>
<td>Imprisonment for a term not exceeding 12 months or a fine not exceeding the statutory maximum (or both)</td>
<td>Imprisonment for a term not exceeding 5 years or a fine (or both)</td>
</tr>
<tr>
<td>Rape of a young child</td>
<td>Section 14</td>
<td></td>
<td>Life imprisonment and a fine</td>
</tr>
<tr>
<td>Sexual assault on a young child by penetration</td>
<td>Section 14A</td>
<td></td>
<td>Life imprisonment and a fine</td>
</tr>
<tr>
<td>Sexual assault on a</td>
<td>Section 15</td>
<td>Imprisonment for a term not exceeding 12 months or a fine not exceeding the statutory maximum (or both)</td>
<td>Life imprisonment or a fine</td>
</tr>
</tbody>
</table>
### Sexual Offences (Scotland) Bill

#### Schedule 1—Penalties

<table>
<thead>
<tr>
<th>Offence</th>
<th>Section introducing offence</th>
<th>Maximum penalty on summary conviction</th>
<th>Maximum penalty on conviction on indictment</th>
</tr>
</thead>
<tbody>
<tr>
<td>young child</td>
<td></td>
<td>exceeding 12 months or a fine not exceeding the statutory maximum (or both)</td>
<td>fine (or both)</td>
</tr>
<tr>
<td>Causing a young child to participate in a sexual activity</td>
<td>Section 16</td>
<td>Imprisonment for a term not exceeding 12 months or a fine not exceeding the statutory maximum (or both)</td>
<td>Life imprisonment or a fine (or both)</td>
</tr>
<tr>
<td>Causing a young child to be present during a sexual activity</td>
<td>Section 17</td>
<td>Imprisonment for a term not exceeding 12 months or a fine not exceeding the statutory maximum (or both)</td>
<td>Imprisonment for a term not exceeding 10 years or a fine (or both)</td>
</tr>
<tr>
<td>Causing a young child to look at a sexual image</td>
<td>Section 18</td>
<td>Imprisonment for a term not exceeding 12 months or a fine not exceeding the statutory maximum (or both)</td>
<td>Imprisonment for a term not exceeding 10 years or a fine (or both)</td>
</tr>
<tr>
<td>Communicating indecently with a young child</td>
<td>Section 19(1)</td>
<td>Imprisonment for a term not exceeding 12 months or a fine not exceeding the statutory maximum (or both)</td>
<td>Imprisonment for a term not exceeding 10 years or a fine (or both)</td>
</tr>
<tr>
<td>Sexual exposure to a young child</td>
<td>Section 19A</td>
<td>Imprisonment for a term not exceeding 12 months or a fine not exceeding the statutory maximum (or both)</td>
<td>Imprisonment for a term not exceeding 10 years or a fine (or both)</td>
</tr>
<tr>
<td>Voyeurism towards a young child</td>
<td>Section 19B</td>
<td>Imprisonment for a term not exceeding 12 months or a fine not exceeding the statutory maximum (or both)</td>
<td>Imprisonment for a term not exceeding 10 years or a fine (or both)</td>
</tr>
<tr>
<td>Causing a young child to see or hear an indecent communication</td>
<td>Section 19(2)</td>
<td>Imprisonment for a term not exceeding 12 months or a fine not exceeding the statutory maximum (or both)</td>
<td>Imprisonment for a term not exceeding 10 years or a fine (or both)</td>
</tr>
<tr>
<td>Having intercourse with an older child</td>
<td>Section 21</td>
<td>Imprisonment for a term not exceeding 12 months or a fine not exceeding the statutory maximum (or both)</td>
<td>Imprisonment for a term not exceeding 10 years or a fine (or both)</td>
</tr>
<tr>
<td>Engaging in penetrative sexual activity with or towards an older child</td>
<td>Section 21A</td>
<td>Imprisonment for a term not exceeding 12 months or a fine not exceeding the statutory maximum (or both)</td>
<td>Imprisonment for a term not exceeding 10 years or a fine (or both)</td>
</tr>
<tr>
<td>Offence</td>
<td>Section introducing offence</td>
<td>Maximum penalty on summary conviction</td>
<td>Maximum penalty on conviction on indictment</td>
</tr>
<tr>
<td>------------------------------------------------------------------------</td>
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<td>--------------------------------------------</td>
</tr>
<tr>
<td>Engaging in sexual activity with or towards an older child</td>
<td>Section 22</td>
<td>Imprisonment for a term not exceeding 12 months or a fine not exceeding the statutory maximum (or both)</td>
<td>Imprisonment for a term not exceeding 10 years or a fine (or both)</td>
</tr>
<tr>
<td>Causing an older child to participate in a sexual activity</td>
<td>Section 23</td>
<td>Imprisonment for a term not exceeding 12 months or a fine not exceeding the statutory maximum (or both)</td>
<td>Imprisonment for a term not exceeding 10 years or a fine (or both)</td>
</tr>
<tr>
<td>Causing an older child to be present during a sexual activity</td>
<td>Section 24</td>
<td>Imprisonment for a term not exceeding 12 months or a fine not exceeding the statutory maximum (or both)</td>
<td>Imprisonment for a term not exceeding 5 years or a fine (or both)</td>
</tr>
<tr>
<td>Causing an older child to look at a sexual image</td>
<td>Section 25</td>
<td>Imprisonment for a term not exceeding 12 months or a fine not exceeding the statutory maximum (or both)</td>
<td>Imprisonment for a term not exceeding 5 years or a fine (or both)</td>
</tr>
<tr>
<td>Communicating indecently with an older child</td>
<td>Section 26(1)</td>
<td>Imprisonment for a term not exceeding 12 months or a fine not exceeding the statutory maximum (or both)</td>
<td>Imprisonment for a term not exceeding 5 years or a fine (or both)</td>
</tr>
<tr>
<td>Causing an older child to see or hear an indecent communication</td>
<td>Section 26(2)</td>
<td>Imprisonment for a term not exceeding 12 months or a fine not exceeding the statutory maximum (or both)</td>
<td>Imprisonment for a term not exceeding 5 years or a fine (or both)</td>
</tr>
<tr>
<td>Sexual exposure to an older child</td>
<td>Section 26A</td>
<td>Imprisonment for a term not exceeding 12 months or a fine not exceeding the statutory maximum (or both)</td>
<td>Imprisonment for a term not exceeding 10 years or a fine (or both)</td>
</tr>
<tr>
<td>Voyeurism towards an older child</td>
<td>Section 26B</td>
<td>Imprisonment for a term not exceeding 12 months or a fine not exceeding the statutory maximum (or both)</td>
<td>Imprisonment for a term not exceeding 10 years or a fine (or both)</td>
</tr>
<tr>
<td>Engaging while an older child in sexual conduct with or towards another older child</td>
<td>Section 27(1)</td>
<td>Imprisonment for a term not exceeding 12 months or a fine not exceeding the statutory maximum (or both)</td>
<td>Imprisonment for a term not exceeding 10 years or a fine (or both)</td>
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<td>Engaging while an older child in</td>
<td>Section 27(4)</td>
<td>Imprisonment for a term not exceeding 12 months or a fine not exceeding the statutory maximum (or both)</td>
<td>Imprisonment for a term not exceeding 10 years or a fine (or both)</td>
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</table>
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<table>
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<tr>
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<th>Maximum penalty on summary conviction</th>
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</tr>
</thead>
<tbody>
<tr>
<td>consensual sexual conduct with another older child</td>
<td></td>
<td>fine not exceeding the statutory maximum (or both)</td>
<td>a fine (or both)</td>
</tr>
<tr>
<td>Sexual abuse of trust</td>
<td>Section 31</td>
<td>Imprisonment for a term not exceeding 12 months or a fine not exceeding the statutory maximum (or both)</td>
<td>Imprisonment for a term not exceeding 5 years or a fine (or both).</td>
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<tr>
<td>Sexual abuse of trust of a mentally disordered person</td>
<td>Section 35</td>
<td>Imprisonment for a term not exceeding 12 months or a fine not exceeding the statutory maximum (or both)</td>
<td>Imprisonment for a term not exceeding 5 years or a fine (or both).</td>
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#### SCHEDULE 2
*(introduced by section 38)*

**ALTERNATIVE VERDICTS**

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<th>Alternative offence</th>
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<tbody>
<tr>
<td>Rape</td>
<td>Section 1</td>
<td>Sexual assault by penetration</td>
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<tr>
<td></td>
<td></td>
<td>Sexual assault</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Having intercourse with an older child</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Assault at common law</td>
</tr>
<tr>
<td>Sexual assault by penetration</td>
<td>Section 1A</td>
<td>Sexual assault</td>
</tr>
<tr>
<td></td>
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<td>Engaging in penetrative sexual activity with or towards an older child</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Engaging in sexual activity with or towards an older child</td>
</tr>
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<td></td>
<td></td>
<td>Assault at common law</td>
</tr>
<tr>
<td>Sexual assault</td>
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</tr>
<tr>
<td></td>
<td></td>
<td>Assault at common law</td>
</tr>
<tr>
<td>Offence</td>
<td>Section introducing offence</td>
<td>Alternative offence</td>
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<tr>
<td>--------------------------------------------------</td>
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<td>-------------------------------------------------------------------------------------</td>
</tr>
<tr>
<td>Sexual coercion</td>
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<td>Coercing a person into being present during a sexual activity</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Coercing a person into looking at a sexual image</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Communicating indecently</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Causing a person to see or hear an indecent communication</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Causing an older child to participate in a sexual activity</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Assault at common law</td>
</tr>
<tr>
<td>Coercing a person into being present during a</td>
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Coercing a person into looking at a sexual image  
Communicating indecently  
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Breach of the peace at common law            |
| Voyeurism                                        | Section 7A                  | Breach of the peace at common law                                                  |
| Rape of a young child                            | Section 14                  | Sexual assault on a young child by penetration  
Sexual assault on a young child  
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Engaging in penetrative sexual activity with or towards an older child  
Engaging in sexual activity with or towards an older child  
Engaging while an older child in sexual conduct with or towards another older child  
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| Sexual assault on a young child by penetration    | Section 14A                 | Sexual assault on a young child  
Engaging in penetrative sexual activity with or towards an older child  
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SCHEDULE 3
(introduced by section 42)
LISTED OFFENCES

PART 1
INCITEMENT TO COMMIT CERTAIN SEXUAL ACTS OUTSIDE UK

1 An offence under Part 1 of this Act against a person under the age of 18.
2 An offence under Part 4 of this Act.
3 Sexual abuse of trust (section 31 of this Act).
4 Sexual abuse of trust of a mentally disordered person (section 35 of this Act) where the mentally disordered person is under the age of 18.
5 Indecent assault of a person under the age of 18.

PART 2
OFFENCES COMMITTED OUTSIDE UK

6 An offence under Part 1 of this Act against a person under the age of 18.
7 An offence under Part 4 of this Act.
8 Sexual abuse of trust (section 31 of this Act).
9 Sexual abuse of trust of a mentally disordered person (section 35 of this Act) where the mentally disordered person is under the age of 18.
10 Indecent assault of a person under the age of 18.
11 An offence under section 52 of the Civic Government (Scotland) Act 1982 (c.45) (taking and distribution of indecent images of children).
12 An offence under section 52A of that Act (possession of indecent images of children).
13 An offence under section 9 of the Protection of Children and Prevention of Sexual Offences (Scotland) Act 2005 (asp 9) (paying for sexual services of a child).
14 An offence under section 10 of that Act (causing or inciting provision by child of sexual services or pornography).
15 An offence under section 11 of that Act (controlling a child providing sexual services or involved in pornography).
16 An offence under section 12 of that Act (arranging or facilitating provision by child of sexual services or pornography).
17 Conspiracy or incitement to commit any offence specified in paragraphs 6 to 16.
18 An offence under section 293(2) of the Criminal Procedure (Scotland) Act 1995 (c.46) (aiding and abetting etc. the commission of a statutory offence) relating to any offence mentioned in paragraphs 6 to 9 or 11 to 16.
SCHEDULE 4  
(introduced by section 48)  

MINOR AND CONSEQUENTIAL AMENDMENTS  

The Criminal Law (Consolidation) (Scotland) Act 1995 (c.39)  

1 (1) The Criminal Law (Consolidation) (Scotland) Act 1995 is amended as follows.  

(2) In section 4 (proceedings and penalties for offences under sections 1 to 3), in each of subsections (1) and (5), for the words “, 2 or 3” there is substituted “or 2”.  

(3) In the section title of that section, for the words “to 3” there is substituted “and 2”.  

(4) In section 9 (permitting girl under 16 years to use premises for intercourse)—  

(a) in subsection (2)—  

(i) after the word “charge” there is inserted “in proceedings”,  

(ii) the words from “, being” to “offence,” are omitted,  

(aa) after that subsection, there is inserted—  

“(2A) But the defence under subsection (2) is not available to the person so charged if—  

(a) that person has previously been charged by the police with a relevant sexual offence; or  

(b) there is in force in respect of that person a risk of sexual harm order.”,  

(b) in subsection (3), for the words from “(2)” to the end there is substituted “(2A) above—  

(a) “a relevant sexual offence” has the same meaning as in section 29(5)(a) of the Sexual Offences (Scotland) Act 2009 (asp 00); and  

(b) “a risk of sexual harm order” has the same meaning as in section 29(5)(b) of that Act.”.  

(5) In section 10(3) (application of provisions of section 10 to offence of indecent behaviour towards girl under 16), for “section 6 of this Act” there is substituted “sections 14A to 19B and 21A to 26B of the Sexual Offences (Scotland) Act 2009 (asp 00) (certain sexual offences relating to children)”.  

(5A) After section 12, there is inserted—  

“12A Sections 11(5) and 12: further provision  

(1) Premises shall be treated for the purposes of sections 11(5) and 12 of this Act as a brothel if people resort to them for the purposes of homosexual acts in circumstances in which resort to them for heterosexual practices would have led to the premises being treated as a brothel for the purposes of those sections.  

(2) For the purposes of this section, a homosexual act is an act of engaging in sexual activity by one male person with another male person; and an activity is sexual in any case if a reasonable person would, in all the circumstances of the case, consider it to be sexual.”.  

(5B) For the heading above section 13, there is substituted “Living on earnings of another from male prostitution”.
(5C) For the section title, there is substituted “Living on earnings of another from male prostitution”.

(6) In section 13 (homosexual offences), in subsection (9), the words from “or who” to “above” are omitted.

The Criminal Procedure (Scotland) Act 1995 (c.46)

1 (1) The Criminal Procedure (Scotland) Act 1995 is amended as follows.

(2) In section 3(6) (jurisdiction and powers of solemn courts), after the word “rape” there is inserted “(whether at common law or under section 1(1) of the Sexual Offences (Scotland) Act 2009 (asp 00)), rape of a young child (under section 14 of that Act)”.

(3) In section 7(8)(b)(i) (JP court: jurisdiction and powers), after the word “rape” there is inserted “(whether at common law or under section 1(1) of the Sexual Offences (Scotland) Act 2009 (asp 00)), rape of a young child (under section 14 of that Act)”.

(4) In section 19A (samples etc. from persons convicted of sexual and violent crimes)—

(a) in subsection (6), in the definition of “relevant sexual offence”—

(i) in paragraph (a), after the word “rape” there is inserted “at common law”,

(ii) the word “and” which immediately follows paragraph (h) is repealed, and

(iii) after paragraph (i) there is inserted “and

(j) any offence which consists of a contravention of any of the following provisions of the Sexual Offences (Scotland) Act 2009 (asp 00)—

(i) section 1 (rape),

(ii) section 1A (sexual assault by penetration),

(iii) section 2 (sexual assault),

(iv) section 3 (sexual coercion),

(v) section 4 (coercing a person into being present during a sexual activity),

(vi) section 5 (coercing a person into looking at a sexual image),

(vii) section 6(1) (communicating indecently),

(viii) section 6(2) (causing a person to see or hear an indecent communication),

(ix) section 7 (sexual exposure),

(x) section 7A (voyeurism),

(xi) section 14 (rape of a young child),

(xii) section 14A (sexual assault on a young child by penetration),

(xiii) section 15 (sexual assault on a young child),

(xiv) section 16 (causing a young child to participate in a sexual activity),

(xv) section 17 (causing a young child to be present during a sexual activity),

(xvi) section 18 (causing a young child to look at a sexual image),
(xiv) section 19(1) (communicating indecently with a young child),
(xv) section 19(2) (causing a young child to see or hear an indecent communication),
(xva) section 19A (sexual exposure to a young child),
(xvb) section 19B (voyeurism towards a young child),
(xvi) section 21 (having intercourse with an older child),
(xvia) section 21A (engaging in penetrative sexual activity with or towards an older child),
(xvii) section 22 (engaging in sexual activity with or towards an older child),
(xviii) section 23 (causing an older child to participate in a sexual activity),
(xix) section 24 (causing an older child to be present during a sexual activity),
(xx) section 25 (causing an older child to look at a sexual image),
(xxi) section 26(1) (communicating indecently with an older child),
(xxii) section 26(2) (causing an older child to see or hear an indecent communication),
(xxia) section 26A (sexual exposure to an older child),
(xxiiib) section 26B (voyeurism towards an older child),
(xxiii) section 27(1) (engaging while an older child in sexual conduct with or towards another older child),
(xxiv) section 27(4) (engaging while an older child in consensual sexual conduct with another older child),
(xxv) section 31 (sexual abuse of trust) but only if the condition set out in section 32(6) of that Act is fulfilled,
(xxvi) section 35 (sexual abuse of trust of a mentally disordered person);”;

(b) in subsection (7), in paragraph (b)(i) after the words “paragraph (i)” there is inserted “or (j)”.

(5) In section 24A (bail conditions: remote monitoring of restrictions on movements), in each of subsections (2)(a), (3) and (5)(a), for the words “or rape” there is substituted “, rape (whether at common law or under section 1(1) of the Sexual Offences (Scotland) Act 2009 (asp 00)) or rape of a young child (under section 14 of that Act)”.

(7) In section 210A(10) (extended sentences for sex and violent offenders), in the definition of “sexual offence”—

(a) in paragraph (i), after the word “rape” there is inserted “at common law”, and
(b) after paragraph (xxvi) there is inserted “and

(xxvii) an offence which consists of a contravention of any of the following provisions of the Sexual Offences (Scotland) Act 2009 (asp 00)—

(A) section 1 (rape),
Sexual Offences (Scotland) Bill

Schedule 4—Minor and consequential amendments

(AA)section 1A (sexual assault by penetration),
(B)section 2 (sexual assault),
(C)section 3 (sexual coercion),
(D)section 4 (coercing a person into being present during a sexual activity),
(E)section 5 (coercing a person into looking at a sexual image),
(F)section 6(1) (communicating indecently),
(G)section 6(2) (causing a person to see or hear an indecent communication),
(H)section 7 (sexual exposure),
(HA)section 7A (voyeurism),
(I)section 8 (administering a substance for sexual purposes),
(J)section 14 (rape of a young child),
(JA)section 14A (sexual assault on a young child by penetration),
(K)section 15 (sexual assault on a young child),
(L)section 16 (causing a young child to participate in a sexual activity),
(M)section 17 (causing a young child to be present during a sexual activity)
(N)section 18 (causing a young child to look at a sexual image),
(O)section 19(1) (communicating indecently with a young child),
(P)section 19(2) (causing a young child to see or hear an indecent communication),
(PA)section 19A (sexual exposure to a young child),
(PB)section 19B (voyeurism towards a young child),
(Q)section 21 (having intercourse with an older child),
(QA)section 21A (engaging in penetrative sexual activity with or towards an older child),
(R)section 22 (engaging in sexual activity with or towards an older child),
(S)section 23 (causing an older child to participate in a sexual activity),
(T)section 24 (causing an older child to be present during a sexual activity),
(U)section 25 (causing an older child to look at a sexual image),
(V)section 26(1) (communicating indecently with an older child),
(W)section 26(2) (causing an older child to see or hear an indecent communication),
(WA)section 26A (sexual exposure to an older child),
(WB)section 26B (voyeurism towards an older child),

(X) section 27(1) (engaging while an older child in sexual conduct with or towards another older child),

(Y) section 27(4) (engaging while an older child in consensual sexual conduct with another older child),

(Z) section 31 (sexual abuse of trust),

(ZA)section 35 (sexual abuse of trust of a mentally disordered person);

(8) In section 288C(2) (prohibition of personal conduct of defence in cases of certain sexual offences)—

(a) in paragraph (a), after the word “rape” there is inserted “(whether at common law or under section 1(1) of the Sexual Offences (Scotland) Act 2009 (asp 00))”, and

(b) for paragraph (j) there is substituted—

“(j) an offence under any of the following provisions of the Sexual Offences (Scotland) Act 2009 (asp 00)—

(zi) section 1A (sexual assault by penetration),

(i) section 2 (sexual assault),

(ii) section 3 (sexual coercion),

(iii) section 4 (coercing a person into being present during a sexual activity),

(iv) section 5 (coercing a person into looking at a sexual image),

(v) section 6(1) (communicating indecently),

(vi) section 6(2) (causing a person to see or hear an indecent communication),

(vii) section 7 (sexual exposure),

(viia)section 7A (voyeurism),

(viii)section 14 (rape of a young child),

(viia)section 14A (sexual assault on a young child by penetration),

(ix) section 15 (sexual assault on a young child),

(x) section 16 (causing a young child to participate in a sexual activity),

(xi) section 17 (causing a young child to be present during a sexual activity),

(xii) section 18 (causing a young child to look at a sexual image),

(xiii)section 19(1) (communicating indecently with a young child),

(xiv)section 19(2) (causing a young child to see or hear an indecent communication),

(xiva)section 19A (sexual exposure to a young child),

(xivb)section 19B (voyeurism towards a young child),
(xv) section 21 (having intercourse with an older child),

(xvaa) section 21A (engaging in penetrative sexual activity with or towards an older child),

(xvi) section 22 (engaging in sexual activity with or towards an older child),

(xvii) section 23 (causing an older child to participate in a sexual activity),

(xviii) section 24 (causing an older child to be present during a sexual activity),

(xix) section 25 (causing an older child to look at a sexual image),

(xx) section 26(1) (communicating indecently with an older child),

(xxi) section 26(2) (causing an older child to see or hear an indecent communication),

(xxia) section 26A (sexual exposure to an older child),

(xxib) section 26B (voyeurism towards an older child),

(xxii) section 27(1) (engaging while an older child in sexual conduct with or towards another older child),

(xxiii) section 27(4) (engaging while an older child in consensual sexual conduct with another older child),

(xxiv) section 31 (sexual abuse of trust) but only if the condition set out in section 32(6) of that Act is fulfilled,

(xxv) section 35 (sexual abuse of trust of a mentally disordered person);”, and

(c) after paragraph (j) (as inserted by paragraph (b) above), there is inserted—

“(k) attempting to commit any of the offences set out in paragraphs (a) to (j).”.

(9) In Schedule 1 (offences against children under the age of 17 years to which special provisions apply)—

(a) after paragraph 1 there is inserted—

“1A Any offence under section 14 (rape of a young child) or 21 (having intercourse with an older child) of the Sexual Offences (Scotland) Act 2009 (asp 00).

1AA Any offence under section 14A (sexual assault on a young child by penetration) or 21A (engaging in penetrative sexual activity with or towards an older child) of that Act.

1B Any offence under section 15 (sexual assault on a young child) or 22 (engaging in sexual activity with or towards an older child) of that Act.

1C Any offence under section 31 of that Act (sexual abuse of trust) towards a child under the age of 17 years but only if the condition set out in section 32(6) of that Act is fulfilled.”, and

(b) after paragraph 4 there is inserted—
“4A Any offence under section 4 (coercing a person into being present during a sexual activity), 5 (coercing a person into looking at a sexual image), 6 (communicating indecently etc.), 7 (sexual exposure) or 7A (voyeurism) of the Sexual Offences (Scotland) Act 2009 (asp 00) towards a child under the age of 17 years.

4B Any offence under any of sections 16 to 19B or 23 to 27 of that Act (certain sexual offences relating to children).”.

The Criminal Injuries Compensation Act 1995 (c. 53)

3 In section 11(9) of the Criminal Injuries Compensation Act 1995 (approval by parliament of certain alterations to the Tariff or provisions of the Scheme), at the end there is inserted “, and in relation to anything done in Scotland means rape (whether at common law or under section 1(1) of the Sexual Offences (Scotland) Act 2009 (asp 00)) and rape of a young child (under section 14 of that Act)”.

The Protection of Children (Scotland) Act 2003 (asp 5)

3A(1) Schedule 1 to the Protection of Children (Scotland) Act 2003 is amended as follows.

(2) At the end of paragraph 1 there is inserted—

“(n) an offence under section 14 (rape of a young child) of the Sexual Offences (Scotland) Act 2009 (asp 00);

(o) an offence under section 14A (sexual assault on a young child by penetration) of that Act;

(p) an offence under section 15 (sexual assault on a young child) of that Act;

(q) an offence under section 16 (causing a young child to participate in a sexual activity) of that Act;

(r) an offence under section 17 (causing a young child to be present during a sexual activity) of that Act;

(s) an offence under section 18 (causing a young child to look at a sexual image) of that Act;

(t) an offence under section 19(1) (communicating indecently with a young child) of that Act;

(u) an offence under section 19(2) (causing a young child to see or hear an indecent communication) of that Act;

(v) an offence under section 19A (sexual exposure to a young child) of that Act;

(w) an offence under section 19B (voyeurism towards a young child) of that Act;

(x) an offence under section 21 (having intercourse with an older child) of that Act;

(y) an offence under section 21A (engaging in penetrative sexual activity with or towards an older child) of that Act;

(z) an offence under section 22 (engaging in sexual activity with or towards an older child) of that Act;
(za) an offence under section 23 (causing an older child to participate in a sexual activity) of that Act;

(zb) an offence under section 24 (causing an older child to be present during a sexual activity) of that Act;

(zc) an offence under section 25 (causing an older child to look at a sexual image) of that Act;

(zd) an offence under section 26(1) (communicating indecently with an older child) of that Act;

(ze) an offence under section 26(2) (causing an older child to see or hear an indecent communication) of that Act;

(zf) an offence under section 26A (sexual exposure to an older child) of that Act;

(zg) an offence under section 26B (voyeurism towards an older child) of that Act;

(zh) an offence under section 31 (sexual abuse of trust) of that Act.”.

(3) After paragraph 2(d) there is inserted—

“(da) commits an offence under section 1 (rape) of the Sexual Offences (Scotland) Act 2009 (asp 00) in relation to a child;

(db) commits an offence under section 1A (sexual assault by penetration) of that Act in relation to a child;

(dc) commits an offence under section 2 (sexual assault) of that Act in relation to a child;

(dd) commits an offence under section 3 (sexual coercion) of that Act in relation to a child;

(de) commits an offence under section 4 (coercing a person into being present during a sexual activity) of that Act in relation to a child;

(df) commits an offence under section 5 (coercing a person into looking at a sexual image) of that Act in relation to a child;

(dg) commits an offence under section 6(1) (communicating indecently) of that Act in relation to a child;

(dh) commits an offence under section 6(2) (causing a person to see or hear an indecent communication) of that Act in relation to a child;

(di) commits an offence under section 7 (sexual exposure) of that Act in relation to a child;

(dj) commits an offence under section 7A (voyeurism) of that Act in relation to a child;

(dk) commits an offence under section 35 (sexual abuse of trust of a mentally disordered person) of that Act in relation to a child;”.

**The Sexual Offences Act 2003 (c.42)**

4 In Schedule 3 to the Sexual Offences Act 2003 (sexual offences for purposes of Part 2 of that Act)—
(a) in paragraph 36, at the end there is added “at common law”,

(aa) after paragraph 41, there is inserted—

“41A Public indecency if—

(a) a person (other than the offender) involved in the offence was under 18, and

(b) the court determines that there was a significant sexual aspect to the

offender’s behaviour in committing the offence.”,

(b) after paragraph 59C there is inserted—

“59D An offence under section 1 of the Sexual Offences (Scotland) Act 2009 (asp 00) (rape).

59DA An offence under section 1A of that Act (sexual assault by penetration).

59E An offence under section 2 of that Act (sexual assault).

59F An offence under section 3 of that Act (sexual coercion).

59G An offence under section 4 of that Act (coercing a person into being present during a sexual activity).

59H An offence under section 5 of that Act (coercing a person into looking at a sexual image).

59J An offence under section 6(1) of that Act (communicating indecently).

59K An offence under section 6(2) of that Act (causing a person to see or hear an indecent communication).

59L An offence under section 7 of that Act (sexual exposure) if—

(a) the offender, in respect of the offence, is or has been—

(i) sentenced to a term of imprisonment, or

(ii) admitted to a hospital, or

(b) the offender was 18 or over and the victim was under 18.

59LA An offence under section 7A of that Act (voyeurism).

59M An offence under section 8 of that Act (administering a substance for sexual purposes).

59N An offence under section 14 of that Act (rape of a young child).

59NA An offence under section 14A of that Act (sexual assault on a young child by penetration).

59P An offence under section 15 of that Act (sexual assault on a young child).

59Q An offence under section 16 of that Act (causing a young child to participate in a sexual activity).

59R An offence under section 17 of that Act (causing a young child to be present during a sexual activity).

59S An offence under section 18 of that Act (causing a young child to look at a sexual image).

59T An offence under section 19(1) of that Act (communicating indecently with a young child).
59U An offence under section 19(2) of that Act (causing a young child to see or hear an indecent communication).

59UA An offence under section 19A of that Act (sexual exposure to a young child).

59UB An offence under section 19B of that Act (voyeurism towards a young child).

59V An offence under section 21 of that Act (having intercourse with an older child) if the offender—

(a) was 18 or over, or

(b) in respect of the offence, is or has been—

(i) sentenced to a term of imprisonment, or

(ii) admitted to a hospital.

59VA An offence under section 21A of that Act (engaging in penetrative sexual activity with or towards an older child) if the offender—

(a) was 18 or over, or

(b) in respect of the offence, is or has been—

(i) sentenced to a term of imprisonment, or

(ii) admitted to a hospital.

59W An offence under section 22 of that Act (engaging in sexual activity with or towards an older child) if the offender—

(a) was 18 or over, or

(b) in respect of the offence, is or has been—

(i) sentenced to a term of imprisonment, or

(ii) admitted to a hospital.

59X An offence under section 23 of that Act (causing an older child to participate in a sexual activity) if the offender—

(a) was 18 or over, or

(b) in respect of the offence, is or has been—

(i) sentenced to a term of imprisonment, or

(ii) admitted to a hospital.

59Y An offence under section 24 of that Act (causing an older child to be present during a sexual activity) if the offender—

(a) was 18 or over, or

(b) in respect of the offence, is or has been—

(i) sentenced to a term of imprisonment, or

(ii) admitted to a hospital.

59Z An offence under section 25 of that Act (causing an older child to look at a sexual image) if the offender—

(a) was 18 or over, or

(b) in respect of the offence, is or has been—
Sexual Offences (Scotland) Bill
Schedule 4—Minor and consequential amendments

59ZA An offence under section 26(1) of that Act (communicating indecently with an older child) if the offender—
(a) was 18 or over, or
(b) in respect of the offence, is or has been—
   (i) sentenced to a term of imprisonment, or
   (ii) admitted to a hospital.

59ZB An offence under section 26(2) of that Act (causing an older child to see or hear an indecent communication) if the offender—
(a) was 18 or over, or
(b) in respect of the offence, is or has been—
   (i) sentenced to a term of imprisonment, or
   (ii) admitted to a hospital.

59ZBA An offence under section 26A of that Act (sexual exposure to an older child) if the offender—
(a) was 18 or over, or
(b) in respect of the offence, is or has been—
   (i) sentenced to a term of imprisonment, or
   (ii) admitted to a hospital.

59ZBB An offence under section 26B of that Act (voyeurism towards an older child) if the offender—
(a) was 18 or over, or
(b) in respect of the offence, is or has been—
   (i) sentenced to a term of imprisonment, or
   (ii) admitted to a hospital.

59ZC An offence under section 27(1) of that Act (engaging while an older child in sexual conduct with or towards another older child) if, in respect of the offence, the offender is or has been—
(a) sentenced to a term of imprisonment, or
(b) admitted to a hospital.

59ZD An offence under section 27(4) of that Act (engaging while an older child in consensual sexual conduct with another older child) if, in respect of the offence, the offender is or has been—
(a) sentenced to a term of imprisonment, or
(b) admitted to a hospital.

59ZE An offence under section 31 of that Act (sexual abuse of trust) where (either or both)—
(a) the offender is 20 or over,
(b) the condition set out in section 32(6) of that Act is fulfilled.

59ZF An offence under section 35 of that Act (sexual abuse of trust of a mentally disordered person).”, and

(c) in paragraph 60, for the words “59C” there is substituted “59ZF”.

The Mental Health (Care and Treatment) (Scotland) Act 2003 (asp 13)

5 In section 326(4)(c) of the Mental Health (Care and Treatment) (Scotland) Act 2003, for “310 or 313(5)” there is substituted “or 310”.

The Protection of Children and Prevention of Sexual Offences (Scotland) Act 2005 (asp 9)

6 In section 1(5) of the Protection of Children and Prevention of Sexual Offences (Scotland) Act 2005, for the words from “Subsections” to “(c.39)” substitute “Subsection (7) of section 43 of the Sexual Offences (Scotland) Act 2009 (asp 00)”.


### SCHEDULE 5
*(introduced by section 48)*

#### REPEALS

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Sexual Offences (Scotland) Bill
[AS PASSED]

An Act of the Scottish Parliament to make new provision about sexual offences, and for connected purposes.

Introduced by: Kenny MacAskill
On: 17 June 2008
Bill type: Executive Bill