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.

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 Scotland1. 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 20052 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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This document relates to the Sexual Offences (Scotland) Bill (SP Bill 11) as introduced in the Scottish Parliament on 17 June 2008

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 SLCs 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

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.

38. 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)

39. 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)

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
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
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.

73. 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:
This document relates to the Sexual Offences (Scotland) Bill (SP Bill 11) as introduced in the Scottish Parliament on 17 June 2008

“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 in 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.
90. 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:

“If indeed consent were free from ambiguity and vagueness, even if restricted to the context of criminal offences, then that would be reflected in the views of others who have practical experience of the workings of the criminal justice system, not only in Scotland, but in other jurisdictions.

“…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.

91. 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.

92. 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

93. 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 dependant 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.

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”.

132. 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.

133. 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.

134. 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.

137. 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
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

POLICY MEMORANDUM


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