



Scottish Law Commission
promoting law reform

Report on Rape and Other Sexual Offences

Report on a reference under section 3(1)(e) of the Law Commissions Act 1965
Laid before the Scottish Parliament by the Scottish Ministers

December 2007

SCOT LAW COM No 209
SE/2007/243
EDINBURGH: The Stationery Office

£33.45

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ISBN: 978-0-10-888216-6

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SCOTTISH LAW COMMISSION

Report on a reference under section 3(1)(e) of the Law Commissions Act 1965

Report on Rape and Other Sexual Offences

To: Mr Kenny MacAskill MSP, Cabinet Secretary for Justice

We have the honour to submit to the Scottish Ministers our Report on Rape and Other Sexual Offences.

(Signed) JAMES DRUMMOND YOUNG, *Chairman*
GEORGE GRETTON
GERARD MAHER
JOSEPH M THOMSON
COLIN TYRE

Michael Lugton, *Chief Executive*
28 November 2007

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List of Abbreviations

Alison

A Alison, *Principles of Criminal Law* (1832; reprinted, 1989)

Draft Criminal Code

E Clive, C Gane, P Ferguson and R A A McCall Smith, *A Draft Criminal Code for Scotland with Commentary* (published under the auspices of the Scottish Law Commission, 2003)

Gane

C Gane, *Sexual Offences* (1992)

Gordon

Sir Gerald H Gordon QC, *The Criminal Law of Scotland* (3rd edn ed Michael G A Christie, vol I, 2000; vol II, 2001)

Hume

Baron Hume, *Commentaries on the Law of Scotland Respecting Crimes* (4th edn 1844; reprinted, 1986)

Setting the Boundaries

Home Office, *Setting the Boundaries: Reforming the law on sex offences* (2000)

Stair Memorial Encyclopaedia

The Laws of Scotland — Stair Memorial Encyclopaedia 25 vols (1986-1995 with updates)

Temkin

J Temkin, *Rape and the Legal Process* (2nd edn, 2002)

Part 1 Introduction

Terms of reference

1.1 In June 2004 we received the following reference¹ from the Scottish Ministers:

"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."

1.2 On receiving the reference we engaged in various processes of consultation, which included participation in seminars and discussion with several professional bodies. We also set up an Advisory Group with a membership from a wide range of backgrounds and interests.² The Advisory Group's contribution was invaluable in shaping the direction of the project and we wish here to repeat our expression of thanks to the Group members for giving so much of their time to consult with us. We published our Discussion Paper in January 2006.³ We received a considerable level of response to the questions and proposals contained in the Discussion Paper, and we are particularly struck by the number of responses from people writing in a private capacity.⁴ We recognise that this project involves not only matters of legal principles and rules but also important issues of social policy, and it was important for us in formulating our final recommendations for reform of the law that we were able to take into account a wide range of perspectives. We are grateful to all the people and organisations who responded to our Discussion Paper.

Background to the reference

1.3 The immediate background to the reference was the existence of public, professional and academic concern as a consequence of certain high-profile decisions of the High Court of Justiciary. In *Lord Advocate's Reference (No 1 of 2001)*,⁵ the Court held that the crime of rape was defined as a man having sexual intercourse with a woman without her consent. The Court ruled that, despite 19th Century decisions to the contrary, it was not a requirement that the man forcibly overcame the will of the woman. The focus of the Court's decision was the actus reus (the actings which constitute the crime) of rape and the Court did not deal with issues such as the mens rea (the state of mind of the perpetrator) or with proof of lack of consent. These issues were considered in the later decisions of *McKearney v HM*

¹ Under the Law Commissions Act 1965, s 3(1)(e).

² The membership of the Advisory Group was as follows: Sandy Brindley, Rape Crisis Scotland; James Chalmers, University of Aberdeen School of Law; Brian Dempsey, Outright Scotland; Iain Fleming, Law Society Criminal Law Committee; Janette de Haan, Glasgow Women's Support Project; Tim Hopkins, Equality Network; Louise Johnson, Scottish Women's Aid; Frances McMenamin QC, Faculty of Advocates; Stephanie Whitehead, Policy and Development Manager, Brook.

³ Scottish Law Commission, *Discussion Paper on Rape and Other Sexual Offences* (Scot Law Com DP No 131 (2006)). Full details of the steps which we followed in preparing our Discussion Paper are set out in para 1.2 of the Paper.

⁴ We received a total of 82 responses and we reckon that over 30 of these were submitted by people who were not writing in a professional capacity. A list of consultees who submitted a written response is set out in Appendix B.

⁵ 2002 SLT 466.

*Advocate*⁶ and *Cinci v HM Advocate*,⁷ decisions which were widely, if not entirely accurately, interpreted as pointing to the existence of major problems for the Crown in proving the accused's lack of belief in the consent of the victim.

1.4 In addition to the issues arising from these recent decisions of the High Court, other more general aspects of the Scots law on sexual offences had been identified as requiring consideration and reform. Much of the law derives from times when sexual attitudes were very different from those of contemporary society. In 1976 an Act consolidated the law on various sexual offences based on 11 statutes passed between 1885 and 1975. For over 300 years the law on incest was to be found in an Act of 1567. That law was modernised but not entirely altered by the Incest and Related Offences (Scotland) Act 1986. Prohibitions on certain forms of homosexual conduct can be traced back to court decisions in the sixteenth century.⁸

1.5 Furthermore, while some of the law on sexual offences is based on statute, various offences, including rape and indecent assault, remain governed by the common law. There are limits on how far law can be altered by means of judicial decision, even if it is clear that the law no longer reflects contemporary social values. For example, there was, from at least the late 18th Century, a rule that a husband could not be convicted of raping his wife. That rule was abolished by judicial decision but only in 1989.⁹ A more far-reaching change to the law of rape, as for example extending the types of prohibited conduct to include anal or oral penetration of the victim, would be unlikely to result from judicial development of the common law.¹⁰

1.6 In recent times there have been substantial reviews in other jurisdictions of the law on sexual offences. In the 1980s radical reform of the law was introduced in legal systems in the USA, Canada, and Australia. These reforms were often influenced by writings, usually from a feminist perspective, about what should be appropriate sexual conduct and attitudes in society. The aim of such law reform was not merely to make the law more coherent in terms of legal ideas but also to make a public statement of the proper values to govern sexual relationships. The reforms sought to change the ways in which sexual offences were defined by the law (for example, by having no separate category of rape or by defining sexual assault as part of the wider law on assaults) and to clarify the manner in which consent to sexual activity should be understood (by statutory statements of situations which are to be treated as indicating the absence of consent).¹¹

1.7 Over the last decade there has been further consideration of sexual offences in various jurisdictions, most recently in the Australian Capital Territory, South Africa, Victoria, and England and Wales. In 2001, the Law Reform Commission of the Australian Capital

⁶ 2004 JC 87. In this case, the Court held that where a charge of rape did not involve force, the Crown had to lead specific evidence from which the accused's knowledge of the victim's lack of consent could be inferred.

⁷ 2004 JC 103. Here the Court re-iterated a further point made in *McKearney* that evidence of distress by the victim after an alleged rape could not act as corroboration of the accused's state of mind at the time of the rape.

⁸ Hume, I, 469 mentions the case of *Swan and Litster* decided in 1570.

⁹ *Stallard v HM Advocate* 1989 SLT 469.

¹⁰ The seven judge case of *Lord Advocate's Reference (No 1 of 2001)* was decided by a majority of five to two. The view of at least one of the dissenting judges was that the courts lacked the authority to change an established legal rule, and that reform should be done by Parliament which would be better placed to assess the contemporary social values at the root of the decision (2002 SLT 466 at 488-490 (Lord McCluskey)).

¹¹ For a useful assessment of these reforms, see Temkin, chapter 3.

Territory published its Report on *the Laws Relating to Sexual Assault*.¹² The Report examined the definitions of sexual assault and sexual intercourse, offences against children, issues of consent and mens rea as well as procedure and evidence. The South African Law Commission undertook a comprehensive review of the legal, procedural and investigative provisions relating to sexual offences, the results of which are published in its 2002 *Sexual Offences Report*.¹³ We also took particular notice of the work of the Victorian Law Reform Commission. In 2004 the Commission published a report on sexual offences, which was followed by an implementation report in 2006.¹⁴ We consider the Commission's proposals on consent and the impact of their implementation in chapter 2 below.

1.8 Two further developments are of special significance to our own project. The first was the passing of the Sexual Offences Act 2003, which established a new legal framework for sexual offences in England and Wales.¹⁵ Part 1 of the 2003 Act contains a comprehensive set of provisions on sexual offences.¹⁶ A feature of the 2003 Act which was of particular interest for this project is the model of consent used in the definition of various offences. Although we have not agreed with all of the detail of that model, it has been influential in guiding our thinking on how Scots law should approach this important issue.¹⁷ The 2003 Act followed a review of the law on sexual offences by the Home Office, the results of which are published in a report, *Setting the Boundaries: Reforming the law on sex offences*.¹⁸ That report contains a wide-ranging discussion of the principles and ideas which are relevant to the reform of the law, and we have found the report to be of considerable value during this project.

1.9 The second development of significance for our project was the completion of a Draft Criminal Code for Scotland by a group of academic lawyers. In order to encourage its wider consideration, we published the draft Code for consultation on behalf of the group in September 2003.¹⁹ The Code contained various provisions on sexual offences, some of which differed from the existing common law. These provisions embody an impressive amount of industry and reflection, and we have referred to the Code's provisions as useful models at various places throughout this Report.²⁰

¹² ACT LRC Report No 18 (2001).

¹³ SALC Project 107 (2002).

¹⁴ Victorian Law Reform Commission, *Sexual Offences: Final Report* (2004).

¹⁵ Part 1 of the 2003 Act deals with the law on sexual offences in England and Wales. It came into effect on 1 May 2004. Part 2 of the Act, which relates to the procedures for notification in respect of convicted sex offenders (sometimes referred to as the 'sex offenders register'), also applies to Scotland and Northern Ireland.

¹⁶ The provisions deal with such matters as rape and sexual assault, child sex offences, offences involving abuse of trust, offences against child family members and persons with mental disorder, child pornography, prostitution, and miscellaneous offences such as exposure and voyeurism.

¹⁷ We consider consent as a part of the law on sexual offences in Part 2 of this Report.

¹⁸ Home Office (2000).

¹⁹ *A Draft Criminal Code for Scotland with Commentary* (2003, published under the auspices of the Scottish Law Commission).

²⁰ In March 2005 we held a seminar at the University of Edinburgh to explore how far we could build upon the work of the Code group for our own project. The speakers were Professor Jennifer Temkin, University of Sussex; Professor Christopher Gane, University of Aberdeen; Dr Victor Tadros, University of Edinburgh; and Professor Eric Clive, University of Edinburgh. The seminar was of considerable assistance in helping us to identify and understand the complex issues involved in reforming the law on sexual offences, and we wish to repeat our expression of gratitude to the speakers and other participants at the seminar.

Scope of the project

1.10 Our terms of reference refer to the law relating to rape and other sexual offences and to evidence. There are two distinct elements to these terms. First, we understand the reference to sexual offences as meaning the substantive law, that is, with how these offences are defined in terms of the actus reus and mens rea, and defences to these crimes. Secondly the law of evidence is concerned with how these offences are to be proved. We do not interpret our terms of reference as including questions of pre-trial or trial procedure except as incidental to the matters of substantive law or evidence. To determine the exact scope of the project it is necessary to consider what is included within the idea of sexual offences, and we discuss this issue later.²¹

1.11 There are certain issues relating to sexual offences which are beyond the scope of this project because strictly speaking they are outwith our terms of reference or because they have recently been, or are currently being, reviewed by other bodies. We give a brief summary of each of these areas below.

Prosecution policy and practice

1.12 This project is not concerned with prosecution policy and practice. In 2004 the Crown Office and Procurator Fiscal Service started a review of the way in which sexual offences are investigated and prosecuted. That review included an examination of the use of evidence (including the operation of statutory provisions relating to evidence), the treatment of victims, and departmental and prosecution policy in respect of sexual offences. The report of the review was published in 2006.²² The report makes 50 recommendations, some of which have already been implemented. The implementation of the remaining recommendations is scheduled to be completed by mid-2009.

Prostitution

1.13 We do not consider the law on prostitution in this Discussion Paper. There are two reasons for this. First, it is not entirely clear that offences relating to prostitution are properly speaking sexual offences, as opposed to offences against public disorder or involving public nuisance.²³ Furthermore the law on prostitution was under review by an Expert Group on Prostitution, which was set up by the Scottish Executive in 2003. The remit of the Group was to consider "the legal, policing, health and social justice issues surrounding prostitution in Scotland."²⁴ The Group published a report in December 2004.²⁵ The Scottish Executive carried out a consultation on the proposals of the Expert Group, and published an analysis of responses in November 2005. The Prostitution (Public Places) (Scotland) Act 2007, which gives effect to some but not all of the recommendations of the Expert Group, was passed by the Scottish Parliament in February 2007.²⁶ Given the wide remit of the Expert Group we decided that it was neither necessary nor appropriate to include the law on prostitution within our own project.

²¹ Paras 1.17-1.21.

²² Crown Office and Procurator Fiscal Service, *Review of the Investigation and Prosecution of Sexual Offences in Scotland. Report and Recommendations* (June 2006).

²³ "The essence of [soliciting] is the nuisance - that is, the fear, alarm or offence - caused by the conduct to the individuals importuned and to members of the public." (Commentary to the Draft Criminal Code, p 175.)

²⁴ Scottish Executive, *Being Outside: Constructing a Response to Street Prostitution* (2004), p v.

²⁵ *Ibid.*

²⁶ The main provisions of the Act came into force on 15 October 2007 (SSI 2007/382).

Pornography

1.14 There is a very wide range of issues involved in the interaction of the criminal law and pornography. These extend to questions such as whether criminalising pornography is compatible with freedom of expression, whether certain categories of pornography should be permitted or licensed, and whether pornography should be criminalised because it typically presents wrongful or harmful images of women. These, and other, questions involve important and serious issues. However, we have not examined these matters, as they involve much wider social issues than those of the present project.

1.15 One of the main issues in this project are offences which involve sexual acts that are non-consensual or are exploitative due to the victim's lack of capacity. We accept that arguments can be advanced that many people involved in the making of pornography do not give consent but our present focus is on conduct which is clearly non-consensual or exploitative. One category of pornography that falls within this area is pornography involving children. We take it as axiomatic that child pornography should be subject to control by the criminal law. However, we do not propose to examine this topic except as incidental to our more general recommendations relating to sexual conduct involving children.²⁷ Our reasons for doing so are largely pragmatic in that the issue of child pornography has been the subject of recent legislation. Provisions on child pornography are contained within the Civic Government (Scotland) Act 1982,²⁸ which make it an offence to take, distribute, or possess indecent images of children. These provisions were amended by the Criminal Justice (Scotland) Act 2003. A further issue is arranging or facilitating the commission of child pornography. Such conduct has recently been considered by the Scottish Parliament and is regulated by the Protection of Children and Prevention of Sexual Offences (Scotland) Act 2005.²⁹

Adult entertainment

1.16 Another area of sexual activity which does not fall within the scope of this project relates to so-called adult entertainment. The Scottish Executive set up a Working Group in March 2005 to review the scope and impact of adult entertainment activity. The Group submitted a report in April 2006, and the Scottish Executive indicated that it was minded to implement the majority of the Group's recommendations.³⁰ We doubt whether this form of activity would fall within the scope of our terms of reference but, in any case, given the activities of the Working Group, this is not a subject which we examine in this project.

What are sexual offences?

1.17 In order to identify which areas of substantive law and evidence we should examine as falling within our terms of reference, we need to consider the question of what constitute

²⁷ The 2003 Act in England and Wales deals with pornography only in relation to children and young persons (ss 45-46, 48-51). However, the Home Office Review was criticised for not dealing with pornography more generally (see N Lacey, "Best by Boundaries: The Home Office Review of Sex Offences" [2001] Crim LR 3, 13). The Draft Criminal Code includes a section on child pornography in the part on sexual offences (Part 3, s 72). This section is based mainly on the existing law in the Civic Government (Scotland) Act 1982. The Code also contains a section on obscene material in the part of the Code dealing with offensive conduct (Part 8, s 106).

²⁸ Sections 52 and 52A.

²⁹ The 2005 Act came into effect in October 2005.

³⁰ Letter dated 9 October 2006 to the chairman of the Working Group from Tom McCabe MSP, Minister for Finance & Public Service Reform.

sexual offences. In the Discussion Paper we examined definitions and classifications of sexual offences used in the existing law,³¹ and in the Draft Criminal Code.³² We also considered how sexual offences are characterised in legal writings. On the basis of these sources we adopted the following approach.³³

1.18 We classified sexual offences into three broad categories. First, there are offences which are concerned with promoting or protecting a person's sexual autonomy. Secondly, there are offences which seek to provide protection to persons who are vulnerable to sexual exploitation or about whom there are doubts concerning their capacity to engage in consenting sexual conduct. Thirdly, there are offences which seek to promote a social or moral goal other than those in the previous two categories (that is, autonomy and protection). Later we discuss the key ideas which are used in this framework (sexual autonomy, protection, and public morality).³⁴ The types of sexual offences which we consider fall within the scope of our project can be classified in the following way.

1.19 The first set of offences, which we consider in Part 3 of this Report, are those prohibiting conduct which infringes the sexual autonomy of a person involved in it. These offences can generally be described as sexual assaults and under the existing law encompass the crimes of rape and indecent assault.

1.20 The next category, considered in Part 4, concerns offences which protect persons who are vulnerable in respect of sexual matters. The two most obvious types of person in this situation are young persons and people with a form of mental disorder. There is a range of existing offences which deal with these types of vulnerable person. In addition to common law offences (for example lewd, indecent or libidinous behaviour), there are several statutory provisions specifically criminalising sexual activity with children. These are contained within sections 5(1),³⁵ 5(3),³⁶ 6³⁷ and 13³⁸ of the Criminal Law (Consolidation) (Scotland) Act 1995. Sections 311-313 of the Mental Health (Care and Treatment) (Scotland) Act 2003³⁹ make provision in respect of persons who are mentally disordered, criminalising both non-consensual sexual acts⁴⁰ with such persons, as well as sexual acts (regardless of consent) involving the carers of such persons.⁴¹ In addition the law has widened its use of the protective principle to deal with other situations involving vulnerability, including regulation of sexual conduct between persons one of whom has a position of trust or authority over the other.⁴²

³¹ For example, Criminal Procedure (Scotland) Act 1995, s 288C; Sexual Offences Act 2003, Sch 3.

³² Draft Criminal Code, ss 60-74.

³³ We found particular value in the discussion in Gane (pp 1-6) and also a broadly similar approach used in the article on Criminal Law in the Stair Memorial Encyclopaedia, vol 7, paras 294-320. This model has not been followed in 2005 Reissue of this article.

³⁴ Paras 1.22-1.31.

³⁵ Unlawful sexual intercourse with a girl under the age of 13.

³⁶ Unlawful sexual intercourse with a girl over the age of 13 and under the age of 16.

³⁷ Extension of the offence of lewd, indecent or libidinous conduct to include girls aged between 12 and 16.

³⁸ Homosexual offences: this section would cover homosexual acts with a boy under the age of 16 (s 13(5)(c)).

³⁹ The relevant provisions of this Act came into force on 5 October 2005.

⁴⁰ Mental Health (Care and Treatment) (Scotland) Act 2003, s 311.

⁴¹ *Ibid*, s 313.

⁴² See Sexual Offences (Amendment) Act 2000, ss 3 and 4 which make it an offence for a person over the age of 18 to have sexual intercourse or engage in any other sexual activity with a person under that age where there is a position of trust between them. The scope of this offence in English law has been extended by the Sexual Offences Act 2003, ss 16-24.

1.21 The final range of sexual offences, discussed in Part 5, are those where the underlying rationale is a social or moral principle or goal other than protecting sexual autonomy or protecting vulnerable persons. These offences can be generally labelled as offences against public morality. This label is useful even if not entirely accurate, for, as we point out later, all sexual offences are based on some or other moral principle. The offences we consider under this heading are homosexual offences, incest, indecent conduct formerly falling within the offence of shameless indecency, assaults involving sado-masochistic activity, and bestiality. Certain other offences which come within the broad heading of public morality offences such as prostitution-related offences, and pornography, are not considered in this project for the reasons set out earlier.⁴³

Guiding principles for reforming the law of sexual offences

1.22 In the Discussion Paper we formulated certain principles which we identified as appropriate sources of guidance for the task of reforming the law on sexual offences. These principles have influenced our thinking in making our final recommendations and we consider that it will be of value in reading this Report if we now restate those principles.⁴⁴

1.23 We do not see any discussion of principles for reforming this area of law as dealing with the 'enforcement of morals'. That debate, often presented in the context of sexual offences, is concerned about the extent to which social views should influence legal development.⁴⁵ But, in one sense, all of the major issues about reforming the law on sexual offences involve giving legal effect to some or other underlying moral principle and for us the important issue is to identify what those principles are.⁴⁶

Clarity of the law

1.24 One important goal for any law reform project is to make the law clear.⁴⁷ The need for clarity is especially significant in the criminal law, where the consequence of infringement is the liability of incurring a penalty involving deprivation of liberty or property. This need is perhaps all the greater in respect of the law regulating sexual conduct. Persons contemplating engaging in a particular form of sexual conduct should be able to know, or find out without difficulty, whether what they are intending to do is, or is not, legal. There are two important issues in seeking clarity of the law in this context. The first is that each sexual offence must be defined in such a way that what it prohibits is directly stated. The second is that each offence must be comprehensive in scope; it prohibits certain forms of conduct but nothing more. There should not be open-ended sexual offences, a criticism that was made of the former offence of shameless indecency and could also be made about the offence of lewd, indecent or libidinous behaviour. Rather, we favour classifying sexual offences according to the specific type of wrong which the prohibited act does to the victim.

⁴³ Paras 1.13-1.15.

⁴⁴ In the Discussion Paper we set out principles concerning the law of evidence. In Part 6 we state our reasons for not making any recommendations for reforming the law of evidence, and we do repeat those guiding principles here.

⁴⁵ The classical statements of the issues in this debate are P Devlin, *The Enforcement of Morals* (1965); H L A Hart, *Law, Liberty, and Morality* (1963).

⁴⁶ We have found useful earlier discussions of reforming the law of sexual offences. See, for example, D J West, "Thoughts on Sex Law Reform" in R Hood (ed), *Crime, Criminology and Public Policy* (1974) 469; B Hogan, "On Modernising the Law of Sexual Offences" in P R Glazebrook (ed), *Reshaping the Criminal Law* (1978) 174.

⁴⁷ One of the duties of the Scottish Law Commission is to review Scots law with a view to "the simplification and modernisation of the law" (Law Commissions Act 1965, s 3(1)).

Respect for sexual autonomy

1.25 In trying to locate the wrongs involved in certain forms of sexual conduct the most fundamental principle is respect for a person's sexual autonomy. Autonomy is a complex idea but in the context of legal regulation of sexual conduct it involves placing emphasis on a person freely choosing to engage in sexual activity. Respect for autonomy operates at two levels. Where a person participates in a sexual act in respect of which she has not freely chosen to be involved, that person's autonomy has been infringed, and a wrong has been done to her. This generates a fundamental principle for the law on sexual offences, namely that any activity which breaches someone's sexual autonomy is a wrong which the law should treat as a crime. But respect for autonomy has also a different type of implication for the criminal law. Where a person freely chooses to engage in a sexual activity, the law should in principle not prohibit that activity. There may be exceptional instances where a person's free choice in sexual activity is overridden and the conduct is made criminal. But these instances are truly exceptional and must be based on clear and convincing reasons.

1.26 Often the idea of consent is seen as a key element of giving effect to sexual autonomy. At a general level this concept helps to explain exactly what is wrong about certain forms of sexual conduct. Sexual activity usually involves social interaction between different people. In order for one person to respect the sexual autonomy of another, it is necessary to obtain that other person's consent to a sexual act. This requirement applies to every person who is or may be a party to a particular act. Where one person engages in sex with another without her consent there has not been an appropriate form of interaction between them. Engaging in sexual activity without the consent of another person is a particular form of wrongdoing to that person.⁴⁸

1.27 One value of using consent to explain the more abstract idea of sexual autonomy is that it acts as a more concrete way of stating a crucial general principle for assessing rules of the criminal law. The general principles about promoting and respecting sexual autonomy can also be reformulated in terms of consent. First, non-consenting sexual conduct should be criminalised. And secondly, consenting sexual conduct should not be criminalised unless there are strong reasons for doing so.

Protective principle

1.28 One possible approach is to state that the two main principles based on consent provide all that is needed for reforming the law on sexual offences, albeit to achieve this purpose the consent model would have to be developed in some detail. However, we have identified a further possible principle which, at least at first glance, does not sit entirely easily with using consent as the key element of sexual autonomy. We refer to this as the protective principle. The underlying idea here is that the criminal law should give special protection to persons about whom consenting to sexual activity is problematic. The categories of persons are children, persons with a mental disorder, and persons over whom others hold a position of trust. There are several rationales for the protective principle. One is that it simply adds to the consent requirement, in that such persons cannot consent to sexual activity. This is the position in regard to young children. However, the protective principle goes further and applies in cases where the person to be protected can give

⁴⁸ This approach to consent as a feature of sexual autonomy is explored in J Gardner and S Shute, "The Wrongness of Rape" in J Horder (ed), *Oxford Essays in Jurisprudence, Fourth Series* (2000) 193.

consent (for example, older children or persons over whom others hold a position of trust or authority). Here the protective principle acts to protect vulnerability and to prevent exploitation. It must be noted that in these situations the protective principle overrides the principle that sexual conduct based on the consent of the parties should not be criminalised. We further examine the protective principle and its relationship with the consent model in Part 4.

Distinctions based on sexual orientation or gender

1.29 A further guiding principle is that the law on sexual offences should not involve distinctions based on sexual orientation or types of sexual practice. If sexual conduct involves consenting parties, none of whom falls within the scope of the protective principle, then that conduct should not be made criminal unless there are clear and convincing reasons to do so. An allied but subsidiary point is that the criminal law on sexual offences should, as far as possible, not make distinctions based on gender.

Other types of legal and social intervention

1.30 This project is concerned with reforming a part of the criminal law. However, not all legal regulation of sexual conduct needs to be done by way of the criminal law, and other types of legal process may be a more appropriate way of dealing with problematic sexual conduct. For example, in Scotland most offences committed by children do not result in prosecution in the criminal courts but are dealt with by the welfare-based children's hearings system. Still less should the criminal law cover every possible type of morally wrong sexual conduct. Matters such as adultery or infidelity are not issues for the criminal law or perhaps even for the law generally.

European Convention on Human Rights

1.31 Finally, we would draw attention to the provisions of the European Convention on Human Rights. The Convention provisions are a crucial element in the legislative competence of the Scottish Parliament.⁴⁹ The Scots law on sexual offences has already been amended to ensure compliance with the Convention.⁵⁰ But the Convention is also of importance as a statement of the basic values of the law on sexual offences.⁵¹ In that context there are various principles which the Convention sets out.

(1) Clarity and certainty of criminal law.⁵² The Convention sets out various rights which must be observed by States. A State may limit the exercise of these rights in various circumstances but must do so in accordance with 'law'. In explaining this idea the European Court of Human Rights has observed:⁵³

"a norm cannot be regarded as a 'law' unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able – if need be with

⁴⁹ Para 1.35.

⁵⁰ See, for example, the Sexual Offences (Amendment) Act 2000, s 1 which standardised the heterosexual and homosexual 'age of consent' at 16. See also the Convention Rights (Compliance) (Scotland) Act 2001, s 10, which removed the prohibition of consensual homosexual activity involving more than two men.

⁵¹ Setting the Boundaries, paras 1.2.1-1.2.6.

⁵² Article 7 of the ECHR.

⁵³ *Silver v United Kingdom* (1983) 5 EHRR 347, para 88.

appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail."

(2) Need for an effective system of sexual offences. There is a duty on a State to formulate adequate measures on sexual offences and to ensure that the law is properly implemented. The effect of Article 3 (prohibition of degrading treatment) and Article 8 (right to respect for private life) is that a State must provide for the penalisation of non-consensual sexual activity, including where there was no evidence of physical resistance by the victim, in order to secure protection of the individual's sexual autonomy.⁵⁴

(3) Prohibition of discrimination based on sexual orientation.⁵⁵ Decisions of the European Court of Human Rights, such as *Sutherland*,⁵⁶ indicate that a difference of treatment of homosexual men as opposed to heterosexual men and women cannot be justified, which suggests that there can be no place for specifically homosexual offences in any reforming legislation. Furthermore any 'protective' legislation cannot apply to homosexual conduct without also covering heterosexual acts.⁵⁷

A note on terminology: victims and complainers

1.32 In Scots law there are two terms which refer to the person against whom a crime has been, or may have been, committed. The more technical term 'complainer' is used to indicate the person who alleges that an offence has been committed against him or her.⁵⁸ The word is neutral in respect of whether any crime has been committed against that person, and therefore does not assume that another person, especially the accused in a trial, committed the crime. Strictly speaking, a complainer does not become a victim unless and until the accused is convicted. In contrast, in everyday language the term 'victim' is not restricted to persons in this situation. A person can be the victim of a crime even though no one is ever charged or prosecuted. The law also uses this wider term. The Criminal Justice (Scotland) Act 2003 makes provision for victims' rights. Some of these rights (for example, the right to make a victim statement) apply to a person against whom an offence has been, or appears to have been, perpetrated.⁵⁹ Other provisions (for example, disclosure of information to victim support services) apply simply in respect of a person against whom an offence appears to have been perpetrated.⁶⁰ Generally in this Report we will use the more common, and more easily understood, term 'victim'. However, where the point in issue is

⁵⁴ *MC v Bulgaria* (2005) 40 EHRR 20. This case concerned an allegation by a 14 year-old girl of rape (14 was the age of consent in Bulgaria), proceedings for which had been terminated by the district prosecutor due to a lack of evidence of the use of force or threats and, in particular, lack of evidence of resistance on the part of the applicant. The European Court of Human Rights held that the approach of the Bulgarian authorities amounted to a violation of Articles 3 and 8. The focus of the Bulgarian authorities should have centred on evidence of lack of consent, rather than on evidence of physical force or resistance. In reaching this decision, the Court placed considerable emphasis on the fact that other European countries had reformed traditional legal definitions of rape requiring force, and had removed this requirement in favour of a lack of consent.

⁵⁵ Article 8 (right to respect for private and family life), read with Article 14 (prohibition of discrimination).

⁵⁶ *Sutherland v United Kingdom* (App No 25186/94), para 36. The European Commission of Human Rights held that a minimum age of 18 for lawful sexual practices between men in the United Kingdom rather than 16 (the age limit for heterosexual and lesbian sexual activity) violated the applicant's right to respect for private life guaranteed under Article 8, taken in conjunction with Article 14 (prohibition of discrimination).

⁵⁷ *SL v Austria* (2003) 37 EHRR 39.

⁵⁸ See for example Criminal Procedure (Scotland) Act 1995, s 274(2): "In subsection (1) above — 'complainer' means the person against whom the offence referred to in that subsection is alleged to have been committed."

⁵⁹ Criminal Justice (Scotland) Act 2003, s 14(2).

⁶⁰ *Ibid*, s 18(1).

whether or not a crime has been committed against a person, we will use the more technical term 'complainer'.

Structure of the Report and outline of our recommendations

1.33 In Part 2 we consider the idea of consent in relation to sexual offences. We recommend that the law should provide a definition of consent. This definition should have two elements: first, a general definition of consent as meaning 'free agreement'; secondly, a non-exhaustive list of factual situations which define when a person has not consented to sexual activity. In Part 3 we deal with offences of rape and other types of sexual attack. We recommend that the definition of rape should be widened so as to include various types of sexual penetration, which can be committed against victims of either sex. We also recommend that there should be a detailed definition of the offence of sexual assault, and that there should be offences dealing with coerced sexual activity. A further recommendation concerns the mens rea for these offences. In assessing whether an accused person lacked reasonable belief that the victim consented, regard is to be taken of the steps (if any) which the accused took to find out whether there was consent. Part 4 deals with offences which fall within the protective principle. We recommend that there should be offences of strict liability where someone engages in sexual activity with a child under the age of 13. We also recommend that there should be criminal liability on someone aged 16 or older who has sexual activity with a consenting child aged 13, 14, or 15. There should also be offences designed to protect a variety of people who are owed duties by someone else under a relationship of trust. In Part 5 we consider various types of sexual offences which fall within the heading of public morality. We recommend that existing laws prohibiting consenting homosexual conduct should be abolished or repealed. We further recommend the creation of an offence of sexual exposure, and that criminal liability should be removed from people over the age of 16 who agree to engage in physical attack for the purpose of sexual gratification. Part 6 examines issues in the law of evidence concerning proof of sexual offences. For the reasons we explain there we do not make recommendations for any change to the law of evidence. In Part 7 we consider miscellaneous matters such as transitional issues, continuity of the law, alternative verdicts, and penalties. Part 8 contains a list of our recommendations. Appendix A contains our Draft Bill, with notes on sections, and Appendix B set out the list of consultees who submitted a written response to our Discussion Paper.

Legislative competence

1.34 The recommendations set out in this Report relate to criminal law. With a few exceptions, which do not concern any of the matters in this Report, this area of law is not reserved to the United Kingdom Parliament.⁶¹ We consider that our recommendations would therefore be capable of being implemented by legislation of the Scottish Parliament.

⁶¹ Scotland Act 1998, s 126(5); Sch 5.

1.35 A further aspect of the legislative competence of the Scottish Parliament is that an Act of the Parliament must be compatible with the rights set out in the European Convention on Human Rights.⁶² We deal specifically with Convention matters at various places in this Report.⁶³ We have also considered the competence of the Scottish Parliament in respect of European Community law.⁶⁴ In our view enactment of the recommendations made in this Report would be compatible with Convention rights and with Community law.

⁶² Ibid, ss 29(2)(d), 126(1); Human Rights Act 1998, s 1(1).

⁶³ Paras 4.34-4.38; 4.71-4.73; 4.79-4.80; 5.19; 6.32; 7.3; 7.20.

⁶⁴ Scotland Act 1998, ss 29(2)(d), 126(9). We consider a specific issue of EU law at paras 4.111 and 4.127.

Part 2 Consent

Consent and sexual offences

2.1 In Part 1 we examined the principle of respecting a person's sexual autonomy.¹ In this Part, we consider how the idea of respect for sexual autonomy can be best expressed in legal rules and definitions, and in particular we explore the issue whether the Scots law on sexual offences should contain a consent model.

2.2 In many jurisdictions the law on sexual offences uses consent as a key element in defining the scope of specific offences. Where a person has not consented to a form of sexual activity then that activity is treated as criminal. Where a person has consented then the activity is not criminal. These principles are general in nature and are subject to a variety of qualifications and exceptions, for example with offences where consent to sex given by a child or a person with a mental disorder is disregarded for protective purposes. The protective principle applies to people about whom consenting to sexual activity is problematic. In order to protect such people the law bypasses consent for several reasons, one of which is that doubt remains about the validity of any consent which such a person can give.² But in one area of sexual offences consent has traditionally played a central role, namely sexual assault. These offences relate to forms of sexual contact which in the absence of the consent of the participants give rise to criminal liability, as for example rape or indecent assault. In many legal systems rape is defined as sexual intercourse without the consent of the victim. Prior to the decision in *Lord Advocate's Reference (No 1 of 2001)*,³ in Scots law the actus reus of rape made no reference to consent and was instead defined in terms of a man having sexual intercourse by force and against the will of the victim. However, the Scots law of rape did recognise consent, not as part of the actus reus but as a defence.⁴ As a result of that decision, rape is now defined as sexual intercourse with a woman without her consent.⁵

2.3 A further aspect of defining rape in this way relates to mens rea. As rape involves sexual intercourse without the consent of the woman, for the accused to be found guilty the Crown has to prove that the accused knew, or was reckless as to the possibility, that the woman was not consenting. The need for the Crown to prove facts which indicate this state of mind on the part of the accused adds a complexity to the way in which consent operates in the law of rape. The role of the Crown in a rape trial is to lead evidence of facts which show not only that there was as a matter of fact no consent given by the woman but also that the lack of consent was or (should have been) clear to the accused.

¹ Paras 1.25-1.27.

² For fuller consideration of offences based on the protective principle see Part 4 below.

³ 2002 SLT 466.

⁴ This position is so established that it is taken for granted in leading cases such as *Jamieson v HM Advocate* 1994 JC 88 and *Meek v HM Advocate* 1983 SLT 280. The defence of consent is also referred to in statute: see the Criminal Procedure (Scotland) Act 1995, ss 78 and 149A (introduced by the Sexual Offences (Procedure and Evidence) (Scotland) Act 2002, s 6 (accused to give notice of defence of consent)). Later we consider whether it is better to treat consent as part of the offence or as a defence. See para 2.18. We consider (at paras 2.87-2.88) whether the provisions on giving notice of consent should be repealed.

⁵ A further consequence of the decision is to make redundant the separate crime of clandestine injury to women.

2.4 As lack of consent is a core element of both the actus reus and the mens rea of rape, it might be thought that the law would be attentive to making clear what consent means in this context. However, under current Scots law there is no specific definition of consent. Indeed it has been held that a judge should not provide the jury with a definition. In *Marr v HM Advocate*,⁶ a jury in a trial involving a charge of indecent assault had asked for guidance on the meaning of consent.⁷ The sheriff's response was that the "definition of consent is a common, straightforward definition of consent. It's the common English word given its normal meaning. And that I am afraid is it. Consent is consent." On appeal the High Court of Justiciary commented:⁸

"We recognise that the sheriff might have decided in the face of this request to use some synonym for consent and, for example, tell the jury that they must look for agreement, but we are not persuaded that it was necessary for her to do so. What was important was that she made it plain to the jury that the word 'consent' had no special meaning in law but required to be given its normal meaning."

2.5 We do not regard the current position on consent in the Scots law on rape and indecent assault as satisfactory. If consent is to be a central part of the law, then the law should provide guidance as to what the term means. But before we consider the issue of defining consent, it is necessary to consider an alternative approach, which is entirely to remove consent as a defining element of sexual offences.

Alternative approaches to defining sexual offences

2.6 The main rationale for omitting consent from the definition of sexual offences is that the concept of consent lacks any clear meaning and its use hinders rather than helps understanding what is wrong about sexual assaults. Various criticisms have been made of defining sexual assault by reference to the lack of the victim's consent (either as part of the offence or as a defence), especially where, as in Scots law, consent is not itself defined. The main criticisms are the following:

- (i) There are problems in knowing that consent to sexual activity has been given.
- (ii) The idea of consent is ambiguous. A woman who has sexual intercourse with a man because she has been threatened with violence can still be said to have consented to intercourse, albeit for invalid reasons.
- (iii) Consent is a vague term which may lead to various undesirable consequences; for example, at a trial the victim might give evidence that she had not consented but the accused could nonetheless suggest that her actings at the time indicated that she had given consent.
- (iv) Consent models of sexual offences use improper stereotypes about victims, especially where women are victims.
- (v) Consent models have the effect that the focus of a trial becomes the actings of the victim rather than those of the accused.

⁶ 1996 SCCR 696.

⁷ The idea of consent in the law on indecent assault is the same as that in the law of rape.

⁸ *Marr v HM Advocate* 1996 SCCR 696 at 699 E-F.

We consider these points in turn.

Determining consent

2.7 The first point focuses on the difficulty of knowing when consent has, or has not, been given in respect of an activity. Clearly if a person utters the words 'I consent' then it is reasonable to suppose that consent has been given. However, even in this situation there may be factors which suggest that the consent is not genuine (for example, because it is the result of threats of force). That situation is the main point of the second criticism, which we consider later. Rather the present point is how consent can be given where there has been no express utterance of the words 'I consent' (or their equivalent). In some situations sexual conduct proceeds on the basis of the consent of the parties without there being discussion or negotiation about consent, for example where parties have a long-standing relationship and regularly engage in a particular type of sexual activity.

2.8 The giving of consent in this way (implied consent) may also arise through conventions by which certain actings, or even doing nothing at all, can be understood as the giving of consent. This approach can be summarised as 'playing by the rules'. A general example is taking part in a game. If a person takes part in a game genuinely and willingly then she can be said to have consented to the rules of the game. Her consent is implicit in her taking part. Another example is to be found in decision-making; in many types of meetings failure by a person to object to a proposal is taken to mean that the person agrees with it.

2.9 But it is by no means clear that such conventions exist in respect of sexual conduct,⁹ or if they do exist whether it is correct to continue to use them. It could well be, for example, that there are conventions to the effect that where a woman wears revealing clothes or where a man enters a certain type of gay bar, then they are to be understood as indicating their willingness to engage in sex with persons whom they may encounter. But serious questions arise whether there are in fact conventions of this type which are accepted and understood by all the parties whose actings are to be interpreted by them. In the absence of such shared acceptances of the conventions, any inference that a person is playing by the rules of the conventions cannot be drawn. Indeed there are good reasons to suppose that some of these conventions reflect a one-sided, partial view of sexuality.¹⁰ If that is the case then such conventions should not be used as a means of determining consent. And if that conclusion is adopted, then problems remain about knowing when an activity is based on the parties' consent where there has been no express utterance to that effect.

⁹ DN Husak and GC Thomas III, "Date Rape, Social Convention, and Reasonable Mistakes" (1992) 11 *Law and Philosophy* 95.

¹⁰ There is an extensive literature which indicates that men and women adopt different perspectives in the context of sexual interaction. For discussion, see David Archard, *Sexual Consent* (1998), pp 30-37. Archard quotes (pp 156-157) the following passage from one of these works (Antonia Abbey, "Sex Differences in Attributions for Friendly Behavior: Do Males Misperceive Females' Friendliness?" (1982) 42 *Journal of Personality and Social Psychology* 830, at 830 n 17):

"The research described in this article grew out of the observation that females' friendly behavior is frequently misperceived by males as flirtation. Males tend to impute sexual interest to females when it is not intended. For example, one evening the author and a few of her female friends shared a table at a crowded campus bar with two male strangers. During one of the band's breaks, they struck up a friendly conversation with their male table companions. It was soon apparent that their friendliness had been misperceived by these men as a sexual invitation, and they finally had to excuse themselves from the table to avoid an awkward scene. What had been intended as platonic friendliness had been perceived as sexual interest. After discussions with several other women who verified that this experience was not unique, the author began to consider several related, researchable issues."

Ambiguity of consent

2.10 A further problem about a consent model is that even when it can be shown that consent was given, the idea of consent is inherently ambiguous. A distinction can be drawn between consent given for good and acceptable reasons and consent given for bad and unacceptable reasons. For example, a woman may have engaged in sexual intercourse with a man for the following reasons: first, because she found him sexually attractive and wanted to have intercourse; secondly, because he had told her, and she had believed him, that he was a doctor and that the intercourse was a part of a medical examination; or thirdly, because he had threatened to harm her child if she did not have intercourse. Each of these situations contrasts with that of intercourse where the woman is subdued by violence used by the man. And in each the woman gives her consent to the intercourse but for quite different sorts of reasons. In the second case, the consent is based on a mistake as to the purpose of the intercourse and in the third, consent is given to intercourse as the lesser of two evils. Such cases suggest that not all cases of consent to intercourse should be treated in the same way. The first example is not a crime at all; the second is a crime, as is, even more clearly, the third. But (putting aside some overriding factor such as a protective principle), if some type of sexual conduct should be criminal even if the victim has consented, then it cannot be the absence of consent which accounts for its criminal nature.

Problems in the use of consent as a defence

2.11 Further problems about a consent model arise from its use in practice. If the key issue in proving a sexual assault is the presence or absence of the victim's consent, the accused can exploit the vagueness and uncertainty of consent in order to persuade a court or jury that, although the victim now says that she did not consent, her behaviour at the time suggested otherwise. As the victim did not say at the time that she did not consent, then the proper interpretation of what she did is that she did consent. This approach can appeal to the social conventions, mentioned earlier, about behaviour which can be interpreted as indicating willingness to have sex, such as the type of clothing worn by the victim or his presence in certain types of bar. Moreover, even if defence counsel did not adopt this approach in presenting a defence of consent, a jury might use the same sort of reasoning in deciding the crucial question of whether the victim did or did not consent. This scenario is all the more likely where the jury are not given any directions about what consent means in the context of sexual assault.

Stereotypes of women's sexuality

2.12 Allied to this scope for abuse is the potential for consent models to make use of inappropriate stereotypes about sexual behaviour and attitudes, especially in relation to women. The paradigm sexual act is taken as penile penetration of a woman's vagina, and the role of a woman is either to accept or reject the advances of a man. If the woman gives her consent then the intercourse is legitimate, but the woman only engages in sexual activity by passively permitting the man to penetrate her. Critics point out that this stereotyping uses an exclusively male picture of sex and denies women any sexuality other than saying yes or no to a man having sex with her.

Focus on the victim

2.13 A related problem is that at a trial the focus of attention is not on what the accused did to the victim but on what the victim did with the accused. If the defining element of offences such as rape or indecent assault is consent, then whether the victim gave consent becomes crucial in proving the offence. But this requirement concentrates on what the victim did or said and whether the victim's actions can be interpreted as indications of consent, or lack of consent, to intercourse. The focus on the victim brings with it the use of the social conventions or understandings mentioned earlier, which in turn leads to the asking of questions about the sexual behaviour and attitudes of the victim, usually evidenced by considering her sexual character or her sexual history with the accused or with other men. A frequently reported complaint by rape victims is that they feel that they have been harmed twice; first in the actual rape itself and secondly at the trial, where they are forced to discuss in a detailed way a whole range of highly personal issues.¹¹

2.14 We do not propose to give a detailed analysis or assessment of these criticisms of the consent model. Rather our approach is to concede that unless it can be shown that each of them (and other possible criticisms) is misconceived and is inherently implausible, then there are difficulties in using the concept of consent in relation to sexual offences. One possible response is to abandon consent as an element of sexual offences and to replace it with something else. Another response, which we favour is to refine the idea of consent to make it a more satisfactory and workable concept in the context of sexual offences, a concept which would meet the points of criticism already noted.

2.15 In the Discussion Paper we presented two different ways of achieving the aim of avoiding the use of consent in defining sexual offence. The first was to use instead a different key element, for example defining rape and sexual assault as involving sexual intercourse or contact with 'force' or 'against the will' of the victim. This in effect would return Scots law to something like its position from the time of Hume (if not earlier) until the decision in the *Lord Advocate's Reference (No 1 of 2001)*,¹² with the major difference that consent could not be a defence to any such offence.

2.16 A second approach, which we called the 'definitional' approach, denies that there is any overarching concept which explains every instance of rape and other sexual assaults. Instead what the law should do is to set out all of the factual scenarios involved in rape and sexual assaults. In other words statute should define every possible circumstance in which rape and other sexual assaults could be committed, as well as the defences available in each set of circumstances.

2.17 In the Discussion Paper we stated that we did not favour defining rape and other sexual offences by an exhaustive and comprehensive list of all the factual scenarios which constitute these offences and their specific defences. We thought that the result would be an extremely complex and lengthy set of statutory provisions, which would have to be amended from time to time to cover scenarios not already on the list. Furthermore, we took the view that using another concept such as 'against the will' of the victim involves the same sort of issues as referring to 'without the consent' of the victim. Virtually all of our consultees

¹¹ Temkin, pp 8-11. In Part 6 we discuss the current law on the use which can be made of evidence as to the complainant's sexual history and sexual character. See paras 6.24-6.33.

¹² 2002 SLT 466.

agreed with our proposal that the concept of consent should remain as a key element of the definition of rape and other sexual assaults.¹³ There was limited support for returning to the use of 'against the will' in place of lack of consent, and no support for the definitional model. Accordingly, we remain of the view that the idea of consent should be used in defining rape and sexual assaults.

2.18 In the Discussion Paper we also noted that consent as an element of the law of sexual assault could be expressed as part of the definition of the offence or as a defence. There we were of the view that the absence of consent is at the very core of crimes such as rape and indecent assault. By placing consent as a defence the criminal law would fail to express what is wrong about the conduct in question.¹⁴ We therefore favoured treating the absence of consent as part of the definition of these offences,¹⁵ rather than the presence of consent as a defence to them. This was not a matter which attracted much comment during the consultation process but no consultee disagreed with our conclusion.

2.19 We recommend that:

1. **A constituent element of the offences of rape and other sexual assaults and of offences involving coerced sexual activity should be the lack of consent by the victim.**

(Draft Bill, sections 1(1); 2(1); 3(1); 4(1); 5(1); 6(1),(2))

Should the law define consent?

2.20 We have already noted the various criticisms that can be made of the idea of consent.¹⁶ In the Discussion Paper we stated that we saw no merit in the option of continuing to leave consent undefined. Rather, we believed that a refined model of consent could deal with the problems which those criticisms identified.

2.21 Our view received strong support from consultees. However, the case for leaving consent undefined, as in the current law, was made in the response of the Judges of the High Court of Justiciary who argued that consent should carry its 'normal' meaning, which meaning in the context of rape and sexual assault was quite clear. We are not persuaded by these comments. 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. No such view was suggested to us by any other consultee and 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.¹⁷

¹³ However, at least one consultee suggested that the word 'consent' could be omitted from the new definitions of the offences.

¹⁴ For discussion see K Campbell, "Offence and Defence" in IH Dennis (ed), *Criminal Law and Justice* (1987), 73.

¹⁵ This is currently the law on rape since the decision in *Lord Advocate's Reference (No 1 of 2001)* 2002 SLT 466.

¹⁶ Paras 2.7-2.13.

¹⁷ It may be that the Judges had in mind a wholly different approach to consent from that which we used in the Discussion Paper. In their Response they write that:

2.22 We recommend that:

2. **There should be a definition of consent in respect of sexual offences which involve the lack of consent of any person.**

(Draft Bill, sections 9-11)

Refining consent: an active, not passive, model of consent

2.23 In the Discussion Paper we argued that one difficulty with the idea of consent is that it might present a model of sexual activity in which one party (usually, but not always, a woman) does not play an active role. On this approach sexual activity is something which is done *to* women by men, and women either consent to sex or they refuse consent. However, to the extent that sexual activity involves more than one person (and most forms do) it involves *interaction* between the parties. If the sexual autonomy of all of the parties is to be respected, then the focus should be on what all the parties, in their respective interactions, do to arrive at genuine consenting sexual activity.

2.24 The model of consent which we proposed was an 'active' (or positive) type as opposed to a passive model. On an active understanding of consent to sexual conduct the basic principle is that both participants in sexual activity should respect each other's sexual autonomy and each is equally active in reaching agreement on their sexual relations. In determining whether agreement has been given to a particular sexual act a court or jury should look at the whole background circumstances. The primary question should be 'what did all the parties do to ensure that they participated in a fully consensual act?' The focus of enquiry would be not only on the behaviour of the victim but on the actions of the accused in the process of reaching agreement on consent.

2.25 We considered that re-interpreting consent in an active sense helps to overcome or minimise the problems thought to exist with a consent model. As we have just noted, by emphasising the essentially interactive nature of sexual conduct, the primary focus of attention moves away from the victim and more to the accused. Problems about the vagueness and ambiguity of consent can be resolved by providing detailed accounts of what consent means rather than, as at present, leaving it undefined. In the Discussion Paper we observed that a similar approach had been taken by the Home Office Review Group, whose recommendations led to the enactment of the Sexual Offences Act 2003. The Group made the following observations:¹⁸

"It is vital that the law is as clear as possible about what consent means. The law sets out the ground rules of what is and is not criminal behaviour, and all citizens need to know and understand what these are. This is particularly important because consent to sexual activity is so much part of a private relationship where verbal and non-verbal messages can be mistaken and where assumptions about what is and is

"It is said that 'the idea of consent is inherently ambiguous'. We do not agree that consent is either an idea or ambiguous. The conclusion is that 'there are difficulties in using the concept of consent in relation to sexual offences'. Consent is not a concept. It is a matter of fact which we think can be readily understood by juries in a range of different circumstances."

We would re-iterate that our concern is with identifying the appropriate idea or concepts which should be used in the definitions of sexual offences. We consider later the separate question whether consent on the model we propose may cause difficulties in directing juries or in being understood by juries. See paras 2.31-2.34.

¹⁸ Setting the Boundaries, paras 2.10.1; 2.10.3 respectively.

not appropriate can lead to significant misunderstanding and, in extreme cases, to forced and unwelcome sex."

"In law consent is given its ordinary meaning, which means that in the particular circumstances of each case the jury has to decide that they are sure, beyond reasonable doubt, whether the complainant was consenting or not. This is an important, and often difficult, role. Clarifying the meaning of consent in statute would enable judges to be able to explain what the law said and for juries to understand just what is meant by consent. It would also enable Parliament to consider and recommend what should and should not form acceptable standards of behaviour in a modern society. One of the messages that had come to us in consultation was that consent was something that could be seen as being sought by the stronger and given by the weaker. In today's world it is important to recognise that sexual partners are each responsible for their own actions and that there should be parity of status."

2.26 As indicated earlier, we do not consider that consent as part of the definition of offences of sexual assault should remain undefined. In the Discussion Paper we noted that definitions of consent in the law of sexual offences in various other jurisdictions provided examples of the model of consent which was of interest to us.¹⁹ There is a common structure to these provisions. In the first place, there is a general definition of consent; secondly, there is a list of specified factors which indicate when the absence of consent is established or to be presumed. We proposed that Scots law should adopt this two-tiered approach to defining consent.

2.27 There was widespread support among consultees for adopting this broad strategy to defining consent in sexual offences. We also continue in the view expressed in the Discussion Paper that such an approach would bring distinct advantages to the Scots law of sexual offences. Earlier we noted various criticisms which can be made against using lack of consent as a defining part of sexual assaults.²⁰ One was that there would be difficulty in determining whether consent had been given in the absence of a person expressly using the words such as 'I consent' or 'I agree'. However, a model which locates consent in the interaction between the parties avoids this problem. Giving consent is not simply a matter of making a particular verbal utterance. It is rather something which emerges from what the parties do and say to each other. 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.

2.28 A further problem about leaving consent undefined is that the idea is too vague and open-ended to assist in decision-making. But whereas this criticism may have force where consent is undefined, it does not necessarily extend to more detailed definitions, such as the model we are considering. A definition can aid by indicating situations where consent is present and when it is absent. By its nature such a definition would be more detailed than no definition at all but it does not follow that the term would become vague.²¹ Whether or not

¹⁹ We gave particular attention to jurisdictions which have carried out recent reviews and reform of the law on sexual offences, including England and Wales, Canada, California and New South Wales. In formulating our proposals, we were particularly influenced by the approach taken in the State of Victoria.

²⁰ Paras 2.7-2.13.

²¹ Later we consider in more detail the objection that the definition would make the law too complicated to apply (see paras 2.31-2.34).

a definition of consent is vague depends upon what that definition says. There is no reason to suppose that all definitions of consent must have this characteristic.

2.29 We now consider two objections which can be made against the mode of defining consent which we are advocating. The first argues that this approach adds nothing to the law but only states what is obvious. The second takes the opposite view: it argues that the proposed method of defining consent makes the law unduly complicated. However, we do not consider that there is much weight to either of these objections.

2.30 The first objection is to the effect that the proposed change states the obvious and therefore serves no purpose. It is clear, for example, that where a person has sexual intercourse as a result of certain types of threat or deception, then that person has not consented to having intercourse. But other cases are less clear. There may not be universal social consensus on what constitutes consent in relation to sexual conduct. Earlier we quoted a passage from *Setting the Boundaries* which states that there is scope for misunderstanding and confusion about what constitutes consent to sex. In our view the law of sexual offences should make clear what is and what is not consent in sexual activity. Furthermore, the law has an important function not only in guiding action but also in expressing values. In discussing the list of circumstances where consent was not present, the Home Office Review Group made the following comment:²²

"It sets out those areas that are well established in case law as to when consent is not present, and those where it should be clear that consent would not be present. Most are obvious. The courts will continue to develop the common law as they consider cases where different circumstances apply. They will however have the benefit of a more detailed statute, in which Parliament will have given a clear indication to the courts and to society about the bounds of acceptable behaviour."

2.31 A second criticism of the proposed approach takes the directly opposite view from the first. It is argued that defining consent by a general definition along with examples of 'no consent' makes the law unwieldy and complicated. Instead of applying the notion of consent to the facts of each case, a court or jury would have to apply a general definition and then proceed through a possibly long list of statutory examples or indicators. However, we see little merit in this objection. Applying a general definition to the facts of a case does not make things more difficult than applying no definition at all. It may, depending on the content of the definition, make things easier. Further, this objection misunderstands the purpose of the statutory examples or indicators. These examples would not apply to each case. The point is that if the facts of any one case do correspond to one of the statutory examples then the law helps to provide an answer to the question of the presence or absence of consent.

2.32 Nor do we consider that a model of the type we are proposing would be unworkable in practice. In some of the jurisdictions which use this model there are statutory jury directions on how to apply its provisions. For example the directions in Victoria include the following:²³

²² *Setting the Boundaries*, para 2.10.7. The Home Office Review Group appears to assume that a statute reforming sexual offences would co-exist with the common law. However we are proceeding on the basis that statutory reform would result in the abolition of the common law. See paras 3.34-3.35; 3.46-3.47.

²³ Crimes Act 1958, s 37 ('Jury directions on consent'). (We have set out the version of s 37 as amended in 1997 and 2006.) An example of the application of s 37(1)(a) is: "Consent obviously is a state of mind. It means free agreement. It may be evidenced by what the woman says or does or what she does not say or do. But evidence

"(1) If relevant to the facts in issue in a proceeding the judge must direct the jury that—

(a) the fact that a person did not say or do anything to indicate free agreement to a sexual act at the time at which the act took place is enough to show that the act took place without that person's free agreement;

(b) a person is not to be regarded as having freely agreed to a sexual act just because—

(i) she or he did not protest or physically resist; or

(ii) she or he did not sustain physical injury; or

(iii) on that or an earlier occasion, she or he freely agreed to engage in another sexual act (whether or not of the same type) with that person, or a sexual act with another person;

(c) in considering the accused's alleged belief that the complainant was consenting to the sexual act, it must take into account whether that belief was reasonable in all the relevant circumstances;

and relate any direction given to the facts in issue in the proceeding so as to aid the jury's comprehension of the direction.

(2) A judge must not give to a jury a direction of a kind referred to in sub-section (1) if the direction is not relevant to the facts in issue in the proceeding."

2.33 These jury directions were assessed by the Law Reform Commission of Victoria which found that they were well received.²⁴ We do not propose that a statute reforming the law of sexual offences in Scotland should include jury directions. The point, however, is that in jurisdictions which have adopted a positive model of consent there do not seem to be practical problems in applying it, and there is no reason to suppose that similar directions could not be developed for use by judges in Scotland.

2.34 Indeed, the experience in Victoria of reforming consent in the law on sexual offences gives general support to adopting the proposed model of consent. In the Crimes (Rape) Act 1991 Victoria adopted a definition of consent as 'free agreement' followed by a non-exhaustive list of circumstances in which a person does not freely agree to act. An evaluation report found that there was broad acceptance among legal personnel of the new definition, and for some barristers and judges it had made the conduct of trials easier.²⁵ The report noted:²⁶

that a woman does not say or do anything to indicate consent is normally enough to show the act takes place without that person's free agreement." (Victorian Law Reform Commission, *Sexual Offences: Final Report* (2004), p 347 (Trial 5).) An example of a direction based on s 37(1)(b)(iii) is: "you have heard in this case ... of previous consensual intercourse with the accused, and there has [sic] been questions about whether or not she had consensual intercourse with another or others, but whatever the answer on that, well, the fact that she may have is not to be regarded as resulting in free agreement on this occasion." (Ibid, p 348 (Trial 20).)

²⁴ It was noted that the only real problem was that some judges would give all the directions even in cases where only one or some were relevant.

²⁵ *The Crimes (Rape) Act 1991: An Evaluation Report*, Report No.2, (1997), Rape Law Reform Evaluation Project, Department of Justice, Victoria.

²⁶ Ibid, Executive Summary, p 71.

"Opinions amongst legal personnel interviewed varied about the introduction of the consent definition. Most of the solicitors and magistrates and over half the barristers and judges thought that the definition had been 'helpful' and clarified the common law position on consent. Many thought the definition was easier to work with than the common law because it provided 'a framework', or 'one source meaning'. Some judges thought that the definition was a useful guideline, which made it easier to direct juries at the end of the trial. Others thought it served an educative purpose and was a proper way for Parliament to reflect community views. Some of the solicitors thought the definition had assisted in explaining the law to complainants. They also felt it had influenced decisions to prosecute some cases which might not otherwise have been considered to have a reasonable chance of gaining a conviction."

2.35 We take the view that the law on rape and other sexual assaults should contain a definition of the central element of consent on the lines we have described. We recommend that:

3. (a) **For sexual offences in which the lack of consent on the part of the victim is a part of the offence, there should be a statutory definition of consent.**
- (b) **Consent should be defined first by means of a general description of what consent means.**
- (c) **Secondly the statutory definition should also provide a non-exhaustive list of situations where consent does not exist.**

(Draft Bill, sections 9 and 10)

General definition of consent

2.36 The first element of the consent model which we propose should be adopted for the law on sexual offences is a general definition of the term. What we are seeking is a broad definition which captures the core meaning of consent but which can also be readily understood without resort to sophisticated philosophical theory. In the Discussion Paper we set out examples of general definitions of consent used in other legal systems.²⁷ Drawing on these provisions we proposed two contrasting examples of a general definition. One (consent as 'free agreement') was a short definition stating the core elements of the concept. The other (consent as 'positive co-operation in act or attitude pursuant to an exercise of free will, involving persons acting freely and voluntarily and with knowledge of the nature of the act in question') was more complex but it was suggested because it expressly referred to the issue of co-operative agreement which the positive mode of consent is intended to promote.

2.37 There was a noticeable division of view among consultees on this point. A slight majority favoured option (a), often with some suggested addition to the definition.²⁸ Some

²⁷ For example England and Wales: "For the purpose of this Part a person consents if he agrees by choice, and has freedom and capacity to make that choice (Sexual Offences Act 2003, s 74); California: "'consent' shall be defined to mean positive co-operation in act or attitude pursuant to an exercise of free will. The person must act freely and voluntarily and have knowledge of the nature of the act or transaction involved." (California Penal Code, s 261.6); Canada: "'consent' means ... the voluntary agreement of the complainant to engage in the sexual activity in question" (Criminal Code, s 273.1); Victoria: "'consent' means free agreement." (Crimes Act 1958, s 36)

²⁸ One addition, mentioned by several consultees, was the 'Victorian direction'. See later at paras 2.49-2.50.

consultees who favoured option (b) thought that it should be stated in a simpler way. Others advocated following the definition in English law, subject to various amendments.

2.38 We now take the view that consent should be defined as 'free agreement'. This definition has the merit of brevity. It avoids the use of complex terminology. At the same time it provides a meaningful account of what consent involves. It focuses on what for us is often a key issue in the context of sexual activity. Clearly where a person does not agree at all to sexual conduct, consent is absent. But equally clearly a person can 'agree' to conduct without that there being a 'real' or 'full' or 'valid' agreement (as where she submits to sexual intercourse because of physical threats).

2.39 During the consultation process some critical comments were made of this general definition, which we now consider. First, the definition uses the term 'agreement' which might be misunderstood as meaning something like the legal notion of contract. In the Discussion Paper we emphasised that in the context of sexual activity consent functions in quite a different way from agreement (consensus in idem) in the law of contract. It is of the very essence of the law of contract that once a contract is made a party is held bound by it, whatever his or her subsequent wishes. In contrast, in the present context it would be inappropriate to prohibit the withdrawal of consent to sexual activity. However we do not accept that there is likely to be confusion between agreement and contract. Agreement is a term in common usage in a wide variety of social contexts, and not simply in the law of obligations. We do not think it likely that asking a jury if a person gave free agreement to sexual activity would result in jurors thinking of the law of contract. Moreover, we are making a specific recommendation to make clear that consent to sexual activity can later be withdrawn by the party who gave it.²⁹

2.40 Another concern about understanding consent as free agreement is that the definition is too general or vague to be of any practical value. In particular, it might be argued that the definition fails to capture the idea of a positive, co-operative approach to consent. We would accept that the definition is set out in general terms but we consider that it still provides an explanation of the idea of consent. In the first place we take the view that the phrase 'free agreement' does suggest notions of positive, cooperative activity between different people.³⁰ Secondly, the general definition is only one part of our model of consent in sexual offences. We also propose that the law should specify a number of circumstances in which consent as free agreement is not present.³¹ The cumulative effect of general and particular definitions, taken together, is to set out a model of consent of a positive, co-operative type, as does our proposal on mens rea in relation to lack of consent.³²

2.41 A further point was raised by consultees who favoured the general definition of consent as free agreement. This was that if this definition were to be adopted the term 'consent' should not be used in legislation and that reference to free agreement or lack of free agreement would suffice. We are not convinced by this argument. We do not see the

²⁹ For our recommendation on this point see paras 2.85-2.86

³⁰ One of the reasons given by the Report on the Australian Model Penal Code for adopting this formulation was that "it emphasises, by way of the use of the word 'agreement', that consent should be seen as a positive state of mind. Defining consent in positive terms has been a focal point of reform in recent years, on the basis that to do so more properly reflects two objectives of sexual offences law: the protection of the sexual autonomy and freedom of choice of adults." (Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General of Australia, *Model Criminal Code Report* (1999), chapter 5, p 43.)

³¹ Paras 2.56-2.59.

³² Paras 3.69-3.78.

role of a general definition as simply that of providing a word or phrase which is a synonym of 'consent.' Rather the purpose of the general definition, as read with other provisions including the particular definitions, is to provide an explanation of the concept of consent.

2.42 We consider that there is merit in the law providing this general definition of consent, as part of a wider explication of that concept as it is to be used in the law on sexual offences. We recommend that:

4. Consent as a constituent element of sexual assaults be defined in general terms as 'free agreement'.

(Draft Bill, section 9)

Particular definitions of consent as free agreement

2.43 Many of the jurisdictions which adopt the positive model of consent in sexual offences supplement the general definition by means of examples of situations where consent is not, or is presumed not to be, present. 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 an abstract sense but as referring to consent as set out in the general definition (for example, as free agreement). In England and Wales the Sexual Offences Act 2003 provides that 'consent'³³ is absent in two situations: first, where the accused deceived the victim as to the nature and purpose of the act; secondly, where the accused induced the victim to participate in the act by impersonating someone known personally to the victim.³⁴ The 2003 Act also sets out six situations which, if established, give rise to a rebuttable presumption that the victim did not consent.³⁵

2.44 In the Discussion Paper we proposed that Scots law should follow this approach of adding to the general definition of consent a list of situations where consent is not present. This proposal was approved by virtually all of our consultees. However, several of the responses raised important issues about the list of situations, and we recognise that this is a matter which requires clarification and explanation.

Nature and status of items in the list

2.45 In the Discussion Paper we referred to the items as 'indicators'. We sought to distinguish indicators of lack of consent from presumptions about lack of consent. As noted above, English law lists several situations which, if proved, are to be taken as showing lack of consent unless the accused brings forward sufficient evidence to raise an issue as to whether consent was given. We did not favour stating the indicators as evidential presumptions. This was for the reason that doing so does not correctly characterise what the indicators are seeking to do. They are not so much part of the law of evidence as

³³ That is, as defined in general terms in section 74 of the Act: "a person consents if he agrees by choice, and has the freedom and capacity to make that choice."

³⁴ 2003 Act, s 76.

³⁵ Section 75. The situations are where at the time of the relevant act: (i) violence had been used or threatened against the victim; (ii) violence had been used or threatened against another person; (iii) the victim was unlawfully detained and the accused was not; (iv) the victim was asleep or otherwise unconscious; (v) the victim was unable to communicate because of a physical disability; and (vi) the victim had involuntarily consumed a substance which caused or enabled him or her to be stupefied or overpowered.

illustrations of the key element of the offence itself, namely lack of consent, and should be understood in that way.

2.46 Nonetheless, several consultees favoured the adoption of rebuttable presumptions of this sort in Scots law, mainly for the reason that their use would result in placing a burden of proof on the accused to show that there was consent. We are still not persuaded that the particular situations set out in the statutory list should be evidential presumptions. We remain of the view that these situations are not concerned with evidence used to prove lack of consent but are rather facts which constitute lack of consent. As one of our consultees put it:³⁶ "The situations here do not involve inferring one fact from another. Agreeing to sexual intercourse under a threat of force is not a fact (the basic fact) which allows us to presume a lack of consent (the presumed fact): it is *in itself* a lack of consent in any legally relevant sense."

2.47 Furthermore the experience of the Sexual Offences Act 2003 in English law suggests that presumptions have only a limited value in proving lack of consent in the prosecution of sexual offences.³⁷

2.48 We now accept that use of the term indicator might have given the misleading impression that we were concerned with factual situations which, like presumptions, pointed to, rather than established, the absence of consent. For this reason we now refer to these factual situations as particular definitions. Each item on the list sets out a situation where consent as free agreement is lacking either because there is no agreement at all, or if there is agreement it is not free in nature. Removing any suggestion of evidential presumptions allows for the application of the normal rules on burden of proof. The onus will remain on the Crown to establish lack of consent for all crimes where that is an element of the offence. Where the Crown can establish the factual situation of one of the statutory situations, then they have successfully discharged that burden of proof. In other words proof of a statutory situation establishes the absence of free agreement. This model of particular definitions of absence of consent has been used in England and Wales³⁸ and in Victoria,³⁹ and we are not aware of any problems in those systems arising from this way of defining lack of consent.

³⁶ Mr James Chalmers.

³⁷ The Home Office has considered whether to add a further presumption relating to the capacity of a person to give consent whilst intoxicated (Office for Criminal Justice Reform, *Convicting Rapists and Protecting Victims – Justice for Victims of Rape. A Consultation Paper* (2006)). In rejecting this suggestion the Consultation Paper noted (p 15): "there is little evidence that the existing evidential presumptions have enjoyed great usage. The presumptions apply unless the defendant raises 'sufficient evidence' to raise an issue as to whether the victim consented. Where the defendant does raise such evidence, the judge will direct the jury that the presumption does not apply and the jury should consider the issue of consent in the normal way. In practice, it is not particularly onerous for defendants to enter the witness box and give 'sufficient evidence' to disengage the presumption. Therefore, we believe that the arguments for creating an additional evidential presumption are not strong and the better course would be to proceed by legislating to provide for a clearer definition of capacity."

See also *R v Jheeta* [2007] EWCA Crim 1699 (at para 23): "The starting point in our analysis is to acknowledge that in most cases, the absence of consent, and the appropriate state of the defendant's mind, will be proved without reference to the evidential or conclusive presumptions. When they do apply, section 75 and section 76 are directed to the process of proving the absence of consent to whichever sexual act is alleged. They are concerned with presumptions about rather than the definition of consent."

The relative under-use of the evidential presumptions in the 2003 Act was confirmed to us by a senior prosecutor in the Crown Prosecution Service.

³⁸ Sexual Offences Act 2003, s 76 which provides that the complainant did not consent to the relevant act where (i) the defendant intentionally deceived the complainant as to the nature or purpose of the relevant act; and (ii) the defendant intentionally induced the complainant to consent to the relevant act by impersonating a person known personally to the complainant. English law characterises these provisions as 'conclusive' presumptions.

2.49 Several of our consultees suggested that Scots law should also adopt as part of the definition of consent a situation which is used in some Australian states. For example, one of the statutory jury directions used in Victoria is the following:⁴⁰

"the fact that a person did not say or do anything to indicate free agreement to a sexual act at the time that act occurred is evidence that the act took place without that person's free agreement."

2.50 We do not favour using this factual situation as one of the particular definitions of consent. It may be noted that in the legal systems in question the situation appears as a jury direction, not a legal rule. Furthermore the situation sets out a presumption only, and not a conclusive rule. It is clearly possible for someone to consent to a sexual act without expressly saying so. We have already set out our reasons for not using presumptions, and accordingly we do not favour including this factual situations as one of the particular definitions. However, there may be value in a judge referring to this scenario when directing a jury about consent. The jury can be reminded that if they accept that the complainer said nothing or did nothing to indicate free agreement then that is a factor which suggests lack of consent.

Should there be 'negative' indicators?

2.51 The matters in the list of particular definitions all deal with situations which constitute a lack of consent (Fact A *means* no consent). Several consultees suggested that Scots law should also contain a list of situations which do not in themselves constitute consent (Fact B does not constitute consent). An example can be found in another jury direction used in Victoria:⁴¹

"a person is not to be regarded as having freely agreed to a sexual act just because—

(i) she or he did not protest or physically resist; or

(ii) she or he did not sustain physical injury; or

We find this terminology unhelpful and prefer to talk of rules of substantive law which provide definitions of the absence of consent.

³⁹ 1958 Act, s 36.

⁴⁰ Crimes Act 1958, s 37(1) (Victoria). This is the version of the direction which we set out in the Discussion Paper. The direction was amended in 2006 and now reads as follows: "The fact that a person did not say or do anything to indicate free agreement to a sexual act at the time at which the act took place is enough to show that the act took place without that person's free agreement."

In Tasmania there is a similar direction: "The fact that a person did not say or do anything to indicate free agreement to a sexual act is normally enough to show that the act took place without that person's free agreement" (Criminal Code Act 1924, Sch 1, s 371AA(2) (Tasmania)).

⁴¹ Crimes Act 1958, s 37 ('Jury directions on consent'). An example of the application of s 37(1)(a) is: "Consent obviously is a state of mind. It means free agreement. It may be evidenced by what the woman says or does or what she does not say or do. But evidence that a woman does not say or do anything to indicate consent is normally enough to show the act takes place without that person's free agreement." (Victorian Law Reform Commission, *Sexual Offences: Final Report* (2004), p 347 (Trial 5).) An example of a direction based on s 37(1)(b)(iii) is: "you have heard in this case ... of previous consensual intercourse with the accused, and there has [sic] been questions about whether or not she had consensual intercourse with another or others, but whatever the answer on that, well, the fact that she may have is not to be regarded as resulting in free agreement on this occasion." (Ibid, p 348 (Trial 20).)

(iii) on that or an earlier occasion, she or he freely agreed to engage in another sexual act (whether or not of the same type) with that person, or a sexual act with another person."

2.52 In California the Penal Code also mentions two situations which in themselves do not amount to sufficient evidence of consent. These are a current or previous dating or marital relationship; and the victim's suggestion or request that the accused uses a condom or other birth control device. Another possible example would be that the fact that a woman was wearing revealing clothing does not in itself prove that she was consenting to sex.

2.53 We accept that the value of these negative indicators is that they challenge stereotypes about situations when people, especially women, are deemed to be giving consent to sexual activity where they do not expressly state their consent. However, we do not take the view that they should be included in statutory provisions on consent. One problem is in selecting the appropriate indicators. Even in the context of sexual practices in contemporary society, many things do not and should not be held to amount to consent. Picking some, but omitting others, may give rise to the unwelcome risk of an inference of consent in those situations which are not included. Furthermore, the main purpose of indicators of this type is to block the use of inference based on unacceptable stereotypes or social conventions. If the legal system has a role in promoting this goal it might be more appropriately done, as it is in Victoria, by way of jury directions. We also take the view that much can be done, by education and public awareness campaigns, to increase general attitudes and perceptions about situations that do not mean a person is consenting to sex.

Non-exhaustive nature of the list of particular definitions

2.54 A further point about the list of particular definitions is that list is not to be understood as exhaustive of the situations where consent does not exist. This is a crucial point about the consent model which we are proposing. Consent is defined in general terms as 'free agreement'. The particular definitions are concerned with some factual situations where there is no free agreement. But there will be many types of factual situation, not on the statutory list, which may also involve lack of consent as free agreement. In other words, the general definition is not empty in content or devoid of application. In all cases where consent is in issue, the court or the jury must ask if the complainant gave free agreement to the sexual activity in question. If the evidence puts the case into one of the particular definitions, then the answer is that there was no consent. But even if the case does not fall within the particular definitions, the question of the presence or absence of free agreement must still be answered. Indeed we envisage that over time case law will evolve on what constitutes lack of consent in the general sense of free agreement.

2.55 In the Discussion Paper we asked what factual situations should be included on the list of indicators. We have incorporated some of the suggestions into the proposed list, which we consider below. But there are other suggested factual situations which we consider should be left to the general definition of consent. One example relates to the indicator proposed in the Discussion Paper that a person had not consented to a sexual act where at the time of the act the person was subject to actual or threatened force or violence against him or her or against another person. We have decided that the particular definitions should include this factual scenario. However, consultees made various suggestions about expanding the scope of the definition. For example, what if the violence or threat was aimed at property of the victim? Should the definition include threats to do something not involving

violence, for example to reveal embarrassing facts about the victim's past? We consider that the question of the presence or absence of consent in these scenarios can be answered by applying the general definition to the established facts of each case: did the complainant freely agree to the sexual act? Other examples of situations of lack of consent to sex which can be answered in terms of the general definition are other types of threats or inducements. In the Discussion Paper we provided two examples. In the first, a man, a highly placed manager at a place of work, tells a woman (a junior employee) that she will be sacked if she does not have sex with him. The man knows that the woman is in severe financial straits. They have sexual intercourse. In the second example, the situation is the same, except that the man tells the woman that if she has sex with him he will give her a promoted post. Our view is that it would be difficult to formulate a rule that situations of these types in all cases constitute lack of free agreement. Rather the presence or absence of free agreement depends upon the particular facts and circumstances of each case.

2.56 The question remains as to what situations should appear on the list. As one of the functions of the list is to state and reinforce social values about appropriate behaviour in sexual matters, the list should include situations where clearly consent is not present, including where violence or threats of violence have been used, or where the victim has been deceived as to some important issue. The list should also include instances of temporary lack of capacity at the relevant time, for example where the victim was asleep or unconscious.

2.57 We are not inclined to include in the list issues concerning general incapacity (because of age or mental disorder) or consent in situations where relationships of trust and authority exist between the parties. Our position is that in many instances where sexual activity occurs involving these situations, the lack of consent will be based on one or more of the other factors on the list. Moreover there is a general question of whether the law should disregard any apparent consent given by a person with a general incapacity based on age or mental disorder or by a person over whom someone holds a position of trust or authority. We explore these issues in more detail in Part 4 when we consider the protective principle.

2.58 There was overwhelming support among consultees for adopting the list of indicators proposed in the Discussion Paper. We have taken account of comments on points of detail in framing the list which are to appear in statute but we are no longer using the term 'indicator'. We would emphasise again that the factual situations set out in the list are not to be understood as pointing to or presuming lack of consent. Rather they are situations which *constitute* lack of consent.

2.59 We recommend that:

5. **There should be a non-exhaustive statutory list of factual situations which define when a person has not consented to sexual activity. The situations should include the following:**
 - (a) **where the person had taken or been given alcohol or other substances and as a result lacked the capacity to consent at the time of expressing or indicating consent unless consent had earlier been given to engaging in the activity in that condition;**

- (b) where the person was unconscious or asleep and had not earlier given consent to sexual activity in these circumstances;**
- (c) where the person agreed or submitted to the act because he or she was subject to violence, or the threat of violence, against him or her, or against another person;**
- (d) where the person agreed or submitted to the act because at the time of the act he or she was unlawfully detained by the accused;**
- (e) where the person agreed or submitted to the act because he or she was deceived by the accused about the nature or purpose of the activity;**
- (f) where the person agreed to the act because the accused impersonated someone who was known to the person;**
- (g) where the only expression of agreement to the act was made by someone other than the person.**

(Draft Bill, section 10)

Comments on the particular definitions

2.60 The interpretation of the provisions on the definition of consent, at both the general and particular level, is a matter for the courts in applying the provisions of the statute which gives effect to our recommendations. However, as it is likely that the statute will be read by people who are not lawyers we consider that it might be useful if we made some comments on certain aspects of the particular definitions. We wish to repeat an important point made earlier, namely that the list of particular definitions is not exhaustive of the circumstances where consent is absent and that factual situations which do not fall within the scope of any the particular definitions must still be considered in terms of the general definition of consent as free agreement. This scenario may arise as a result of failure of proof. For example, the Crown may seek to show that a person submitted to sexual activity as a result of being unlawfully detained by the accused; although the evidence shows that the complainant had been unlawfully detained, it does not establish that the accused was responsible for her detention. The failure to bring the case under one of the particular definitions does not mean that absence of consent has not been shown. The question in all cases is: on the facts as established, did the complainant give free agreement to the sexual act?

2.61 Although all the items on the list provide definitions of lack of consent as free agreement, they are not all of the same type. Some definitions concern situations where a person who generally has capacity to consent is unable to exercise it in particular circumstances. Others deal with situations where a person agrees to conduct but the agreement is not free in nature. In these cases there is a causal link between the vitiating circumstances and the giving of agreement. It will be for the Crown to prove this causal link in order to establish the existence of the definition but we do not consider that this would be an unduly difficult task in most cases. Where a woman has sex with someone who has

pointed a gun at her or who has locked her into a room, the normal inference is that the woman has acted *because* of the threat or the detention.

Lack of capacity to consent as a result of intoxication

2.62 This definition deals with the situation where the victim is intoxicated as a result of taking drink or drugs. Its scope is limited to the scenario where whilst in a state of intoxication the person concerned makes some expression or indication of consent to sexual activity. Where the person is at that time so intoxicated as to have no capacity to make free agreement then whatever he or she has said or done to indicate consent does not amount to free agreement. There is no doubt an element of circularity in the definition (someone who is so drunk as to lack capacity to give consent cannot give consent) but we take the view that the definition is not devoid of meaning or usefulness. Its particular value 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 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 (they are 'asking for it').⁴²

2.63 What the definition does not, and cannot, do is to set a test for when a person lacks capacity to consent as a consequence of taking drink or drugs. There are degrees of intoxication. A person may become so intoxicated that she falls asleep or becomes unconscious, in which case the particular definition dealing with these scenarios may come into play.⁴³ At the other end of the scale, taking drink or drugs may lead to someone losing his or her inhibitions and then doing things whilst drunk that he or she would not have done when sober. The drunken activity is nonetheless based on consent, and sexual activity in this situation would be based on consent. But there is also an effect of intoxication that a person's capacity to make decisions, including the capacity to consent to sexual activity, progressively diminishes until it eventually disappears. There is, then, a distinction between intoxication which results in a lack of capacity to consent and intoxication which alters a person's choices but does not deprive him of the capacity to consent. The difficulty lies in applying this distinction in practical settings. On which side of this line any case falls is a matter of its particular facts and circumstances. This crucial point was emphasised in a recent case in England:⁴⁴

"If, through drink (or for any other reason) the complainant has temporarily lost her capacity to choose whether to have intercourse on the relevant occasion, she is not consenting, and subject to questions about the defendant's state of mind, if intercourse takes place, this would be rape. However, where the complainant has voluntarily consumed even substantial quantities of alcohol, but nevertheless remains capable of choosing whether or not to have intercourse, and in drink agrees to do so, this would not be rape. We should perhaps underline that, as a matter of practical reality,

⁴² See, for example, *Domestic Abuse 2006/7: Post Campaign Evaluation* (Scottish Executive. Office of Chief Researcher; 2007), which reported a study on attitudes in Scotland towards rape and in particular how responsible a woman was considered for being raped in various circumstances. (Respondents were approximately an equal number of men and women.) The majority considered that women were not responsible for rape in any circumstances. However 27% thought a woman was responsible if she was drunk; 26% if a woman was dressed in revealing clothing; 32% if a woman was flirting; and 18% if a woman was known to have had many sexual partners.

⁴³ See paras 2.80-2.81.

⁴⁴ *R v Bree* [2007] 2 All ER 676 at 684G-685B (paras 34 and 35).

capacity to consent may evaporate well before a complainant becomes unconscious. Whether this is so or not, however, is fact specific, or more accurately, depends on the actual state of mind of the individuals involved on the particular occasion.

Considerations like these underline the fact that it would be unrealistic to endeavour to create some kind of grid system which would enable the answer to these questions to be related to some prescribed level of alcohol consumption. Experience shows that different individuals have a greater or lesser capacity to cope with alcohol than others, and indeed the ability of a single individual to do so may vary from day to day. The practical reality is that there are some areas of human behaviour which are inapt for detailed legislative structures. In this context, provisions intended to protect women from sexual assaults might very well be conflated into a system which would provide patronising interference with the right of autonomous adults to make personal decisions for themselves."

2.64 It should be noted that the definition is not concerned with the cause of the victim's intoxicated state. That might arise as result of willing consumption of alcohol with knowledge of its likely effects. Equally the victim might become intoxicated by having been given, without her knowledge, a stupefying drug.⁴⁵ The focus of the definition is on the effect of the resulting intoxication on the victim's capacity to consent. For example, where the evidence shows that someone had been given a stupefying drug but had made an expression of consent before the drug took effect, whether or not there had been free agreement would be a matter for the general, rather than this particular, definition.

2.65 The definition is also limited to the situation where the only expression or indication of consent occurs when the victim is in a state of incapacity because of intoxication. But two people may freely agree whilst sober (or in the early stage of intoxication) to have sex with each other later and then before that agreed time become very drunk. The definition does not deal with this scenario, which again is rather a matter for the general definition.

Agreement or submission because of violence, or threats of violence, against the victim or another person

2.66 This definition uses the term violence, rather than force, to avoid any suggestion that it incorporates the idea of force used in the old law of rape.⁴⁶ The definition covers both actual violence and the threat of violence. Where actual violence is used there is no need for the victim to offer, or to continue with, resistance. The focus is on the effect of the violence on the nature of any agreement or submission made by the victim. The definition does not cover cases where violence is used throughout an attack but the victim at no stage agrees or submits to it. In this case there is clearly no free agreement and the situation is covered by the general definition.

⁴⁵ In English law there is a rebuttable presumption that there is no consent where "any person had administered or caused to be taken by the complainant, without the complainant's consent, a substance which having regard to when it was administered or taken, was capable of causing or enabling the complainant to be stupefied or overpowered at the time of the relevant act" (Sexual Offences Act 2003, s 75(2)(f)). In English law any issue of consent when the victim lacks capacity as a result of voluntary consumption of drink or drugs is a matter for the general definition: *R v Abbes* [2004] EWCA Crim 1813. In Part 3 we propose that there should be an offence of administering a stupefying substance for a sexual purpose (see paras 3.64-3.66).

⁴⁶ Prior to the decision in *Lord Advocate's Reference (No 1 of 2001)* rape was defined as sexual intercourse with a woman by force. However, the idea of force was given an extended definition to include any method of overpowering the woman's will (see *Charles Sweenie* (1853) 3 Irvine 109, 137 (Lord Ardmillan)).

2.67 A threat by itself may be enough if its effect is to prevent free agreement. The definition also applies to cases where not only the victim but any other party is subject to the violence or a threat of it. Also, it need not be the accused who uses the violence or makes the threat. Where B agrees to have sex with A because X has used violence or threatens to use violence, B has not freely agreed.⁴⁷ It is also to be noted that the threat need not be to use immediate violence. If B agrees or submits to having sex with A because of A's threat to assault B or B's child at a later time, B has not freely agreed.

2.68 An important feature of the definition is that it does not require that the violence occurred or the threat was made at time of the sexual act. In other words the definition covers what is known as historic abuse. However, in cases of historical abuse it may be more difficult for the Crown to establish the causal link between the violence or threat and the agreement or submission to the sexual activity.

2.69 The definition covers only threats of violence but not other types of threats. Thus threats to do other types of criminal activity (for example, to abduct or detain the victim or someone else) or to do activities which are not in themselves criminal (as where an employer threatens to dismiss an employee) are not within the scope of the definition. Such cases are to be decided by reference to the general definition: in the circumstances did the complainant freely agree to have sex with the accused?

Agreement or submission because of unlawful detention

2.70 Where a person has been unlawfully detained he or she would be under considerable pressure to agree or submit to sexual advances made by the person responsible for the detention. This definition provides that where the reason for agreement or submission is the unlawful detention, there is no free agreement. The definition is limited in two ways: first, the detention must have been carried out by the accused, and secondly 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. Unlawful detention will by itself involve other breaches of the criminal law,⁴⁸ which will normally be charged in addition to any rape or sexual assault which results from the lack of the victim's consent. However, it is not a requirement of the particular definition that force or violence is used (for example, a man could be tricked into going into a room and then the room is locked).

2.71 Where a person is detained lawfully but is subject to abuse of authority by those in charge of him, any question of free agreement to sexual activity is a matter for the general definition.

2.72 A possible reaction to unlawful detention, especially in the context of being taken hostage, is that the hostage begins to display sympathy or loyalty to the abductor, and cooperates with him.⁴⁹ If this cooperation were to involve sexual activity, the particular definition would not necessarily lack relevance. If it could be established, by appropriate

⁴⁷ In this scenario, A's guilt would of course depend on his having the mens rea as to the lack of consent on the part of B.

⁴⁸ There is an offence at common law of abducting a woman with intent to rape her (*Barbour v HM Advocate* 1982 SCCR 195).

⁴⁹ The so-called Stockholm syndrome.

expert evidence, that any agreement to sexual activity was part of this response mechanism which was itself caused by the unlawful detention, then there would not be free agreement.

Agreement or submission as a result of deception as to the nature and purpose of the sexual act

2.73 This definition deals with the situation where the accused has deceived the victim as to the nature or purpose of the sexual act. Although nature and purpose are distinct ideas, there may be some overlap between them (for example, where a woman is told that digital-vaginal penetration is a necessary medical procedure). A mistake as to the nature of a sexual act may exist when the victim is aware of the relevant physical characteristics (for example, the insertion of a penis into the victim's vagina). What is relevant is the victim's awareness, or lack of awareness, of the act as a *sexual* act. Obvious examples are where the accused falsely tells the victim that the act is a medical procedure.⁵⁰ But the definition would not apply to cases where the act was a medical procedure done for medical reasons but the accused obtained sexual gratification from carrying it out.

2.74 Deceptions by the accused which do not relate to the nature or purpose of the act are not covered by this definition. Examples are where sexual intercourse resulted from the accused having falsely represented that the victim was under threat of attack and that he could protect her,⁵¹ or where the accused falsely represents that he is free from HIV.⁵² But such cases will be determined by applying the general definition.

2.75 Finally, it is to be noted that the deception must be carried out by the accused. The definition does not apply where a third party makes the deception. Nor does it apply where there is an uninduced mistake by the victim. These cases would also be decided in terms of the general definition, and where the accused was aware of the victim's mistake but failed to disabuse him of it, this factor would have relevance in proving mens rea.

Agreement or submission as a result of deception as to the identity of the other person

2.76 This definition deals with the situation where the accused has deceived the victim into thinking that he is someone whom the victim knows and the victim has sex with him because of the induced mistake. The inducement must be made by the accused, not by a third party. Nor does the definition apply to a unilateral mistake by the victim. In these situations the question of lack of consent will be determined by applying the general definition. The focus of the definition is on the impersonation by the accused of someone who is known personally to the victim. The wrong involved in this situation is not simply a fraud on the victim as to the person with whom she is having sex. It is that the victim wrongly thinks that she is having sex with a particular person whom she knows. Consent was given by her to intercourse with that particular person, not to the accused who is falsely claiming to be that person. The definition does not require that the person in question was in

⁵⁰ *Baillie v HM Advocate* 2007 SCCR 26 (plea of guilty by doctor to 17 charges of indecent assault by way of vaginal examination and touching for no clinical reason). See *R v Williams* [1923] 1 KB 340 (16 year old girl persuaded to have sexual intercourse with the accused who had told her that this would improve her singing voice).

⁵¹ *R v Jheeta* [2007] EWCA Crim 1699.

⁵² *R v B* [2007] 1 WLR 1567 (where the Court of Appeal held that under English law the failure of the accused to inform the complainant that he was HIV positive did not by itself vitiate the complainant's consent to sexual intercourse).

any particular relationship with the victim.⁵³ No guidance is given on what is meant by 'known personally' to the victim,⁵⁴ which may require interpretation by the courts.

2.77 The requirement that the impersonation must be of someone known to the victim helps to avoid problems about distinguishing between a person's identity and attributes. The definition does not cover the situations where the accused induced the victim into having sex by claiming falsely that he was a famous film star or football player or that he was rich, situations to be decided by applying the general definition.

Expression of agreement made by someone other than the victim

2.78 A clear infringement of a person's autonomy in sexual matters is where that person does not make any expression of consenting to sexual activity but some other person does so. This definition makes abundantly clear that where the only expression of agreement to sexual conduct involving the victim is made by someone other than the victim himself or herself there is no free agreement as far as the victim is concerned.⁵⁵ It might be thought that such a provision is unnecessary and does no more than state the obvious.⁵⁶ However, 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.

2.79 The definition does not prevent a person expressing consent through the medium of a third party, for example where a person who can communicate only by means of sign language using an interpreter to convey the consent. In this scenario the consent is still being expressed by the person himself or herself. Nor does the definition prevent a third party from repeating an expression of consent already made by the person in question. However, in each of these scenarios the other party would be on notice that he should take appropriate steps to ensure that the consent had in fact been given.⁵⁷

⁵³ The definition is accordingly much wider than the offence under section 7(3) of the Criminal Law (Consolidation) (Scotland) Act 1995: "A man who induces a married woman to permit him to have sexual intercourse with her by impersonating her husband shall be deemed to be guilty of rape." This provision derives ultimately from the Criminal Law Amendment Act 1885, s 4, which overturned the decision of *William Fraser* (1847) Arkley 280.

⁵⁴ For discussion of the similarly worded provision in English law (Sexual Offences Act 2003, s 76(2)(b)), see David Ormerod, *Smith & Hogan Criminal Law* (11th edn, 2005), p 611. Ormerod gives the example of A and B who arrange to meet (for the first time) after internet dating. A does not turn up at the date but X appears in his place pretending to be A. If X and B later have sex, does this trigger the particular definition?

⁵⁵ An example of this situation is *DPP v Morgan* [1976] AC 182, where one of the accused told three other men that they could have sex with his wife and that although she might appear to be resisting in fact she was willing to have sex with them.

⁵⁶ A similar provision exists in the Canadian Criminal Code, section 273.1(2), which states that there is no consent where "the agreement is expressed by the words or conduct of a person other than the complainant." There is no equivalent in the Sexual Offences Act 2003 but a conclusive presumption to this effect was part of the Bill as introduced in Parliament. An explanation for the removal of the clause has been suggested by Professors Temkin and Ashworth ("Rape, Sexual Assaults and the Problems of Consent" [2004] Crim L Rev 328, 339): "some argued that it tipped the scales too far against defendants, in cases where it was simply one person's word against another's: the cogency of this argument depends on whether people have been put on notice that they should never accept a third party's word in matters of sexual autonomy. The other objection was that people with a learning disability or mental disorder could not be expected to know that they were being deceived: insofar as this has substance, it is an argument against almost all objectives tests in the criminal law, and might best be dealt with by way of exception or defence."

⁵⁷ This matter arises in particular in relation to mens rea. See discussion at para 3.77.

Sexual activity with a person who is asleep or unconscious

2.80 This definition is concerned with problems about the victim's capacity to give and express consent. People who are asleep or unconscious lack such capacity while they are in that state. Surprisingly, at common law (at least until the decision in the *Lord Advocate's Reference (No 1 of 2001)*)⁵⁸ it was not rape for a man to have sexual intercourse with a woman who was asleep or unconscious.⁵⁹ What the definition makes clear is that if someone lacks capacity to consent to a sexual act, then he or she has not consented to that act. It does not matter what has caused the state of sleep or unconsciousness. It might, for example, be the result of intoxication (either voluntary or involuntary).

2.81 The definition does allow for one situation where consent to sexual activity might be present even although the person concerned is asleep or unconscious during it.⁶⁰ This is where that person has consented in advance to that particular sexual act taking place while he or she is asleep or unconscious.⁶¹ Of course, whether such consent was actually given has to be determined by applying the general definition of consent and any relevant particular definition.

Limited or specific consent

2.82 A separate issue from the definition of consent concerns the limits or scope of the agreement when consent is given to sexual activity. Consent may be qualified or restricted in some way. An example of consent of this type is where a woman consents to have sexual intercourse with a man provided he wears a condom. In this situation the woman cannot be said to have consented to unprotected sex, and if the man disregards this element of the consent he would be guilty of rape or a sexual assault. Similarly, the fact that a woman consents to one type of sexual contact does not of itself imply she consents to a different type. Kissing, for example, is not a sign of consenting to sexual intercourse. The fact that a woman consents to engaging in one type of sexual act (for example, touching, oral sex) does not imply that she has consented to other types of act (for example, vaginal intercourse). There must be something in addition to engaging in one type of consensual sex to allow the inference that consent has been given to another type of sexual act.⁶²

⁵⁸ 2002 SLT 466.

⁵⁹ *Charles Sweenie* (1858) 3 Irvine 109. Instead the offence was one of clandestine injury or indecent assault. An explanation of this approach was given in the later case of *Rodgers v Hamilton* 1994 SLT 822: "If intercourse was to take place while [the complainer] was asleep, she was not in a position *either to consent or to withhold consent* from such intercourse, and it is well established that if intercourse took place in these conditions it would not constitute rape but clandestine injury or indecent assault" (Lord Justice Clerk Ross at 823 (emphasis added)). The status of the crime of clandestine injury since the decision in *Lord Advocate's Reference (No 1 of 2001)* is problematic. Later we recommend that this crime should be abolished (see paras 3.34-3.35).

⁶⁰ It is to be noted that the presumption in English law on this point is a rebuttable rather than a so-called conclusive one (Sexual Offences Act 2003, s 75(2)(d)).

⁶¹ Ormerod, *op cit*, (p 606) argues about the presumption in English law that: "For example, A who performs a relevant sexual act (note that the presumption applies to offences of touching and not just penetrative acts) on his sleeping partner as a gesture of intimacy to wake her ought not to be conclusively presumed guilty."

⁶² See Note, "Acquaintance Rape and Degrees of Consent: 'No' means 'No' but what does 'Yes' mean?" (2004) 117 Harvard Law Review 2341, 2354-2355, where referring to the decisions of *People v Ray* 2002 WL 64543 (Cal Ct App) and *Commonwealth v Fionda* 599 NE 2d 635 (Mass App Ct) the following point is made: "Indeed, both the *Ray* and *Fionda* courts, without explicitly saying so, seemed to rely on some distinction between the nature of intercourse and the nature of other sexual acts. The acknowledgment of specific, rather than generalized, consent would prompt courts to engage in a more explicit dialogue attempting to articulate and define such distinctions. For example, in evaluating petting and oral sex – the conduct at issue in the aforementioned cases – questions as to the nature of these acts are central to a determination of relevancy to

2.83 In the Discussion Paper we proposed that the law should make it clear that there is no implied escalation to consenting to different types of sexual activity. We were concerned that it might be thought that there are social conventions whereby, for example, a woman going back to man's flat, or kissing a man, are signs that the woman is consenting to full intercourse. We doubted whether there are such conventions which are generally agreed by all the parties whose behaviour is said to be governed by them. But in any case it should be clear that consent has not been given in these situations and the law should reflect the point that consent must be given to specific acts of sexual contact. It can hardly be said that this approach places people in practical difficulties. If one person is not sure that another person is consenting to a sexual activity with him, the obvious and reasonable thing to do is to ask if there is consent.

2.84 This proposal received virtually unanimous support from consultees. We recommend that:

6. The giving of consent to one sexual act does not by itself constitute consent to a different sexual act.

(Draft Bill, section 11(2))

Withdrawal of consent

2.85 A further situation is where someone gives consent to a sexual act and then withdraws consent either before or during the act.⁶³ In our view the exercise of sexual autonomy involves the right to withdraw, at any time, consent previously given. As we noted earlier, consent in this context operates differently from agreement (*consensus in idem*) in the law of contract.⁶⁴ There is already Commonwealth authority that where a man has consensual intercourse with a woman and during the intercourse she indicates that she no longer consents to it, then if the man continues with the intercourse he is guilty of rape.⁶⁵ We agree with the principle of this approach and we are of the view that it should also represent Scots law. Our recommendation to this effect in the Discussion Paper received virtually unanimous acceptance. We wish to make clear that consent to a sexual act cannot be withdrawn after the act is completed, as in this situation the other party to the act has no way of adapting his or her behaviour to the withdrawal of consent.

consent to intercourse. Presumably, people engage in petting with greater frequency than they engage in sexual intercourse; therefore, petting alone does not tend to show consent to sex. However, petting can operate as foreplay to intercourse and in those instances may indicate consent to sex. To distinguish between these two circumstances, the court could require the jury to consider whether the consensual sexual intimacy of the two parties *escalated* consensually from petting to intercourse."

⁶³ For present purposes, the focus on an 'act' is on the actings (*actus reus*) which make up specific sexual offences which are defined by reference to the victim's lack of consent. See further Part 3.

⁶⁴ In the well-known US case of *Tyson v Trigg* (50 F.3d 436, 448 (7th Cir 1995)) the jury were instructed in the following terms: "Possible manifestations of consent *before* [the victim] entered the bedroom would not be enough evidence to require that an instruction on reasonable mistake be given. The law of rape is not a part of the law of contracts. If on Friday you manifest consent to have sex on Saturday, and on Saturday you change your mind but the man forces you to have sex with him anyway, he cannot use your Friday expression to interpose, to a charge of rape, a defense of consent or of reasonable mistake as to consent. You are privileged to change your mind at the last moment."

⁶⁵ *Kaitamaki v R* [1985] AC 147, PC (New Zealand).

2.86 We recommend that:

7. **A person who has consented to a sexual act may at any time before or up until completion of that act indicate that he or she no longer consents, and if the act continues to take place it does so without that person's consent.**

(Draft Bill, section 11(3),(4))

Notice of a 'defence' of consent

2.87 There is a general requirement that an accused person who wishes to use a special defence must give advance notice of his intention to do so.⁶⁶ This requirement has been extended to defences which are not strictly speaking special defences. Included within this category is the defence to a charge of various sexual offences that the complainer consented to the act at the basis of the charge.⁶⁷ The provision on the defence of consent was added by the Sexual Offences (Procedure and Evidence) (Scotland) Act 2002,⁶⁸ but the position in respect of the crime of rape was altered by the *Lord Advocate's Reference (No 1 of 2001)*.⁶⁹ That decision defined the crime of rape as a man having sexual intercourse with a woman without her consent. In other words, the absence of consent was to be treated as part of the actus reus of crime which the Crown would require to prove.

2.88 In Part 3 we recommend that the offences of rape, sexual assault, and sexual coercion (and related offences) should be defined in terms of the absence of the consent of the victim rather than the presence of consent being a defence. In these circumstances the provisions on advance notice are redundant as their effect is to require notice to be given of an element of a crime which the Crown are in any case required to prove. Accordingly we recommend that:

8. **The provisions relating to notice of consent as a defence to a charge of a sexual offence in sections 78 and 149A of the Criminal Procedure (Scotland) Act 1995 should be repealed.**

(Draft Bill, section 44(2); schedule 4)

⁶⁶ Criminal Procedure (Scotland) Act 1995, ss 78; 149A.

⁶⁷ The offences are those listed in section 288C of the 1995 Act. However, that list of sexual offences was originally drawn up in the context of cases where an accused could not conduct his defence in person. The list includes offences to which the consent of the complainer is not a defence (for example, incest and related offences (Criminal Law (Consolidation)(Scotland) Act 1995, ss 1-3); unlawful sexual intercourse with a girl under 13 or 16 (s 5)).

⁶⁸ This Act was passed by the Scottish Parliament on 6 March 2002 and received the Royal Assent on 11 April 2002. The opinions of the court in the *Lord Advocate's Reference (No 1 of 2001)* were given on 22 March 2002.

⁶⁹ 2002 SLT 466.

Part 3 Sexual assaults

Introduction

3.1 In this Part we consider the category of sexual offences which can be referred to, in a general and non-technical way, as sexual assault. In particular we are focussing on crimes in which the lack of consent by the victim is a central element in the definition of the offence.¹ Strictly speaking, in current Scots law there is no recognised category of crime called sexual assault. The two main relevant offences are rape and indecent assault. Historically rape has always been regarded as a separate offence from assault, probably as a consequence of the older view that the wrongfulness of rape was the attack on the victim's honour and value rather as an infringement of her physical and sexual autonomy. Furthermore as a matter of strict law there is no offence known as indecent assault. Rather the crime consists of "assault aggravated by indecency in the manner of its commission."²

3.2 It is also important to be clear about the ways in which these offences are defined. In Scots law the definition of the physical requirement of rape is very narrow. Rape consists of the penetration of a woman's vagina by the penis of the accused without the woman's consent. All other forms of sexual assault, including penile penetration of other parts of the victim's body, or other types of vaginal penetration, are not rape but indecent assaults. By contrast with rape, the scope of indecent assault is very wide and covers all forms of contact by one person on another in circumstances of indecency.³ The gender of the parties is immaterial. However, little guidance has been given on the criteria to be used in determining that an assault is indecent in nature.⁴

3.3 In the Discussion Paper we expressed our dissatisfaction with the current law. We had three main concerns: the first was that the law did not give direct recognition of the special and specific wrongfulness of sexual assaults. Secondly, the division of offences into rape and indecent assault failed to reflect the different types of infringement of a victim's sexual autonomy. Thirdly, there are problems in the way the current offences are defined. In Part 2 we have already considered one of these definitional problems, which is that, although the lack of consent by the victim is a central element in both rape and indecent assault, the law does not define consent and indeed does not allow for consent to be defined or explained to juries. We now consider each of these issues.

Should there be a separate category of sexual assaults?

3.4 There are various arguments for not introducing a separate category of sexual assault. Rape and indecent assaults are essentially acts of violence and should be seen as

¹ In this Part when we refer to consent or the lack of it we have in mind the consent model considered in Part 2.

² *Grainger v HM Advocate* 2005 SCCR 175, 179 (Lord Justice Clerk Gill).

³ "A savage sexual attack, involving the infliction of severe injury in circumstances of indecency is an example of serious indecent assault; at the other end of the spectrum, an uninvited sexual fondling in a bus queue exemplifies a less serious, but definite assault of an indecent nature." (Stair Memorial Encyclopaedia, vol 7, para 305).

⁴ See, for example, *Stewart v Thain* 1981 JC 13, 17: "Each case must be considered in the light of the whole circumstances relevant to it."

part of the law on assault. Classifying these offences as separate from other types of assault might fail to reflect the violence involved in sexual attacks. Secondly, drawing a distinction between sexual and other forms of assault involves the difficult question of defining what is meant by sexual in this context. Furthermore, the current law of assault does allow for attention to be given to the sexual nature of certain types of assault. The law of assault does not draw rigid distinctions between different categories but instead allows for various circumstances which are recognised as aggravating an assault.⁵ On this approach, sexual assaults would not be a separate type of sexual offence but the sexual character of some assaults could be used to indicate an aggravating circumstance.

3.5 We are not convinced of the merits of this approach. Whilst it is true that many types of rape and indecent assault are violent in nature, others are not. Rape and indecent assault can involve situations which, while coercive in nature, are not violent. Indeed, many instances of rape occur between people who are acquainted with each other and involve a minimal degree of violence. We think it right that the law should refuse to reflect the view that non-violent rape is not 'real' rape. Moreover, one of our guiding principles for reform of the law on sexual offences is that the law should promote and protect sexual autonomy.⁶ But this key principle is undermined if sexual assaults are treated as only examples of the more general offence of assault. Furthermore, the specific wrong of sexual assault is the infringement of sexual autonomy; the use of violence is an additional, not a central, part of the wrongdoing.⁷

3.6 There is also the matter of appropriate labelling. It does not seem right for the law to say, for example where a man attacks a woman by penetrating her anus with his penis that she has not been the victim of a sexual assault. Common sense suggests that is exactly what has happened. Yet under the current law there is no such offence of sexual assault.

3.7 In the Discussion Paper we argued that violation of sexual autonomy is a specific form of wrong suffered by the victim, and accordingly we proposed that there should be a general category of sexual offence which has assault at its core. There was unanimous support for this proposal among our consultees. Indeed, one of the consultees made the point that, whatever the theory of the present law, indecent assault was de facto treated for some purposes at least as a separate category of offence from assault in general.⁸

⁵ Gordon, vol II, pp 399-401, who states that the most important ways in which assault may be aggravated are (1) by the weapon used; (2) by the injury caused; (3) by the place of the assault; and (4) by the character of the victim.

⁶ See paras 1.25-1.27.

⁷ A study of the experience of victims in New Zealand threw doubt on the value of the approach of reclassifying sexual assault within the general law of assault. It noted that: "Victims who had been beaten felt that the act of sexual intercourse rather than the assault was the primary injury. ... Any legislation highlighting the violent component of the offence at the expense of the sexual violation involved would therefore seem to be at odds with the perception of many victims." (Warren Young, *Rape Study* (1983), p 109, cited in *Setting the Boundaries* Appendix D1, p 129).

⁸ Indecent assault is mentioned as a type of 'sexual offence' in the Criminal Procedure (Scotland) Act 1995, s 288C (which is headed "Prohibition of personal conduct of defence in cases of certain sexual offences"). Indecent assault also appears in Schedule 3 to the Sexual Offences Act 2003, which contains a list of "Sexual offences for purposes of Part 2". (Part 2 of the 2003 Act deals with notification requirements (the so-called sex offenders register).)

3.8 Accordingly we recommend that:

9. **Sexual assaults should not be subsumed within the general law of assault but should form a separate category of offence.**

(Draft Bill, sections 1-2)

Undifferentiated sexual assaults

3.9 A second option is to have a general offence of sexual assault but no specific types or subcategories within that general offence. Some legal systems which have adopted this approach have marked out differentiation of sexual assaults by the general categories of the law of assault (for example, sexual assault involving grievous bodily harm). However, as noted earlier, the Scots law of assault tends not to use rigid divisions of types of assault. No doubt such categories could be devised for sexual assaults but adopting such an approach is in effect to concede that distinctions should be made between different types of sexual assault. A significant consequence of treating all sexual assaults within one broad category is that there would be no room for terms such as rape to describe particular types of sexual assault. We examine this point below but for present purposes our main objection to having a general category of sexual assault is that it fails to mark out the range of types of wrong which different types of sexual assault can involve. It seems to us that there are major differences between, for example, a sexual assault involving penetration of the victim's body with a penis or with an object and an assault involving the touching of the victim's breasts or buttocks. In the Discussion Paper we set out our view that the law on sexual assaults should reflect these differences in the wrong done to the victim. Almost all of our consultees agreed with this view.⁹ We recommend that:

10. **Sexual assaults should not be classified as one general type of offence but should be divided into specific types of offence.**

(Draft Bill, sections 1-2)

Distinguishing types of sexual assault

3.10 In the Discussion Paper we identified a third option, which was to distinguish different types of sexual assault in terms of more specific wrongs done to the victim. We developed a detailed model showing how this approach would work. The key characteristics of this model, which are inter-related, are set out in the following paragraphs.

3.11 (1) Its first element involves a distinction between penetrative and non-penetrative sexual assaults. The rationale of this distinction is that in the context of sexual assault, penetration is a particularly serious attack on a person's physical (and emotional) integrity and a major infringement of his or her sexual autonomy. The point is not that non-penetrative sexual assaults are necessarily of lesser seriousness; some may be, but not all are, and much depends on the circumstances and nature of the assault. Rather, sexual penetration of another person's body without that person's consent is a distinctive type of

⁹ One consultee who disagreed argued that sexual assault should be a generic offence but that it should contain subcategories.

attack on that person and the law should mark out the different forms of wrong which are involved in each type of sexual attack.

3.12 (2) We also argued that a further distinction should be made between assaults involving penetration with a penis and assaults by penetration with something else (either another part of the body or an object). Our basis for making this proposal was the view that as the penis is a sexual organ, penetration with a penis represents a quite different form of 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.

3.13 (3) A further point concerns the issue whether the law should continue to use the term rape to refer to a certain type of sexual assault. In the Discussion Paper we noted that in some legal systems, the word rape has been removed from the law on sexual crimes.¹⁰ However, we also pointed out that the experience of those systems suggested that little was gained by taking this approach. There was a danger that by not using the term rape, the seriousness of the offence became downgraded. We therefore took the view that Scots law should continue to have a crime known as rape. The stigmatic effects of this word have important functions in labelling a particular form of wrongdoing.¹¹

3.14 (4) The next issue was how each of the separate offences should be defined. We proposed a three-fold set of offences within a general category of sexual assault: rape; sexual penetration; and a residual category of sexual assault. Rape would be defined as penile penetration of another person's vagina, anus or mouth. The offence of sexual penetration would cover the penetration of another person's genitalia or anus (but not the mouth) by anything other than a penis. The last category, the appropriate name of which was not clear to us, would cover all other forms of sexual touching or contact with another person. It is, of course, a fundamental feature of these proposed offences that the victim did not consent to the sexual activity.¹²

3.15 (5) In the Discussion Paper we did not discuss the maximum penalties for any of the proposed offences but we did state that the offences of rape and sexual penetration should attract the same maximum penalty.

3.16 This set of proposals attracted a very wide range of support. Almost all of our consultees agreed that the law should distinguish between penetrative and non-penetrative sexual assault. All consultees accepted that the law should retain the term rape but there was some disagreement with our proposed general definition of that offence as involving penile penetration (but not other forms of penetration).¹³ A similar difference in views arose

¹⁰ Temkin, pp 177-178.

¹¹ "The main argument for retention regardless of the form and substance of the law is that the term 'rape' is synonymous in our culture with a particularly heinous form of behaviour." (Law Reform Commission of Victoria, Discussion Paper on *Rape and Allied Offences: Substantive Aspects* (LRCV No 2 (1986)), p 51.)

¹² We also considered that there should be a further offence which would not necessarily involve a form of assault, namely that of compelling or coercing another person to engage in any sexual activity without that person's consent. For discussion of this recommendation see paras 3.48-3.54.

¹³ One consultee suggested rape should cover only penile penetration of the vagina. Another consultee suggested that it should mean penetration of the vagina or mouth with any object. Some consultees wanted a wider definition of rape than that proposed in the Discussion Paper. One argued that it should cover all forms of penetration with any body part or object. Another consultee, who did not accept the penetration/non-penetration distinction, suggested that rape should include any act which usurps or traduces the sexual freedom of another person. Two consultees argued that our proposal would make the offence gender specific.

in respect of the more particular definition of rape as the penile penetration of another person's vagina, anus or mouth, but some consultees made a further point that rape should not cover penetration of the mouth.

3.17 There was general consensus that there should be a separate offence of sexual assault by penetration,¹⁴ and several consultees maintained that it should attract the same range of penalties as rape. There was also broad agreement that the offence should be defined as non-penile penetration of another person's genitalia or anus.¹⁵

3.18 As regards the residual offence most consultees agreed that there should be such an offence. A substantial majority suggested that it should be known as sexual assault. However, two consultees were of the view that the conduct in question should be left to the common law, and another suggested that the common law should remain in addition to a new statutory offence.

3.19 Taking full account of the views expressed during the consultation process, we maintain the position that the recommendations on rape and other sexual assaults set out in the Discussion Paper constitute the correct approach for reform of the law. There was overwhelming support for all of the recommendations in question. However, the proposals which we now make differ in some respects from those in the Discussion Paper, partly as a result of points made by consultees and partly to reflect our own developed views. We set out the detail of our proposals in the paragraphs to follow but it might be useful to present a general summary.

3.20 We consider that the law should retain the term rape and that the offence should be limited to certain types of penile penetration. We also believe that there should be a more general offence of sexual assault but we are of the view that that offence requires more detailed definition than was recommended in the Discussion Paper. However, we have changed our approach to the distinction between penetrative and non-penetrative offences.

3.21 We continue to hold the view that in a general sense there should be a distinction between penetrative and non-penetrative sexual assaults and also that offences involving penetrative assaults should be divided into those of penile penetration and non-penile penetration. However, we now recommend that while non-penile penetration should be marked out as a specific kind of sexual attack, it should constitute one way of committing the offence of sexual assault rather than being a separate offence. In other words, we are now proposing that there should be a two-fold division between rape and sexual assaults (which would include non-penile penetration). The maximum penalty for sexual assault should be the same as that for rape, namely life imprisonment.

3.22 We now consider in more detail how the offences of rape and sexual assault should be defined.

¹⁴ Only a very small number of consultees who responded to our recommendation opposed it. The main point of opposition was that this form of assault should be included in the definition of rape.

¹⁵ Three consultees suggested that the offence should extend to penetration of the mouth.

Rape

3.23 Under the existing law, rape involves the penetration of the vagina of one person by the penis of another person but does not include any other form of penile penetration. This has the effect that, in popular though inaccurate terms, only a man can commit rape and only a woman can be raped. 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. Again, we can identify no reason why men and women victims of penile assault should be treated in different ways. These factors have been recognised in other legal systems where the definition of rape is much wider than that of Scots law. In 1994 the scope of rape in English law was widened to include penile penetration of a person's anus,¹⁶ and the definition was expanded by the Sexual Offences Act 2003.¹⁷

3.24 On the other hand, we do not think that rape should be defined too widely to include, for example, all forms of sexual penetration; we consider that it should be confined to penile penetration. We take this view for the reason that since the penis is a sexual organ, penile penetration constitutes a special type of wrong which is not present in other types of penetration.

3.25 Accordingly there are two strands to our approach: first, that rape should be expanded to include penile penetration of the victim's mouth or anus; but, secondly, rape should not cover all forms of sexual penetration. In the Discussion Paper we noted that a similar approach had been adopted in other reviews of the scope of rape. For example, the Home Office Review Group argued that the offence should not be extended to include all forms of sexual penetration. It felt that:¹⁸

"the offence of penile penetration was of a particularly personal kind, it carried risks of pregnancy and disease transmission and should properly be treated separately from other penetrative assaults."

3.26 A similar view was expressed in the commentary on the Draft Criminal Code:¹⁹

"Penetration by things other than the penis is not defined as rape in this section. It is felt that while modern understanding of the idea of rape extends beyond ordinary sexual intercourse, there is merit, not least in terms of labelling the offence, to confine it to a relatively limited range of sexually aggressive behaviour."

3.27 In the Discussion Paper we proposed that the offence of rape should not include all types of sexual penetration but that it should be widened from its current definition to include penile penetration of the victim's vagina, anus, or mouth. This proposal found widespread support among our consultees, and we are not persuaded by the view of those who opposed it. Keeping the definition narrow, as in the present law, fails to bring together the separate

¹⁶ Criminal Justice and Public Order Act 1994, s 142 (repealed by the Sexual Offences Act 2003, Sch 7, para 1).

¹⁷ 2003 Act, s 1(1), where the actus reus of rape is defined in the following way: "A person (A) commits an offence if (a) he intentionally penetrates the vagina, anus or mouth of another person (B) with his penis, [and] (b) B does not consent to the penetration." A similar definition was proposed for Scots law in the Draft Criminal Code. See sections 60 and 61, which define rape as sexual intercourse with a person without that person's consent and sexual intercourse means "penetration of the genitalia, anus or mouth by the penis."

¹⁸ Setting the Boundaries, para 2.8.4.

¹⁹ Draft Criminal Code, p 123 (comment on section 61(rape)).

ways of committing what is the same wrong. But at the same time putting all types of sexual penetration or indeed all sexual assaults under the heading of rape fails to bring out what is the specific wrong involved in penile penetration.

3.28 Accordingly we recommend that:

- 11. The actings which constitute the offence of rape should be defined in terms of the penetration by a person with his penis of the vagina, anus or mouth of another person without that person's consent.**

(Draft Bill, section 1)

3.29 There are several aspects of the definition of rape contained in the attached Draft Bill which call for comment.

Actus reus

3.30 There are two key components of the actus reus of the proposed offence of rape: first, penile penetration by the perpetrator (A) of the vagina, anus or mouth of the victim (B);²⁰ secondly the lack of the victim's consent to this penetration. The meaning of consent in this context was discussed earlier in Part 2. Note should be made of certain provisions seeking to clarify some other aspects of the actus reus.

3.31 The first is that the definition refers not to the gender of the parties, but to parts of the body. The consequence is that any person who has a penis can commit rape and any person who has a vagina,²¹ anus or mouth can be a victim of rape.²² In the vast majority of cases there should be no difficulty in establishing that a person, whether as an accused or as a victim, possessed the relevant part of the body at the time of the alleged rape. However, problems could arise in respect of surgically constructed or reconstructed parts of the body. Accordingly, 'penis' and 'vagina' are defined so as to include an artificial penis or vagina created in the course of surgical treatment. Again the focus is not on the gender of the parties. It is rather on the factual question of did the accused or the victim possess the relevant part of the body at the time of the offence. For example, there would be no need to show in respect of an accused with an artificial penis that he had obtained a gender recognition certificate.²³

3.32 The Bill also deals with a possible ambiguity in the term 'penetration'. Penetration could mean solely the initial act of penetrating or it could also include the state of being penetrated. The difficulty is where penetration was initially consented to but consent was withdrawn while the state of being penetrated continued. It could be argued that on the first, narrow sense of penetration there had been no penetration without consent. The Bill makes clear that the definition of rape uses the second and wider idea of penetration; penetration is

²⁰ In discussing these provisions of the Draft Bill we adopt the usage in the Bill of referring to the perpetrator as A and the victim as B.

²¹ The Draft Bill makes clear that the term vagina includes the vulva (s 1(4)). A similar provision is to be found in English law (Sexual Offences Act 2003, s 79(9)).

²² A further consequence is that it is impossible for a woman to rape a man, if the term woman is defined as to include a person who does not have a penis. We discuss this scenario in the context of the proposed offence of sexual coercion. See para 3.50.

²³ Gender Recognition Act 2004, s 4. Section 20 of the Act deals with the effect of a gender recognition certificate in relation to offences which are gender-specific.

a continuing act from entry until withdrawal of the penis. The effect is that where B withdraws consent during penetration and A does not respond by removing his penis, A's conduct then falls within the scope of the offence.

Penalties and jurisdiction

3.33 To reflect the seriousness of the wrong involved in any act of rape we recommend below that the maximum penalty for a conviction for the crime should be life imprisonment.²⁴ At common law rape is a plea of the Crown. In other words it is within the exclusive jurisdiction of the High Court of Justiciary. We later recommend that a similar rule should apply to the statutory offence of rape.²⁵

Common law and statutory provisions on rape

3.34 Two main parts of our recommendations for reforming the law of rape are, first, to widen the range of sexual attacks which the crime involves and, secondly, to introduce a definition of consent. Given the radical nature of these recommendations we see little justification for retaining the narrower common law crime of rape. Subject to issues of transitional cases,²⁶ we recommend that the common law crime should be abolished. A further common law crime is clandestine injury to women, which is defined as having sexual intercourse with a woman while she is asleep or unconscious.²⁷ Since the decision in *Lord Advocate's Reference (No 1 of 2001)*,²⁸ which defined rape as sexual intercourse without a woman's consent, this crime is probably redundant.²⁹ In our view having non-consenting penetrative intercourse with someone who is asleep or unconscious is a form of rape or another penetrative sexual assault, and there is no point in retaining the common law crime of clandestine injury. For similar reasons we recommend the repeal of section 7(3) of the Criminal Law (Consolidation) (Scotland) Act 1995 which provides that it is the crime of rape where a man induces a married woman to permit him to have sexual intercourse with her by impersonating her husband.

3.35 We recommend that:

- 12. (a) the common law offences of rape and clandestine injury to women should be abolished.**

(Draft Bill, section 40(a))

- (b) section 7(3) of the Criminal Law (Consolidation) (Scotland) Act 1995 should be repealed.**

(Draft Bill, section 44(2); schedule 4)

²⁴ See para 7.12.

²⁵ See paras 7.14-7.16.

²⁶ See paras 7.2-7.6.

²⁷ The leading authority is *Charles Sweeney* (1858) 3 Irvine 109. Under the law at that time the conduct could not be classified rape as it did not involve the use of force against the victim.

²⁸ 2002 SLT 466.

²⁹ *HM Advocate v Shearer* 2003 SLT 1354. However, in *Spendiff v HM Advocate* 2005 SCCR 522 (at 525F) the Court noted that clandestine injury was still a competent charge.

Sexual penetration and sexual assault

3.36 In the Discussion Paper we proposed that in addition to rape there should be two further offences: non-penile penetration and sexual assault. These proposals received overwhelming support from our consultees. We continue to hold the view that the law should mark out non-penile penetration as a specific form of sexual wrong but we now consider that this type of activity should not be a separate offence but should instead be one of several forms of conduct which constitute sexual assault. There are a number of reasons for us adopting this change in our approach to the classification of sexual assaults. One is a matter which was raised by several consultees. This related to the scope of the proposed offence of sexual penetration, which we had limited to (non-penile) penetration of the victim's vagina and anus. Why, it was asked, should the offence not apply to penetration of the mouth? Part of the problem with this extension of the offence is that, although in some instances oral penetration could be as serious as any other forms of sexual penetration (including rape), the offence as so defined would also cover activities such as a 'stolen' kiss. In the Discussion Paper we emphasised that we were not proposing a hierarchy of offences in terms of their relative seriousness but if that were so then we could not propose a different maximum penalty for the residual category of sexual assault than that for the two penetrative offences. Furthermore, we were concerned that in the Discussion Paper we had given little by way of detail about the content of the proposed residual offence of sexual assault, referring simply to sexual 'touching' and sexual 'contact'.

3.37 We now take the view that sexual assault should be defined in terms of specific types of sexual activity, which should include non-penile penetrative assaults. This approach has the advantage that penetrative attacks short of rape are still identified by the law as a specific form of sexual wrongs but there is now no need to draw a sharp distinction between penetrative attacks which constitute the offence of sexual penetration and penetrative attacks which are to be regarded as sexual assaults. Crucially we now recommend that the maximum penalty for any type of sexual assault should be the same as that for rape, namely life imprisonment.³⁰

3.38 In the Discussion Paper we asked what the name of the offence, as a type of sexual attack other than rape and penetrative assault, should be. Most consultees agreed with the general term 'sexual assault'. We accept that this is the most appropriate name for the offence, especially in light of our recommendation that it should now include non-penile penetration.

3.39 The next issue for consideration is the scope of the offence. It will include sexual penetration not amounting to rape.³¹ In the Discussion Paper we proposed that sexual assault should extend to situations where A touches or has contact with B without B's consent. The touching or the contact has to be sexual in nature. These proposals were accepted by our consultees. We now recommend that there should be one further type of activity which should amount to sexual assault. This is where A ejaculates semen onto B without B's consent. At common law this activity would clearly constitute indecent assault. However, the law of assault uses as one of its defining elements the idea of attack, which is

³⁰ See paras 7.12.

³¹ However, we do recommend that although rape and sexual assault are to be separate offences there should be a degree of overlap in their respective definitions. See para 3.45 below.

given a wide meaning and goes beyond touching or contact.³² To ensure that ejaculating semen onto someone else falls within the scope of sexual assault we now make a specific recommendation to that effect.

3.40 We recommend that:

13. There should be an offence to be known as sexual assault.

14. Sexual assault is constituted by the following conduct:

- (a) A sexually penetrates the vagina, anus or mouth of B without B's consent;**
- (b) A sexually touches B without B's consent;**
- (c) A has sexual contact with B without B's consent;**
- (d) A ejaculates semen onto B without B's consent.**

(Draft Bill, section 2(1), (2))

3.41 There are certain aspects of the offence which deserve some comment.

Defining 'sexual'

3.42 An important element of the offence of sexual assault is that the penetration, touching, or contact is sexual in nature.³³ The question then is locating the perspective from which to judge an activity as sexual. In the Discussion Paper we set out several options. 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.

3.43 We took the view that adopting purely subjective approaches could lead to odd results (for example an accused could not be convicted of a sexual assault where he genuinely believed that touching a woman's vagina or breasts was not sexual in nature). We also considered that attempting to combine objective and subjective elements made the resulting tests too complex to apply. We proposed the use of an objective test. This proposal was accepted by our consultees and we continue in our view that this is the appropriate test. It should be borne in mind that any assault involving a purely subjective sexual element (from the perspective of either the perpetrator or the victim) could still be charged as an assault. Moreover, on conviction of an offender in these circumstances, the court would still have the power to order the use of the sex offender notification procedure.³⁴

³² Thus it is an assault to point a weapon at someone.

³³ This issue does not apply in respect of sexual assault by way of ejaculating semen, as this is obviously sexual in nature.

³⁴ This is the so-called sex offenders register. Schedule 3 to the Sexual Offences Act 2003 lists the offences which can trigger the notification procedure. The list includes a residual category: "An offence in Scotland other than is mentioned in paragraphs 36 to 59C if the court, in imposing sentence or otherwise disposing of the case,

3.44 We recommend that:

- 15. For purposes of the law on sexual assault a penetration, touching or contact is sexual if a reasonable person would consider it to be sexual.**

(Draft Bill, section 2(3))

Meaning of penetration

3.45 In relation to sexual assault by penetration, penetration is defined as a continuing act. The purpose of this provision has been earlier explained in connection with the parallel provisions for rape.³⁵ A further aspect of sexual offence by penetration is that penetration is defined as including penile penetration. There is therefore an element of overlap between the offences of rape and sexual assault by penetration. However, we do not envisage, where the Crown has evidence that the complainant 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 complainant 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 complainant with his penis.

Common law crime of indecent assault

3.46 We do not recommend that the common law on indecent assault should be abolished in its entirety. Instead we favour retaining the common law except in relation to those activities which constitute the proposed statutory offence of sexual assault (or indeed any other offence in the Draft Bill). We have included in that offence four types of conduct which clearly involve attacks on the victim in disregard of his or her sexual autonomy. But there may be other ways in which a person can be subject to a sexual attack. One possible example is where A urinates on B. This conduct is clearly an assault (unless B consents). It may also be an indecent assault but that characterisation would depend on the facts and the circumstances of each case. We wish to retain the possibility that someone who engages in an attack, but not of a type within the definition of sexual assault, should still be liable to be convicted of assault, and where the circumstances merit it, of indecent assault.

3.47 We recommend that:

- 16. The common law on assault under circumstances of indecency should remain in effect except in relation to any conduct which constitutes the statutory offence of sexual assault or another offence in the Draft Bill.**

(Draft Bill, section 40(b))

determines for the purpose of this paragraph that there was a significant sexual aspect to the offender's behaviour in committing the offence." (Para 60.)

³⁵ See para 3.32.

Coercing sexual conduct

3.48 In the Discussion Paper we explored a situation, which though not necessarily involving sexual assault as such, dealt with conduct which is broadly similar. In cases of sexual assault the victim has some form of contact with the offender without the consent of the victim. 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 with herself. In our view in all of these situations the victim does not choose to engage in the sexual activity in question and therefore suffers a major infringement of her sexual autonomy.

3.49 We pointed out that it was not clear how the current law deals with coerced sexual conduct, but we noted that English law contained an offence which specifically covers this situation.³⁶ We proposed that there should be a similar offence in Scots law. This proposal attracted overwhelming support from consultees, though one consultee was concerned that there might be a large degree of overlap with other offences.³⁷ We accept that however the offence was defined there would be overlap with sexual assault in cases where the compelled conduct involved contact between the offender and the victim but in our view conduct which amounted to rape and sexual assault would be prosecuted as such. The merit of the proposed offence of coercion is that it would capture many other types of sexual conduct to which the victim did not consent.

3.50 One such type of conduct is so-called 'female rape', that is where a woman compels a man to have penetrative intercourse with her without his consent. Our proposed definition of rape restricts the commission of offence to a person who has a penis. Where a woman compels a man to penetrate her, although there is intercourse obtained without consent, it is not the victim's body which has been penetrated. This is undoubtedly a violation of the victim's physical integrity and sexual autonomy, but it is questionable whether it can properly be described as 'rape'. The wrong in this situation is that a person has been compelled into taking active steps to engage in sexual activity without his consent. This is a different type of violation from the victim's own body being penetrated and should not be classified as rape but as coerced sexual conduct.

3.51 We recommend that:

17. It should be an offence for a person to cause another person, without that person's consent, to participate in any sexual activity.

(Draft Bill, section 3)

3.52 The rules on consent (including mens rea as to consent) apply to this offence. In determining whether an activity is sexual in nature the same approach is used as that discussed earlier in respect of sexual assaults (namely that sexual is what a reasonable person would consider to be sexual).

³⁶ Section 4 of the 2003 Act creates the offence of 'causing a person to engage in sexual activity without consent'.

³⁷ No consultee opposed making this activity criminal though one consultee favoured including it within a widely defined offence of rape.

3.53 There are two further aspects of the offence which should be noted. The first is that it is defined in terms of A causing B to participate in a sexual activity. The term cause is not defined but we would expect that it would be understood in the sense of proximate cause. For example, it would not be coerced sexual activity where B entered into prostitution as a result of the failure of A (her husband) to aliment her.

3.54 The second matter concerns the possible criminal liability of the person who is being coerced. For example where A forces B to have sexual intercourse with an equally unwilling C, A has clearly committed the offence of sexual coercion against B (and also against C). But in this situation B has committed the actus reus, and also has the mens rea, of rape against C. B's only defence would be that of coercion but that defence is at present strictly defined and may not apply in all instances of forced sexual conduct.³⁸ However, we do not consider that in this scenario B would be subject to criminal prosecution. In addition we will be examining the defence of coercion in a forthcoming project on criminal defences and we consider that reform of the defence should be considered as part of that project rather than being dealt with in the context of the law relating to sexual offences.³⁹

Other forms of coercive sexual conduct

3.55 One further point emerged from our consideration of what amounts to 'participating' in sexual activity for purposes of this offence. In particular we were concerned with the possibility that this term would not cover cases where one person caused another to watch sexual activity without his or her consent. We did not raise this issue in the Discussion Paper nor was it mentioned by any of our consultees. However, we are of the view that just as being forced to participate in sexual activity is an invasion of a person's sexual autonomy so is being forced to watch such activity.

3.56 We were also influenced by our thinking on offences against children. Under the common law there are various forms of conduct against children under the age of puberty which fall within the crime of lewd, indecent or libidinous behaviour. In addition to making criminal the forcing of a child to watch sexual activity this offence also penalises engaging in indecent communications with a child.⁴⁰ In Part 4 we consider how to transform this common law crime into statutory offences against children. We now take the view that there should be corresponding offences covering these forms of behaviour against people of any age where the victim has not consented to the conduct in question.

3.57 However, there is an important distinction between the three offences we have already recommended (rape, sexual assault, and sexual coercion) and the coercive offences we are currently discussing. With rape, sexual assault, and sexual coercion the victim is actively involved in sexual activity without his or her consent. In contrast, where someone is compelled to watch sexual activity or receiving indecent communications without consent the victim's role is passive. In these circumstances it is not clear that a sexual wrong is always involved in the activity in question. For example, where a married couple have sexual

³⁸ The defence requires that the threat is of death or great bodily harm but lesser threats, or indeed no threats at all, may result in a lack of free agreement in terms of the consent model discussed in Part 2. For discussion of the defence of coercion see James Chalmers and Fiona Leverick, *Criminal Defences and Pleas in Bar of Trial* (2006), ch 5.

³⁹ This project forms part of our Seventh Programme of Law Reform. See Scot Law Com No 198 (2005), paras 2.46-2.50.

⁴⁰ *Webster v Dominick* 2005 1 JC 65 at 79 (para 49) (Lord Justice Clerk Gill).

intercourse in a room which they share with their very young child, it hardly seems right to say that the child has been coerced into watching sexual activity, at least for the purposes of the criminal law. Similarly, where a parent or a teacher shows a child sexually explicit material in a biology lesson or as part of a sex education course, it is not obvious that criminal liability must ensue. In other words, there has to be some limit to the scope of these offences.

3.58 For the common law crime of lewd, indecent or libidinous conduct this limit is achieved by the requirement that the tendency of the conduct must be to corrupt the innocence of the child victim.⁴¹ However, this requirement is not appropriate where the victim is an adult. We note that in English law offences on the lines we are proposing state that the accused's purpose was to obtain sexual gratification from his conduct.⁴² While we believe that such a provision is useful it does not by itself catch all forms of wrongful conduct. For example, a man could force a woman to watch a sexual act, not for the purpose of his obtaining sexual gratification but rather in order to distress or humiliate the woman. Accordingly, we recommend that for the coercive offences involving the victim watching sexual activity or receiving indecent communications there should be a requirement that the accused acted for the purpose of obtaining sexual gratification or of humiliating, distressing or alarming the victim.

3.59 We consider first the offence involving someone being compelled to watch sexual activity. A distinction can be made between two situations: one is where A forces B to watch 'live' sexual activity involving any person or persons other than B. The other is where B is forced to watch sexual images, rather than direct sexual activity. In this case the images can be of anyone, including B himself or herself. However, the images may be of sexual activity which is taking place at the same time as B is watching it (eg through a webcam).

3.60 We do not consider that in the case of the first type the Crown should have to prove that B actually looked at the activities. It should be enough for the Crown to show that B was present and could have seen the act. In connection with the second of these offences, the coerced viewing of sexual images, we are aware of a possible problem that images of sexual activity may not depict any actual person but rather computer-created images of people. To avoid any such loophole we recommend that image of a person is defined to include image of an imaginary person.⁴³

3.61 We recommend that:

- 18. It should be an offence for a person, acting for the purpose of obtaining sexual gratification or of humiliating, distressing or alarming another person, to cause that person, without his or her consent, to be present during a sexual activity.**

(Draft Bill, section 4)

⁴¹ Ibid.

⁴² Sexual Offences Act 2003, s 11 (engaging in sexual activity in the presence of a child); s 12 (causing a child to watch a sexual act). It is to be noted that in English law there is no equivalent provisions in respect of (non-consenting) adult victims.

⁴³ This approach is adopted in English law (Sexual Offences Act 2003, s 79(5)).

- 19. It should be an offence for a person, acting for the purpose of obtaining sexual gratification or of humiliating, distressing or alarming another person, to cause that person, without his or her consent, to look at an image of a sexual activity.**

(Draft Bill, section 5)

3.62 We now consider conduct in the form of making indecent communications with someone without his or her consent. As with the coerced watching of sexual activity, the consequence is that the victim is involved in an invasion of his or her sexual autonomy. We therefore recommend that it should be an offence to make a communication which is sexual in nature to a person without that person's consent. The test for determining whether or not a communication is of a sexual nature is that of what a reasonable person would regard as sexual. The communication may be written or oral (and includes the use of sign language) and can be made by any means (for example by telephone, text messages). It should also be an offence where a sexual communication is made with a third party but the accused intentionally causes the communication to be seen or heard by the victim (for example, where A has an indecent conversation by telephone with C but knows that B can hear what he is saying). As with the offences of coercing a person to be present during sexual activity or of looking at an image of sexual activity, this offence would require that the accused acted for the purpose of obtaining sexual gratification or of humiliating, distressing or alarming the victim.

3.63 Accordingly we recommend that:

- 20. It should be an offence for a person, acting for the purpose of obtaining sexual gratification or of humiliating, distressing or alarming another person:**

- (a) to make a sexual communication with that person, without his or her consent, or**
- (b) to cause that person, without his or her consent, to see or hear a sexual communication made to someone else.**

(Draft Bill, section 6)

Administering stupefying substance for sexual purpose

3.64 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 then 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. There would be value in having such an additional offence in that it marks out the conduct as intrinsically wrong. It also has the

effect of imposing criminal liability where there is no resulting sexual contact.⁴⁴ An offence of this nature exists in the present law,⁴⁵ and also in English law.⁴⁶

3.65 The key element of the offence is that the victim is given the substance without her knowledge. This requirement would be satisfied where, for example, B asks A for a glass of orange juice to which A adds alcohol or another drug. It is less clear whether B lacks knowledge of the presence of a substance where she is given something in a greater strength or greater quantity than she expects (for example, where B asks for orange juice and vodka but is given an orange juice with a triple measure of vodka). We consider that the law should make clear that in such situations the victim lacks knowledge of what she is consuming. We also consider that the mens rea for this offence should be that the accused lacked reasonable belief that the victim knew about the administration or taking of the substance. The test for what constitutes reasonable belief should be the same as that for reasonable belief as to consent in the offences based on lack of the victim's consent.⁴⁷

3.66 We recommend that:

- 21. It should be an offence for a person to administer a substance to, or cause a substance to be taken by, another person without that person's knowledge where the purpose is to stupefy or overpower that person so as to enable having sexual activity with him or her.**

(Draft Bill, section 8)

Mens rea

3.67 There are two aspects of mens rea to be considered in respect of the offences of rape, sexual assault, and coercion (and related offences). These parallel the two constituent parts of the actus reus of those offences. The first is the act or conduct which defines the specific offence, such as penile penetration, touching, causing, etc. The second is that this conduct occurs without the consent of the victim. The accused must have the requisite mens rea for each of these parts of the offence in question.

Mens rea as to the act

3.68 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 B to participate in sexual activity. Neither intention nor recklessness is defined in the Act but will carry their normal meaning in the criminal law.⁴⁸

⁴⁴ A charge of attempted rape or attempted sexual assault might not be possible if A had not taken steps to carry out the sexual attack.

⁴⁵ Criminal Law (Consolidation) (Scotland) Act 1995, s 7(2)(c) which 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."

⁴⁶ Sexual Offences Act 2003, s 61.

⁴⁷ See paras 3.69-3.78.

⁴⁸ See SME Reissue, *Criminal Law* (2005), para 77 ('Intentionally'): "Intention is perhaps the best known and most widely distributed of the mental elements found in Scottish practice. It is the antithesis of 'accident' or 'carelessness' and is probably (but sometimes none too clearly) differentiated from 'recklessness'. It suggests 'design' or purpose and is found in the definition of many crimes." Scottish courts have tended to give a wide

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.⁴⁹

Mens rea as to consent

3.69 For some of the offences which we are proposing there is a second matter for which mens rea is required, namely that the victim did not consent to the act in question. Clearly there is mens rea 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. A more difficult issue is where the accused did not actually know of the lack of consent by the victim but was reckless as to this state of affairs. In the Discussion Paper we set out three possible approaches to this issue.

3.70 The first option was the subjective test. On this approach, which probably represents the present law,⁵⁰ an accused lacks mens rea where he genuinely believed that the victim was consenting, even if his reasons for this belief were not reasonable.

3.71 The main argument of principle in support of the subjective test for belief in consent is that any person who genuinely makes a mistake about some central feature of a crime cannot be said to have a guilty mind for that crime. A person in this situation stands in contrast with someone who, knowing that the victim is not consenting, proceeds with a sexual attack, or does so not caring about the consent of the victim. A related consideration is the fairness of judging a person's actions by some external criteria. There may well be understandable reasons, for example based on the accused's cultural background or learning difficulties, why that particular person made a mistake about interpreting the behaviour of another person, especially in the context of sexual interaction where there are complexities in 'reading the signs'. Judging such a person by objective criteria and attaching guilt to him might be to punish someone for his cultural difference or for his stupidity or lack of education.

3.72 Many arguments have been advanced against the honest though unreasonable test. Fundamentally it has the effect that there is no rape even where a woman has indicated that she did not consent to sexual intercourse. As such, the test undermines respect for sexual autonomy. Moreover, allowing unreasonable belief about consent as a defence bolsters the legitimacy of myths and stereotypes about women and sexual choice. Further, the test sits uneasily with the general law of error in the criminal law, by which an error by the accused as to some essential element of a crime must be reasonable to elide mens rea.

3.73 The second option is an objective test. On this approach an accused has mens rea where he was reckless as to whether the victim consented, and recklessness is understood (as it usually is in Scots law) in an objective sense. Many of the strengths of the objective

range of description of recklessness rather than a single definition (ibid, para 81). In Scots law mental elements forming mens rea are understood in an objective rather than a subjective sense.

⁴⁹ A more complicated example is sexual exposure. Here A must expose his genitals intentionally. The effect must be causing alarm and distress but A can either intend or be reckless as to this effect.

⁵⁰ *Jamieson v HM Advocate* 1994 JC 88. In the Discussion Paper we noted that although most commentators treat the rule as firmly established by this decision its exact status is far from clear. The only trace of this rule in Scots law is to be found in obiter remarks in *Meek v HM Advocate* 1983 SLT 280 at 281. The more direct statements by the Court in *Jamieson* proceeded on the basis of a concession by the Crown that the comments in *Meek* were sound.

approach correspond to the weaknesses of the subjective approach (and vice versa). The objective approach would impute mens rea where the reasons for an accused's honest belief as to consent are objectionable or bizarre (for example, where an accused considers himself so sexually attractive that no woman could ever resist his charms). However, there are problems in using the objective standard of the reasonable person in the criminal law. Generally speaking the criminal law tries to avoid convicting a person for purely negligent behaviour (that is, acting or failing to act as a reasonable person would). For that reason, the criminal law at times imputes to the reasonable person certain of the accused's own general characteristics (for example, his age, level of educational development, and so on). A problem about using the reasonable person standard in the abstract is that it is unclear what, if any, attributes the reasonable person is deemed to possess.

3.74 In the Discussion Paper we set out a third option which we referred to as a mixed test, that is it combined aspects of the other two tests. We did not describe this option in much detail but we gave the example of the test used in English law. Section 1 of the Sexual Offences Act 2003 provides for the mental element of the offence first by requiring that the accused has intentionally penetrated the victim and that he did not reasonably believe that the victim was consenting. It further provides that whether "a belief is reasonable is to be determined having regard to all the circumstances, including any steps [the accused] has taken to ascertain whether [the victim] consents." ⁵¹

3.75 There was some support for the subjective test among consultees but little was said by way of substantive reasons in favour of it.⁵² Most consultees opposed this test. The subjective test gives rise to many anomalies and possible injustices from the perspective of social and legal policy. It is also out of step with the general approach of Scots law towards mens rea. We do not favour the subjective test as providing the proper basis of mens rea as to belief in consent.

3.76 Both the objective test and the mixed test attracted support from consultees. Having considered the issues in the light of points raised during consultation we are not inclined to recommend the application of the objective test. We consider that a test which assesses the accused's belief solely in terms of what a reasonable person would have believed or whether there were reasonable grounds for a belief moves attention too far from the actual accused. Rather, there should be a test which while avoiding a totally subjective approach still directs its focus on the accused. In other words we favour a mixed test.

3.77 The question then is what should such a mixed test state. Many of our consultees favoured the example we gave in the Discussion Paper which was based on English law. However, we have become aware of criticism of the way in which that test is drafted.⁵³ In particular the phrase "having regard to all circumstances" as used in the 2003 Act may allow for the inclusion of all the attributes of the accused to be used in assessing the reasonableness of the belief. In other words, the test becomes: given the accused's attributes, including his belief systems, was his belief as to consent reasonable? But this approach does not significantly differ from the subjective test of 'honest' belief. We therefore

⁵¹ Similar definitions are given for assault by penetration (s 2) and sexual assault (s 3).

⁵² The option which found most favour among consultees was the mixed test, followed by the objective test, followed by the subjective test. One consultee favoured either the objective or the mixed test and another found none of the options satisfactory.

⁵³ See for example Andrew Ashworth, *Principles of Criminal Law* (5th edn, 2006), p 352; AP Simester and GR Sullivan, *Criminal Law. Theory and Doctrine* (2nd edn, revised 2004), pp 414-415.

favour omitting from the proposed definition of mens rea any reference to 'all the circumstances'. Instead the provision should state that in assessing reasonableness of a belief as to consent regard is to be had of the steps, if any, taken by the accused in finding out whether the other party consented. This test is objective in nature in insisting that a belief must be reasonable but it is also mixed in the sense that it directs attention to the steps which the actual accused (and not a hypothetical reasonable person) took, or failed to take, to ascertain whether there was consent. We consider that a virtue of this test, by making reference to the accused 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.

3.78 We recommend that:

- 22. For any offence which requires that the accused lacked reasonable belief that another person consented, in assessing what was reasonable regard is to be had to the steps, if any, which the accused took to ascertain whether there was consent.**

(Draft Bill, section 12)

Medical exemption

3.79 In the Discussion Paper we noted that many forms of medical intervention involve the (non-penile) penetration and touching of a person's genitalia or other parts of the body. We were concerned that acts carried out for sound medical reasons could attract criminal liability and we proposed that the offence of sexual assault should not apply to any act done reasonably and in good faith for medical reasons. Most consultees agreed with this proposal. Some, however, questioned whether it was necessary and we now consider that that view is correct. A medical intervention done for proper medical reasons would not be regarded as forming a sexual act,⁵⁴ and so no criminal liability would attach to it as a matter of the definition of the relevant offences. Accordingly we make no recommendations for the inclusion of any provision in the Draft Bill for the exemption from criminal liability of medical acts.

⁵⁴ We propose that the test for whether an element of an assault is sexual in nature is whether a reasonable person would consider it to be sexual. See paras 3.42-3.44.

Part 4 Offences based on a protective principle

Introduction

4.1 The current law contains various types of sexual offence which are aimed at protecting persons whose involvement in sexual activity is problematic. These persons include children, persons with mental disorder, and persons over whom others hold a position of trust. Examples of such offences include the following:

- (1) It is an offence for a person to have sexual intercourse with a girl under the age of 13 years.¹
- (2) It is an offence for a person (including someone under the age of 16) to have sexual intercourse with a girl of or over the age of 13 and under the age of 16.²
- (3) It is an offence for a person who is in a position of care over another person who suffers from a mental disorder to engage in a sexual act with that other person.³
- (4) 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.⁴

4.2 The preliminary question which has to be considered is whether offences based on a protective principle continue to be a necessary part of the law on sexual offences. In particular, the question arises what this principle adds to the principle that sexual activity which does not involve the consent of all the parties to it should be criminalised. It should be borne in mind that when many of the existing offences were enacted, the criminal law used a loosely defined model of consent, which could give rise to a lack of certainty as to when someone could be said to consent to sexual activity. However if, as recommended in Part 2, a more detailed model of consent is used in defining sexual offences, then there may be no need for any special provision in respect of persons such as children or those with a mental disorder. Either such persons can and do consent to sexual activity, in which case the sexual activity is legally permissible; or they cannot or do not give consent, in which case the activity involves a breach of their sexual autonomy and hence should be criminal. Moreover, in this project we have adopted a further guiding principle for reform of sexual offences, namely that where sexual activity is genuinely consensual, then it should not be criminalised

¹ Criminal Law (Consolidation) (Scotland) Act 1995, s 5(1).

² Criminal Law (Consolidation) (Scotland) Act 1995, s 5(3).

³ Mental Health (Care and Treatment) (Scotland) Act 2003, s 313.

⁴ Sexual Offences (Amendment) Act 2000, s 3.

in the absence of clear and convincing reasons.⁵ The criminal law has a role not simply in protecting sexual autonomy but in promoting it.

4.3 A further, but secondary, point is that if separate protective offences are retained along with a refined consent model, it might suggest that the consent model cannot apply in the case of persons who are vulnerable to exploitation because of their age or mental condition. A possible undesirable consequence is that the courts might then give a narrow interpretation to the general provisions on consent, even in cases which do not involve vulnerable persons.

4.4 However, there are also arguments in favour of retaining offences based on a protective principle, even if a richer model of consent were to be introduced. In the first place, some provisions involving children and other vulnerable people are fully consistent with the principle that sexual activity not involving the consent of the participants should be criminal. For example, a rule which states that a child under the age of 10 is not capable of giving consent to sexual intercourse can be interpreted as embodying a general rule that as a matter of fact most children of that age lack the intellectual capacity to give such consent. The rule is then a useful mechanism for by-passing problems of proof of lack of consent in individual cases.

4.5 Nonetheless, it has to be accepted that not all rules which fall within a protective principle can be justified in this way. Although it is probably true (for example) that no child under the age of 10 could give meaningful consent to sexual intercourse, the same does not necessarily hold for children aged 14 or 15. Likewise with persons who have a mental disorder. Certain forms of mental disorder clearly preclude the giving of consent to sexual activity but not all do.

4.6 A further justification for protective offences is not simply to do with the question of consent or no consent. Rather, these provisions serve an important symbolic function of giving direct expression to the principle that vulnerable persons are protected, and are seen to be protected, by the criminal law. Sexual activity with young children or with persons with a serious mental disorder is wrong and the law should say so explicitly rather than subsuming such cases in a more general principle of consent. Protective offences are not inconsistent with the general consent model. They try to spell out in detail what is implicit in that model in respect of vulnerable persons.

4.7 There are two quite different types of wrong involved in these cases. The first involves the judgment that certain forms of sexual activity are in breach of social and moral norms. The activity in question is intrinsically wrongful. Examples are sexual activity with young children and with persons with serious mental disorder. These cases would always fall within a consent model of the kind suggested earlier but that model does not sufficiently bring out what is at the core of the wrongdoing. Consent is a key element of the law on sexual offences because it protects the sexual autonomy of a person who has capacity to give consent but who on any particular occasion chooses not to engage in the activity. There is an *additional* wrong where the person involved lacks any capacity either to give or to withhold consent. Where a person is entirely lacking this capacity, sexual activity is *never* permissible, and the law should therefore mark out these cases as a distinct form of wrong

⁵ Para 1.27.

from those where sexual activity is with a person whose capacity to consent to sex exists but is disregarded.

4.8 Another category of wrong concerns people whose capacity to consent is not fully lacking but is in some way underdeveloped. This is true of (some) children in their teens or persons with a less serious form of mental disorder, such as certain learning disorders. In these types of case, the law does not mark out conduct which is intrinsically wrong but rather aims to protect persons who, although they may be able to consent to sexual activity, are vulnerable to exploitation by others. In this situation, a person can give consent but the consent is held to be of dubious validity because of the person's immaturity or lack of full mental health. But here too the law serves an important symbolic role. By imposing criminal liability for sexual activity involving (older) children or persons who are otherwise open to exploitation, the law sends a clear warning to persons that they should not be involved with this type of activity.

4.9 On this view, the protective principle has two quite separate rationales, and it is important that the law makes each of these explicit. The rationales are (1) that sex with young children and with persons with serious mental disorders is wrong and (2) that persons who are vulnerable to sexual exploitation should be protected. It is important that the difference between these two principles should be borne in mind when making proposals for formulating offences to give effect to them. Whereas the first deals with cases where there is no consent at all, the second principle is concerned with situations where consent is given but the validity of that consent is made doubtful by the circumstances of vulnerability. This important distinction exists in the present law. For example, sexual intercourse with a girl under the age of 13 is treated as a very serious offence, for which no defence as to mistake of age is permitted.⁶ By contrast, sexual intercourse with a 15 year-old girl who 'consents' is regarded as a quite different form of wrong and one for which defences such as mistake of age are allowed.⁷

4.10 In the Discussion Paper we stated that we were inclined to accept the arguments in support of the retention of offences based on the protective principle, which we regarded as complementary to the consent model we have recommended. In order to gauge wider reaction, we asked whether in addition to the consent model, there should continue to be special provisions relating to sexual activity involving children, persons with mental disorder, and persons otherwise open to sexual exploitation. There was unanimity in the response from consultees that the law should retain these protective provisions. Accordingly we now set out our proposals for reform of the law relating to three categories of people who in our view fall within the scope of the protective principle. These are:

- (a) children and young persons;
- (b) persons with a mental disorder; and
- (c) persons who are owed duties of trust.

⁶ Criminal Law (Consolidation) (Scotland) Act, 1995, s 5(1).

⁷ 1995 Act, s 5(3), (5).

A. Children and young persons

4.11 The existing law contains a variety of provisions on sexual offences involving children.

Common law

4.12 The common law offences of rape and indecent assault apply just as much to non-consenting victims under the age of 16 as to adults. Furthermore, there is a special rule in relation to rape involving a victim under the age of 12. In this situation any question of the girl's consent is ignored, and any sexual intercourse with a girl under 12 is rape at common law. It should be noted that there is no similar rule where sodomy has been committed against a boy.⁸

4.13 In addition, there is a special common law offence, known as lewd, indecent or libidinous conduct, which applies only in respect of sexual conduct with a child under the age of puberty (that is, 12 in the case of a girl, 14 in the case of a boy). The type of conduct covered by this offence is wide-ranging,⁹ but it is not clear whether it applies to conduct with consenting children who are close to the age of puberty.¹⁰ Some confusion was caused by the former practice of charging certain types of lewd conduct as 'shameless indecency'. However, the High Court of Justiciary has held that there is no such offence in Scots law and that these forms of conduct, if criminal at all, should be regarded as forms of lewd, indecent or libidinous behaviour.¹¹

Statutory offences

4.14 The main statutory offences involving sexual activity with children are as follows:

- (1) It is an offence for a man to have sexual intercourse with a girl under the age of 13.¹² There is no defence of mistake of the girl's age.
- (2) It is an offence for a man to have sexual intercourse with a girl of or over the age of 13 and under the age of 16.¹³ There are two defences: first, that the man had reasonable cause to believe that the girl was his wife; secondly, that the man had reasonable cause to believe that the girl was 16 or older provided that he was under the age of 24 and had not been previously charged with this or a similar offence.¹⁴

⁸ Alison (I, 566) states that where the party on whom sodomy is committed is under 14 years of age only the actual agent is guilty of the offence. However, Gordon (vol II, p 519, n 3) comments that there is "no authority or ground" for Alison's view.

⁹ See for example *HM Advocate v Millbank* 2002 SLT 1116 (forcing victim to handle penis; touching victim's hair with penis); *Sinder v HM Advocate* 2003 SCCR 271 (placing hands under the clothing of a child); *HM Advocate v JT* 2005 1 JC 86 (touching and photographing the private parts of a child); *Sneddon v HM Advocate* 2005 SLT 651 (inducing children to remove clothes and taking photographs).

¹⁰ See Gordon, vol II, p 530.

¹¹ *Webster v Dominick* 2005 1 JC 65. See further at paras 4.83-4.87.

¹² Criminal Law (Consolidation) (Scotland) Act 1995, s 5(1).

¹³ 1995 Act, s 5(3).

¹⁴ 1995 Act, s 5(5).

- (3) The common law offence of lewd, indecent or libidinous conduct is extended to girls over the age of 12 and under the age of 16.¹⁵ The defences mentioned in (2) above do not apply.
- (4) It is an offence for a man to commit a homosexual act (defined as sodomy and an act of gross indecency) with a boy under the age of 16.¹⁶ It is a defence that the accused had reasonable cause to believe that the boy was 16 or older provided the accused was under the age of 24 and had not been previously charged with a like offence.
- (5) The offence of incest, that is having sexual intercourse with a person within specified degrees of relationship, applies to children.¹⁷ It is a defence that the accused did not consent to the intercourse, did not know that the other person was within the specified degrees, or was married to the other person.
- (6) It is an offence for a step-parent to have sexual intercourse with a step-child where the child is (a) under the age of 21 or (b) 21 or older and before attaining the age of 18 had lived in the same household and had been treated as a child of the family.¹⁸ It is a defence that the accused did not know that the other person was a step-child, believed that the person was over the age of 21, did not consent to the intercourse or was married to the other person at the time when the intercourse took place.

4.15 Many, if not most, of these provisions, may appear acceptable or desirable when viewed in isolation but the overall state of the law is unsatisfactory.

- (1) There is a lack of coherence between the different provisions. Some offences apply only in respect of male offenders and female victims; others apply only in respect of male offenders and male victims. This situation leaves gaps in respect of sexual acts committed by women with boys.¹⁹
- (2) The common law offence of lewd, indecent or libidinous conduct is vague, and its exact scope uncertain. Moreover, since the removal of the offence of shameless indecency, certain types of 'indecent' conduct may no longer be criminal.
- (3) The operation of defences to some of these provisions creates problems. The so-called young man's defence (that is where there is a defence of mistake of age for certain offences involving children under 16 but only if the accused himself is under the age of 24 and has never been charged with a like offence) is lacking in any obvious principle. But whereas there is such a defence in respect of sexual intercourse with a girl under 16, there is no mistake of age defence for indecent conduct falling short of intercourse with a girl below that age.

¹⁵ 1995 Act, s 6.

¹⁶ 1995 Act, s 13(5) (as amended by the Sexual Offences (Amendment) Act 2000, s 1(3)).

¹⁷ 1995 Act, s 1.

¹⁸ 1995 Act, s 2.

¹⁹ This practice could only be charged as a form of lewd, indecent or libidinous conduct. It is not an offence in itself for a woman to have (consensual) sexual intercourse with a boy aged 14 or older.

4.16 In the Discussion Paper we stated that our general approach to reform was to build upon the existing law but with the aim of making the law on protective offences for children and young people more coherent and more comprehensive. That remains the approach which we take in formulating our recommendations for statutory reform.

Gender neutrality

4.17 One of the guiding principles for reform which we have adopted in this project is that the law on sexual offences should not involve distinctions based on sexual orientation or types of sexual practice or on gender.²⁰ As we noted earlier, the current law does not conform to that principle, with the result that different rules apply to the protection of boys from those for the protection of girls, and the range of protection given to girls is different from that given to boys. We find this approach unsatisfactory. There should be no difference given to the protection of children because of their gender. Similarly, there should be equal protection of children from sexual activity whatever the gender of the perpetrator. In the Discussion Paper we proposed that any distinction as to gender in the law on protecting children should be removed. This proposal was accepted unanimously by consultees. We therefore recommend that:

- 23. The law on sexual offences relating to children should not make any distinction in terms of the gender of the child or of the perpetrator of such offences.**

The 'age of consent'

4.18 Much of the discussion on sexual offences and children uses the expression 'the age of consent', which is generally understood as the age of a child below which any sexual activity is wrong and at or over which sexual activity is legally permissible. In this general sense of the term, the age of consent in Scots law is 16. However many legal systems (including Scotland) adopt a more nuanced approach and reject the idea that there is one and only one age which is relevant to fixing criminal liability for sexual activity. In Scots law, for example, there are special rules which apply in respect of sexual intercourse with a girl under the age of 13. There are offences which apply in respect of sexual activity with persons over 16 and under 18 years of age. Referring to 'the' age of consent tends to hide these differences.

4.19 In relation to sexual offences involving children, many legal systems draw a key distinction between the age of a child at which sexual activity is absolutely wrong and a higher age at which sexual activity is still wrong but for which a limited number of defences are available. In its recommendations for reform of English law (which were implemented in the Sexual Offences Act 2003) the Home Office Review Group noted that it had encountered considerable support "for the proposition that the law should make a distinction between an age when children ought not to engage in sex, and an age below which it was absolutely wrong to do so."²¹ This distinction (though stated in reverse order) parallels that which we have already noted between the aims of the law in marking out sexual activity involving children which is always and intrinsically wrong (that is with children at the lower or 'no

²⁰ Para 1.29.

²¹ Setting the Boundaries, para 3.3.6.

defence' age) and consensual sexual activity involving children who may be vulnerable to exploitation (the upper age, or the age of consent).

4.20 In the Discussion Paper we proposed that the law should retain this distinction and that there should be special provisions in applying the law on sexual assaults and coerced sexual activity to children below a defined age, whom we referred to as 'young children'. None of our consultees disagreed with this proposal.²² We now consider the details of the offences which should apply in respect of young children.

Offences involving sexual activity with young children

4.21 In Part 3 of this Report we have made proposals for the introduction of two types of offences involving sexual assault (rape and sexual assault). We also proposed that there should be various offences dealing with coerced sexual conduct. Part of the definition of each of these offences is that the activity in question took place without the consent of the victim. What we are currently proposing are ways in which these offences can be adapted to apply to cases where a victim is a young child and to make them offences of strict liability (that is, there are no defences in respect of the key elements of the offence).²³ Later we consider whether there should be further offences to protect young children.²⁴

What age?

4.22 The rationale for provisions that make sexual activity with young children criminal is that children below a certain age should not be involved in sexual activity in any circumstances. The question then is what should be the age used in defining these offences. Scots law currently uses two ages. There is a common law rule that sexual intercourse with a girl below the age of 12 is rape. A similar approach is taken in the Draft Criminal Code which provides that for the purposes of the provisions on sexual offences "any consent given by a person is to be disregarded if at the time when the consent was given the person was under 12 years of age."²⁵ There is also a statutory rule that sexual intercourse with a girl under the age of 13 is a strict liability offence.²⁶ English law contains a variety of strict liability offences involving sex with children under the age of 13.²⁷

4.23 It may also be worth noting in this context the rules on the age of criminal responsibility. Scots law contains two such rules. A child under the age of 8 is deemed incapable of committing a crime. Moreover, children under the age of 16 can be (and in practice are) prosecuted for crimes only in exceptional cases, with most instances of child offenders being dealt with as part of the children's hearings system. The rule on children under 8 lacking criminal responsibility has been criticised as setting the threshold age too

²² Two consultees raised the point about that problems may arise if both parties are under the defined age. We consider this matter at para 4.58.

²³ The defences which are considered later in respect of older children include mistake of the accused as to the child's age; and marriage or civil partnership between the accused and the child. See paras 4.59-4.78.

²⁴ See paras 4.83-4.87.

²⁵ Section 111(3). By contrast, the Code limits the defence of marriage (which applies to consensual sexual activity) to persons aged 13 or older (s 74).

²⁶ Criminal Law (Consolidation) (Scotland) Act 1995, s 5(1).

²⁷ Sexual Offences Act 2003, s 5 (rape of a child under 13); s 6 (assault of a child under 13 by penetration); s 7 (sexual assault of a child under 13); s 8 (causing or inciting a child under 13 to engage in sexual activity).

low, and we have made proposals for reform of this rule by replacing it with a rule that no child under the age of 12 can be prosecuted for any offence.²⁸

4.24 In the Discussion Paper we asked whether the age for offences in relation to young children should be 12 or 13. There was an equal division of preferences between the two options. Moreover we accept that the ages expressed in our question may have been misinterpreted.²⁹ We now recommend that the protective offences for young children should apply to children who are below the age of 13. We do so for two reasons. First, 13 is the age used for some of the offences in the current law,³⁰ and we see no reason for lowering the level of protection which that law provides. Secondly, in English law the offences which correspond to those which we are recommending for young children apply to children below the age of 13.³¹ It would be anomalous if protective provisions for young children north and south of the border used a different age for the children who fall within their scope.

4.25 Accordingly, we recommend that:

- 24. There should be special provisions in applying the law on rape and other sexual assaults and coerced sexual activity to children who have not reached the age of 13.**

(Draft Bill, sections 14-19)

The role of consent

4.26 Another relevant factor in respect of offences involving sex with young children is the relationship between those offences and sexual offences based on the lack of consent by the victim (that is rape, other sexual assaults and coerced sexual activity). There are two approaches to this issue. On the first approach the provisions relating to young children are taken as special rules on the absence of consent. Thus for offences such as rape or sexual assault, there is no need to prove absence of consent where the victim is under the age in question as such children are deemed to lack the capacity to consent. The offences nonetheless remain those of rape or sexual assault committed without the victim's consent. By contrast, the second approach treats the provisions on young children not as types of sexual assault involving the absence of consent but as offences over and above, and complementary to, sexual assaults. In other words, on this approach these provisions apply only where the fact that the child consented is not in dispute. Cases involving lack of a child's consent (which is a question of fact in each case) are still treated as sexual assaults.

4.27 The second approach has been adopted in English law. The Sexual Offences Act 2003 creates a number of offences involving sexual acts with children under the age of 13.³²

²⁸ Report on *Age of Criminal Responsibility* (Scot Law Com No 185 (2002)), para 3.20. The Draft Criminal Code takes a different approach. There the age of criminal responsibility operates not as an immunity from prosecution but as an absence of criminal capacity, though the proposed age is also 12 (s 15).

²⁹ For example, a consultee who expressed a preference for the age of 12 may have in mind a child aged 12 but who was not yet aged 13. Our intention in framing the question in terms of the ages of 12 and 13 was to draw a distinction between respectively a child who had not yet attained the age of 12 and a child who had not yet attained the age of 13.

³⁰ For example, Criminal Law (Consolidation) (Scotland) Act 1995, s 5(1).

³¹ Sexual Offences Act 2003, ss 5-8.

³² For example, ss 5-8.

These offences are to some extent similar to those which apply when the victim does not consent, but the provisions for children under 13 are intended to cover cases which do not involve any lack of consent on the part of the child victim. For example, sexual intercourse with a girl under 13 who does not consent is the crime of rape. Sexual intercourse with a girl of that age who does consent (or perhaps more accurately does not in any way indicate lack of consent) involves the separate offence of intercourse with a girl under 13. In other words, this last offence is *not* an example of what is sometimes called 'statutory' rape.³³

4.28 Scots law tends to take the first approach in relation to the connection between the age of young children and consent. The common law rule that a girl below the age of 12 cannot consent to sexual intercourse is in effect a form of 'common law' rape, akin to the idea of statutory rape. Indeed it appears to be the practice in Scotland that the separate statutory offence (sexual intercourse with a girl under the age 13) is used only where the girl is aged between 12 and 13 and for the Crown to charge an accused with rape at common law where the girl is below 12.³⁴

4.29 The advantage of the Scottish approach is that it makes the law simple to understand and to apply. Rape involves sexual penetration without consent. Young children below a certain age cannot, as a matter of law, consent. Therefore, sexual penetration of a child under that age is a form of rape. However, a possible disadvantage of this approach is that it fails to bring out what is especially wrong about persons having sex with very young children and treats all these cases as involving the child's lack of consent to sexual activity. By contrast, the merit of the English approach is that it has two separate offences for two different types of wrong. For example, where a young child does not consent to sexual intercourse then the offence of rape has been committed. But even where a young child does as a matter of fact consent to sexual intercourse then the activity is still criminal (sexual intercourse with a child under 13).

4.30 The majority of consultees who responded on this issue expressed a preference for the view that the offences should be based on the idea that children below the age of 13 lack capacity to consent to sexual intercourse. We consider that such a view is not only easier to understand but is also the more principled. Sexual intercourse with any child under the age of 13 should be seen for what it is, namely rape of a child.

4.31 Accordingly, we recommend that:

25. The offences involving rape and other sexual assaults and coerced sexual activity which apply to children under the age of 13 are based on the legal premise that children below that age lack capacity to consent to sexual activity.

(Draft Bill, sections 14-19)

³³ See *Setting the Boundaries*, para 3.5.11: "we are not proposing statutory rape. The presumption of no consent below 13 applies to the 'consensual' offences of adult sexual abuse of a child, persistent sexual abuse of a child and sexual activity between minors. Rape and sexual assault by penetration are in essence offences where lack of consent has to be proved. We hope however that courts will find our arguments useful in considering the issues of consent in cases involving the rape of children."

³⁴ See note to s 5(1) of the 1995 Act in *Current Law Statutes Annotated*, which cites *C v HM Advocate* 1987 SCCR 104.

Strict liability

4.32 Earlier we stated that some of the current offences involving young children are offences of 'strict' liability. We wish to make clear what strict liability means. Liability is said to be strict where a person is held to be criminally responsible without proof of mens rea in respect of all elements of the offence.³⁵ In the present context the key element of the offences is the age of the child. Under English law the offences involving sexual activity with children under 13 are offences of strict liability in this respect. This is generally accepted to be the case with the offence in current Scots law of having sexual intercourse with a girl under 13.

4.33 It should be noted, however, that there is a presumption that mens rea is required as to the central elements of a statutory offence.³⁶ Moreover, the imposition of strict liability has been challenged in England in respect of other offences involving child victims.³⁷ Accordingly, there must be good policy reasons for removing the requirement of mens rea. In the context of sexual activity with young children there is a clear and sound policy, namely that children below a certain age should not be involved in sexual activity at all. In this respect, offences involving children below 13 are different from those involving children under 16 (or 18) where there may be greater scope for a defence of mistake as to the child's age. In short, a person having sex with a child who mistakenly believes the child is 16 or older is in a different position from someone who has sex with a young child but mistakenly believes that the child is 13 or older.³⁸ In the Discussion Paper we proposed that it should not be a defence to offences against young children that the accused believed that the child was of, or older than, the age in question. There was overwhelming support for this proposal.

4.34 However, the question arises whether a provision making liability strict as to the age of the child is compatible with the provisions of the ECHR. We note that the European Court of Human Rights has held that strict liability is not per se an infringement of the Convention.³⁹

4.35 The question of strict liability in relation to sexual offences has been considered in the English courts. In *R v G*,⁴⁰ a boy aged 15 was charged under section 5 of the Sexual Offences Act 2003 (rape of a child under 13). The accused, who stated the sexual activity had been consensual and that he had thought the girl was 15 years old, pled guilty because he had been advised that the offence was one of strict liability. He then appealed against his conviction on two grounds: first that section 5 of the 2003 Act was incompatible with the presumption of innocence guaranteed by article 6(2) of the ECHR; and secondly that the

³⁵ Accordingly strict liability offences are not to be equated with 'no defence' offences (sometime called offences of absolute liability). What is strict about these offences is that they do not require mens rea as to some key element of the offence itself but more general defences, such as insanity or automatism, would still be available.

³⁶ Common law crimes do not involve strict liability. In principle the common law requirement of mens rea would mean that where a man is charged with the rape of a girl under 12, he would have a defence that he believed that the girl was over 12 and was consenting. This issue is discussed by Gordon (vol II, p 514) who concludes that "the court would doubtless have scant sympathy with the accused and might well hold that *mens rea* as to age was unnecessary."

³⁷ *B (A Minor) v DPP* [2000] 2 AC 428. In this case, the accused was charged with the offence of inciting a girl under the age of 14 to commit an act of gross indecency with him (contrary to s 1(1) of the Indecency with Children Act 1960). The victim was 13. It was held that the prosecution had to prove the absence of genuine belief on the part of the accused that the victim was 14 or over.

³⁸ See paras 4.60-4.64.

³⁹ *Salabiaku v France* (1988) 13 EHRR 379

⁴⁰ [2006] 1 WLR 2052.

effect of his prosecution, conviction and sentence, taken individually or together, constituted a disproportionate interference with his right to respect for his private life, contrary to article 8 of the ECHR.

4.36 The Court of Appeal refused the appeal.⁴¹ The Court held that article 6(2) of the Convention is concerned with the procedural fairness of a trial and not with the substantive law that falls to be applied at the trial. It followed Strasbourg jurisprudence that the Convention does not prohibit a State from enacting and enforcing a crime of strict liability. However, the matter is complicated in that under the Convention evidential presumptions might infringe article 6, especially if the presumption was irrebuttable in nature. The point was argued in *R v G* that there was no difference in effect between strict liability and an irrebuttable evidential presumption. The Court of Appeal rejected this submission, although it did accept that its decision did not sit easily with opinions expressed in decisions of the House of Lords dealing with reverse burdens of proof.

4.37 The argument about an infringement of article 8 was based on the circumstance that the accused in this case was aged 15. The Court of Appeal held that the possibility that a prosecution of a child in relation to consensual sexual intercourse might, depending on the particular facts, amount to an unjustified interference with the child's rights under article 8(1).⁴² However, it is not clear that the outcome would be the same where the accused is an adult.

4.38 We conclude on the basis of the Court of Appeal's decision that a provision imposing strict liability as the age of child in offences against children under the age of 13 would not be in breach of the Convention.

4.39 We recommend that:

26. **It is not a defence to an offence involving rape or other sexual assaults and coerced sexual activity which apply to children under the age of 13 that the accused believed that the child was 13 or older.**

(Draft Bill, section 20)

Defences

4.40 We have described as strict liability an offence where there is no need for mens rea in respect of one or more of the defining features that offence. We now consider whether for offences which protect children under 13 there should be any defence which is extraneous to the definition of the offence itself. One such possible defence, which exists at present in respect of offences against children aged between 13 and 16, is marriage. We consider later whether that defence should continue to exist for those offences.⁴³ The immediate question is whether there should be a defence of this nature to offences involving young children.

⁴¹ Leave to appeal was subsequently granted by the House of Lords.

⁴² In Scotland the approach taken in the vast majority of cases where a child under 16 is alleged to have committed a crime is to refer the child to a children's hearing rather than bring a prosecution. See paras 4.52-4.58.

⁴³ See paras 4.65-4.70.

4.41 Under Scots domestic law a person cannot marry if he or she is below the age of 16,⁴⁴ but Scots law may recognise foreign marriages where the parties are below this age.⁴⁵ It is currently an offence for a person to have "unlawful sexual intercourse with any girl under the age of 13." In the context of sexual offences the expression 'unlawful sexual intercourse' is usually understood as referring to intercourse outside of marriage⁴⁶ but there seems to be little support for the view that the offence in respect of girls under 13 years of age is restricted in this way. In the Discussion Paper we stated our view that as regards offences involving young children there should not be a defence of marriage.⁴⁷ The policy reason for not allowing the defence for these offences is the same as that which excludes the possibility of a mistake of age defence. It does not follow that Scots law should deny recognition of foreign marriages where one of the parties is below 12 or 13. That is a matter for the rules of private international law, including the application of the concept of public policy as used in that branch of the law. The point being made here is that even if a foreign marriage is recognised by our legal system it provides no defence to a charge under the provisions relating to sexual activity with young children. We examine later the circumstances in which Scots law may recognise a foreign civil partnership.⁴⁸ In theory, such a relationship could involve a child under 12 (or 13) but we consider that the same public policy point should apply to foreign civil partnerships as to foreign marriages in respect of young children.

4.42 There was overwhelming support among consultees for our proposal in the Discussion Paper that there should be no defence of marriage (or any other relationship) for offences involving young children. Accordingly, we recommend that:

- 27. There should be no defence to offences involving rape or other sexual assaults and coerced sexual activity which apply to children under the age of 13 that the accused was married to, or in a civil partnership with, the child.**

(Draft Bill, sections 14-19)

Offences involving children under 16

4.43 We now consider offences involving sexual activity with children who are below 16 years of age but are aged 13 or older (whom we refer to as older children). This category of sexual offence is controversial mainly because of tensions in the aims of the criminal law in this area. There is a clear social need for the protection of children from sexual abuse and exploitation, especially by adults. There is probably a broad consensus as to the legitimacy of such a goal but not necessarily as to the ways in which it should be achieved. Offences which are based on the lack of a victim's consent to sexual activity (such as rape or indecent assault) apply to children in this older age group. The question then arises why there is any need for other offences to protect such children. The most relevant issue is that many older children may have the capacity to consent to sexual activity. In this context, there is no

⁴⁴ Marriage (Scotland) Act 1977, s 1(2). Indeed a person whose domicile is Scottish cannot marry anywhere if under the age of 16 (1977 Act, s 1(1)).

⁴⁵ A E Anton (with P R Beaumont), *Private International Law* (2nd edn, 1990), pp 436-439.

⁴⁶ *Henry Watson* (1885) 5 Couper 696; *Abinet v Fleck* (1894) 2 SLT 30; *R v Chapman* [1959] 1 QB 100.

⁴⁷ This approach is taken in the Draft Criminal Code: "No offence under this Part of this Act is committed if the two persons involved in any consensual sexual activity which would otherwise constitute the offence or an element of the offence were married to each other at the time and were both aged 13 years or more" (s 74).

⁴⁸ Para 4.66.

scope for provisions which deem children under 16 to lack capacity to consent or for offences of 'statutory' rape and sexual assault. Specific sexual offences in relation to older children must be ones which criminalise consensual sexual activity. A particular problem with this approach is that all the participants in such 'under age' sex might themselves be children in that age group. It seems to be an extreme outcome that 14 or 15 year-old children are to be prosecuted for engaging in activities that are both consensual and, as a matter of empirical fact, prevalent.⁴⁹

4.44 Accordingly, there are two main objections to offences which criminalise sexual activity involving older children. The first is that such offences penalise sexual activity where there is no lack of consent. The second is that such offences penalise conduct which (older) children engage in with each other on a voluntary and consenting basis. We consider each of these points in turn.

The wrongfulness of (consenting) sex with children

4.45 There is without question a wrong where a person has sex without his or her consent, and this applies just as much where the victim is a child. But if an older child has capacity to consent and does in fact consent to a particular sexual act, is any wrong involved? We have already set out, in general terms, the arguments for the application of a protective principle in respect of persons who can and do consent to sexual activity.⁵⁰ In the specific context of older children, the main arguments are, first, that because of the relative immaturity of the child, doubts remain about the validity of the consent, especially where the other party concerned is older and more experienced than the child. What the law is seeking to prevent is the exploitation of the child's vulnerability to give consent without fully appreciating what is involved. The second aim of the law is to make a symbolic statement about child protection. The Home Office Review Group noted that one of the key issues to emerge from its consultation was "the need for the law to establish beyond any doubt that adults should not have sex with children."⁵¹ Placing protection of children in general sexual offences applying to victims of any age tends to hide this statement of principle.

4.46 Nonetheless, it might be argued that children on reaching their 13th birthday do not need this type of protection. According to this view, there must be a point at which a person is thought to be mature enough to decide whether to engage in sexual activity, and that age should be lower than 16. In effect, this is an argument to lower the age of consent to 13. It should be noted that this is an argument of general principle. It is not dealing with the separate issue of children who have sex with other children, or with removing criminal liability from children who have sex.⁵² Rather it goes further and denies that there is anything wrong in a person of *any age* having sex with a child under 16 provided that the child gives his or her consent (and also that there is no relationship of trust between the parties.)⁵³

⁴⁹ K Wellings et al, *Sexual Behaviour in Britain: The National Survey of Sexual Attitudes and Lifestyles* (1994); J Tripp and R Viner "ABC of Adolescence: Sexual Health, Contraception, and Teenage Pregnancy" (2005) Vol 330 No 7491 British Medical Journal 590-593; E Burtney, *Evidence into action: teenage sexuality in Scotland* (2000), HEBS.

⁵⁰ Para 1.28.

⁵¹ Setting the Boundaries, para 3.6.1.

⁵² It could be possible to have offences involving sexual activity with a child under 16 but to remove criminal liability for any child who commits the offence. We consider that issue at paras 4.52-4.57.

⁵³ See paras 4.126-4.134.

4.47 In the Discussion Paper we said that we did not agree with this approach. Our view was that the provisions on consent and on abuse of trust do not by themselves provide adequate protection for children aged 13 to 16. The consent model which we set out in Part 2 widens the scope of what is meant by consent to sexual activity. What that model does is to require examination of parties' interactions to determine whether consent had been given. Thus, a man having sex with a 13 year-old boy or girl would be guilty of rape or assault where the man plied the child with drink, threatened violence, where the child was asleep, and so on. But the consent model does not capture cases where consent is actually given but for questionable reasons. Thus, a woman having sexual intercourse with a man to obtain money or other material reward is not rape. The law must allow people to engage in sex for bad reasons. But this approach would apply equally to children under 16 if protective offences were abolished. It would not then be rape, or any other offence, where a boy of 13 consented to having sex with a man of 52 in exchange for money, or an iPod. Nor is there any lack of consent where a man of 40 'chats up' a girl of 13 and persuades her to have sexual intercourse with him.

4.48 There are also limits to the application of the abuse of trust provisions to cases involving children under 16. By definition, these cases are limited to instances where a position of trust exists between the parties. Thus, on the abolitionist approach, sex with a 13 year-old boy would still be an offence where the other party was a member of his family or a teacher. But there would not be any offence where the same child had sex with a complete stranger, or indeed any adult who did not have a position of trust over him.

4.49 We also think that lowering the age of consent to 13 would have implications for many other areas of law and policy, for example the age of capacity to marry and enter a civil partnership.⁵⁴ Furthermore, there would be cross-border anomalies. Sixteen is the age of consent which applies in the rest of the UK.⁵⁵ A man in England wanting to have sex with a 13 year-old boy there would escape criminal liability by the simple step of crossing the border.

4.50 In the Discussion Paper we set out our view that these arguments amounted to good reasons of principle for retaining protective offences in respect of children aged between 13 and 16. We accepted that there are issues to be considered about defences to these offences and the appropriate legal response to the situation where these offences were committed by children under 16. Subject to those issues we proposed that there should continue to be protective offences in respect of children aged between 13 and 16. There was virtually unanimous support for this proposal among consultees.

4.51 In the Discussion Paper we also considered what sexual activities should be covered by the protective offences applying to older children. A crucial point here is that these offences involve the consent of the child. A further matter is whether the offences should apply where both parties are under 16 years of age. We deal with that matter below.⁵⁶ In

⁵⁴ Other examples are the regulation of child prostitution and child pornography; health strategies in relation to sex education and teenage pregnancies.

⁵⁵ It should also be remembered that a wide model of consent applies in the rest of the United Kingdom along with offences prohibiting sexual activity with children under 16. It should be noted that in Setting the Boundaries the Home Office Review Group stated that fixing the age of consent at 16 was a fundamental principle and not open for discussion. Although the Group's recommendations on sex involving children under 16, and their enactment in the Sexual Offences Act 2003, have attracted strong criticism, as far as we can tell no commentator has argued that the age of consent in English law should be lowered.

⁵⁶ Paras 4.52-4.57.

the Discussion Paper we proposed that the activities which constitute the offences of rape, sexual assault and sexual coercion where the victim does not consent should also be the basis of offences against a child aged between 13 and 16.⁵⁷ There was a virtually unanimous agreement with this proposal among consultees, though some expressed reservations about applying the offences where both parties were under 16 or were close in age to each other. We deal with those issues shortly but in the meantime we recommend that:

- 28. There should be special provisions applying the law on sexual penetration and other sexual assaults and on coerced sexual activity to children aged between 13 and 16 where the conduct involves the consent of the child.**

(Draft Bill, sections 21-26)

Application of the offences where both parties are under 16

4.52 There are problems in applying sexual offences relating to consensual sexual activity with young children to cases where the participants are themselves children.⁵⁸ Many instances of children engaging in sexual contact with other children do not involve any degree of exploitation. Indeed, for many teenage children sexual exploration is regarded as a normal part of growing up. It seems quite inappropriate to criminalise consensual activities which in themselves involve no discernible social wrong. Professor J R Spencer has made the following comment on the provisions on sexual activity between children in the Sexual Offences Act 2003:⁵⁹

"The 'legislative overkill' point is that the child sex offences cover not only consensual sexual acts between children and adults, but all forms of sexual behaviour between consenting children. The result is to render criminal a range of sexual acts, some of which are usually thought to be normal and proper, and others at least not seriously wrong. ... So far are these provisions of the Act out of line with the sexual behaviour of the young that, unless they provoke a sexual counter-revolution, they will eventually make indictable offenders of the whole population."

4.53 In the Discussion Paper we considered whether children under 16 should be exempted from criminal liability under the provisions designed to protect children aged between 13 and 16. We took note of the rules on the age of criminal responsibility in Scots law. The general position for over 30 years or so has been that children under the age of 16 are not prosecuted in the criminal courts. The vast majority of cases involving children under 16 who commit an offence are dealt with through the children's hearings system and not in the criminal justice system. In our project on the age of criminal responsibility, we estimated that in the period we studied over 99 per cent of children alleged to have committed a crime were dealt with in the hearings system, and less than 0.5 per cent were prosecuted in the

⁵⁷ We accepted that there is an oddity about the notion of someone being compelled to do something with his consent. At the same time we took the view that the protective principle should apply where the actions of a person have the effect of leading a child to perform a sexual act. It may be that the language of compelling or coercing activity is inappropriate in this situation but we regarded this as mainly a matter of statutory drafting.

⁵⁸ Such problems do not exist where only one of the parties is a child under 16, and the offence is defined in terms of having sex 'with a child' below that age. In this situation, no criminal liability would attach to the child.

⁵⁹ J R Spencer, "The Sexual Offences Act 2003: (2) Child and Family Offences" [2004] Crim L Rev 347, at 354.

criminal courts.⁶⁰ But in that project we rejected the suggestion that there should be a complete exemption for under 16s from criminal prosecution or liability, though we accepted that cases where a child was prosecuted should be rare and would normally involve a major issue of public interest.

4.54 As regards protective offences for children aged between 13 and 16 our preferred approach was not to exempt children under 16, as offenders, from the scope of these offences. Rather, we argued that these cases should be integrated into the general system on the prosecution of children under 16. The advantage of proceeding in this way was that the practical effect would be that criminality would not in the vast majority of cases be attached to consenting sexual activity between under 16 year-olds. Yet at the same time criminal prosecution could be brought against a child under 16 where there were compelling public interest reasons for doing so (for example, in cases involving exploitation); and, further, children under 16 who engaged in sexual activity could, where appropriate, be referred to a children's hearing. Our proposal in the Discussion Paper that the protective offences for older children should apply to children under 16 who commit them was in broad terms supported by consultees. However there were noticeable dissents from this position, especially from bodies which are concerned with the issue of children's welfare.⁶¹

4.55 We have reconsidered our position in the light of the points raised during consultation, and we now recommend that the provisions should not apply where the parties are under 16. We wish to emphasise that these provisions deal only with conduct involving consent. There is no question of removing criminal liability for people under 16 who participate in sexual conduct with someone who does not consent to it. Where there is exploitation by one child of another who is aged 13 to 16, then that conduct should be criminal where there is no consent to it. In making this recommendation we are particularly struck by anomalies which would follow in criminalising consenting sexual activity between teenagers, which would extend to activities such as kissing each other. We are not impressed by the argument that such criminal liability would be theoretical only and in the vast majority of cases there would be no criminal prosecutions. Such an approach fails to take account of the possibility that older children might still be subject to investigation by the police, even if prosecution in the criminal courts is unlikely. More fundamentally, there is an important point of principle involved. If consenting sexual activity between young people is not to attract criminal liability, then the activity should not be criminal.

4.56 At the same time we are not saying that children who engage in sexual activity should be immune from any form of social intervention. There will be cases where there are issues about the welfare of children who are sexually active and who should be referred to a children's hearing. Our understanding is that there is no ground of referral to a hearing of such a child other than that the child has committed an offence.⁶² Accordingly we are of the view that there must be an additional element to our recommendation that there should be

⁶⁰ These figures are based on data on referrals to children's hearings and on prosecution for the years 1997-2000 (Report on *Age of Criminal Responsibility* (Scot Law Com No 185 (2002)), para 3.10). Table 7 of Appendix D to the Report sets out data on the number of children proceeded against in the criminal courts from 1994 to 1999. The total number of children prosecuted over that period was 1,165, and of these the vast majority were aged 14 (143) or 15 (967). The number of children prosecuted for sexual assault was 18, for lewd, indecent or libidinous conduct 5, and for 'other indecency' 8.

⁶¹ These bodies included Childline Scotland, Brook, and the Scottish Children's Reporter Administration.

⁶² This view was stated in the response to the Discussion Paper submitted by the Scottish Children's Reporter Administration who point out that "as the law currently stands, Reporters are unable to treat a child's sexual behaviour towards another child as him/her being 'exposed to moral danger'."

no criminal liability imposed on children under the protective offences for children aged 13 to 16. This is that there should be a new ground of referral to a children's hearing that a child has engaged in sexual activity with someone else.

4.57 We recommend that:

- 29. The offences mentioned in recommendation 28 cannot be committed by a person who has not reached the age of 16.**

(Draft Bill, sections 21(1); 22(1); 23(1); 24(1); 25(1); 26(1), (2))

- 30. There should be a ground of referral of a child to a children's hearing that the child has engaged in sexual activity with another person or has been subjected to sexual activity with another person.**

(Draft Bill, section 29)

4.58 *Children under 13.* The ground of referral would allow for a case of a child of any age under 16 to be considered by a children's hearing no matter the age of the child. However, where a child of any age (including a child under 13) has a sexual contact with another child who is under 13 and the conduct falls within the scope of the strict liability offences, this ground of referral would not apply. As the conduct amounts to a criminal offence, the ground of referral must be that the child has committed a criminal offence.⁶³ The effect is that where two 12 year-old children have sex with each other, both are committing a crime. If those children are to be referred to a children's hearing, then the ground of referral would have to be that he or she had committed a crime, which because of the requirement of criminal proof may be difficult to establish. A partial solution to this problem would exist if the age of criminal responsibility was 13.⁶⁴ However, under current Scots law the age of criminal responsibility in the sense of criminal capacity is 8, which is too low to set as the age for this type of sexual offence.⁶⁵

Defences

4.59 On any view, offences involving consensual sexual activity with children aged 13 to 16 are less serious than offences relating to sex with children under 13. Earlier we recommended that in relation to offences involving children in the lower age group there should be strict liability as to the child's age and there should be no specific defences.⁶⁶ However, we consider that the arguments for strict liability or for the lack of defences have much less force in relation to offences involving older children. This is the approach taken in existing Scots law,⁶⁷ and in English law.⁶⁸ There are two types of defence: mistaken belief as to the child's age, and marriage and civil partnerships.

⁶³ *Constanda v M* 1997 SC 217. Unlike the other grounds of referral this ground requires the same level of proof as that in a criminal trial, including the requirement of corroboration.

⁶⁴ The solution is partial because it would apply only where both children were under 13. Where for example a 15 year-old boy has sex with a 12 year-old girl, the girl could be referred to a hearing under the new ground we have proposed but the ground of referral for the boy would have to be the 'criminal' ground.

⁶⁵ In our project on age of criminal responsibility we recommended that no person under the age of 12 should be the subject of criminal prosecution (Report on *Age of Criminal Responsibility* (Scot Law Com No 185 (2002), para 3.20). Implementation of this recommendation would narrow the scope of but not remove the problem.

⁶⁶ Paras 4.32-4.42; recommendations 26 and 27.

⁶⁷ Criminal Law (Consolidation) (Scotland) Act 1995, ss 5(3) and 5(5).

4.60 (i) *Mistake as to age*. The current law on mistake as to age contains significant qualifications. It allows an accused to show that he had reasonable cause to believe that the child was of or over 16 years of age but the defence is only open to an accused who is himself under the age of 24.⁶⁹ Furthermore, the defence is not available where the accused has previously been charged with a like offence.⁷⁰ In the Discussion Paper we stated that this defence, sometimes referred to as the 'young man's defence', is unprincipled, and could be explained only in terms of a political compromise in the enactment of a previous version of the defence.⁷¹ Instead we viewed any question of the accused's own age as bearing on his credibility but that it should not be a formal restriction to raising the defence.

4.61 We took a similar view of the fact that the accused may have raised the defence on a previous occasion, that is the issue should go to the credibility of the accused rather than being a restriction on raising the defence. However, there are some problems about how the matter of previous use of the defence can be brought before the court. The current law seems to allow the prosecution to lead evidence that the accused had been previously charged with a like offence whenever an accused raises the defence for a second time but it is not clear how this interacts with provisions restricting the circumstances in which the Crown can disclose an accused's previous convictions.⁷² We could see some merit in allowing the Crown to continue to lead such evidence, not to disallow the defence, but to test the accused's credibility. However, the admissibility of this evidence would be subject to the question of prejudice which the accused might suffer from such disclosure.

4.62 A large majority of consultees agreed that there should be a defence in general terms to offences against older children that the accused believed on reasonable grounds that the child was 16 or over, and that this defence should be without the qualifications contained in the present law. Most consultees also agreed that the Crown should be allowed to lead evidence that the accused had previously been charged with a like offence. However, we do not see any need for a specific rule to this effect and consider that the matter is best left to general rules about the admissibility of character evidence.

4.63 One other matter arises in connection with the accused's belief about the age of the complainer. Offences against older children are defined in terms of the child being aged 13 but not yet 16. As noted, we are recommending that there should be a defence that the accused reasonably believed that the child was 16 or older. Although the defence is specifically limited to a belief as to the age being 16 or older, it might be thought that the accused could escape liability if he believed that the child was under 13. We do not consider that there is any scope for such a defence but to put the matter beyond doubt we recommend that there should be no defence on such a basis.

⁶⁸ For example, Sexual Offences Act 2003, ss 9(1)(c); 10(1)(c); 11(1)(d).

⁶⁹ Criminal Law (Consolidation) (Scotland) Act 1995, ss 5(5)(b); 13(8).

⁷⁰ The meaning of the phrase 'previously charged' is not clear. Gordon (vol II, p 529) suggests that in practice "a man may not be regarded as having been 'previously charged' with an offence unless he has previously stood trial for it."

⁷¹ *Setting the Boundaries*, paras 3.6.9. The offence of having sexual intercourse with a girl between 13 and 16 was introduced by section 5 of the Criminal Law Amendment Act 1885. The defence contained in the 1885 Act was that the accused had reasonable grounds for believing that the girl was 16 or older. The restriction of the defence to an accused aged 23 or younger (and also that he had not been previously charged with a like offence) was introduced by section 2 of the Criminal Law Amendment Act 1922.

⁷² Criminal Procedure (Scotland) Act 1995, s 266.

4.64 We recommend that:

- 31. There should be a defence to an offence relating to sexual activity with a child aged between 13 and 16 that the accused believed on reasonable grounds that the child was 16 or older.**

(Draft Bill, section 27(1)(b))

- 32. It should not be a defence to an offence relating to sexual activity with a child aged between 13 and 16 that the accused believed that the child was under 13 years of age.**

(Draft Bill, section 27(4))

4.65 (ii) *Marriage; civil partnerships.* The offence of having sex with a girl under 16 applies only in respect of 'unlawful' sexual intercourse.⁷³ This term has been interpreted as meaning intercourse outside marriage.⁷⁴ Furthermore, it is a defence to a charge on this offence that the accused had reasonable cause to believe that the girl was his wife.⁷⁵ No equivalent or analogous defence exists in relation to homosexual activity with a boy under 16. In English law the Sexual Offences Act 2003 has no marriage defence in relation to offences involving children under 16. The defence appeared in the original version of the Bill but was removed following concern about treating heterosexual and homosexual conduct differently. However, a defence of marriage does apply to other offences in the 2003 Act,⁷⁶ and in these cases the defence has been subsequently extended to include civil partnership.⁷⁷

4.66 In the Discussion Paper we stated our view that it is appropriate to remove criminal liability for consensual sexual conduct between spouses, at least where neither is a young child.⁷⁸ A person under 16 cannot get married in Scotland (nor can any Scottish domiciliary under 16 get married anywhere) but legal recognition may be given to a foreign marriage where one or more of the parties is under 16. In addition, under the Civil Partnership Act 2004, Scots law allows for the existence of civil partnerships for persons who are 16 or older.⁷⁹ The 2004 Act also provides for the recognition of certain relationships arising under foreign law to be treated as civil partnerships. There is no bar to recognition of a foreign civil partnership involving a person under the age of 16 unless, at the time when the partnership was entered into, one of the parties was domiciled in part of the United Kingdom and was under 16.⁸⁰

4.67 In the Discussion Paper we proposed that there should be a defence to the protective offences for older children that the parties were married or in a civil partnership recognised as valid under Scots law. Consultees gave this proposal a mixed reception. Some of those

⁷³ Criminal Law (Consolidation) (Scotland) Act 1995, s 5(3).

⁷⁴ *Henry Watson* (1885) 5 Couper 696; *Abinet v Fleck* (1894) 2 SLT 30; *R v Chapman* [1959] 1 QB 100.

⁷⁵ 1995 Act, s 5(5)(a).

⁷⁶ Sexual Offences Act 2003, ss 23; 28.

⁷⁷ Civil Partnership Act 2004, Sch 27, paras 173-175.

⁷⁸ One commentator on the lack of the marriage defence in the 2003 Act has noted that "a husband who gives his 15-year-old wife lawfully married abroad a sexual kiss commits an offence under s 9." (Richard Card, *Sexual Offences: The New Law* (Revised Edition) (2004), p 75.)

⁷⁹ Civil Partnership Act 2004, Part 3.

⁸⁰ 2004 Act, s 217.

who opposed the defence may have failed to appreciate that the validity of a marriage or civil partnership under foreign law was not enough. The marriage or civil partnership had to be recognised as valid under Scots law. Others took exception to Scots private international law ever giving recognition to such relationships involving people under 16.⁸¹ We are not convinced by these objections. We are unaware of any problems arising from the operation of this defence under the present law and we consider that it would be anomalous if two people who were married or civil partners were committing a crime by having any form of sexual contact in Scotland.

4.68 In the Discussion Paper we also proposed that the defence should apply where in fact the parties were not married or civil partners but the accused believed on reasonable grounds that he or she was. As with the previous proposal this proposal received a mixed response. However, we have decided not to make any recommendation that there should be a defence on this basis. Being married (or unmarried) is not a defining element of the offences. Rather the defence is based on the policy that it is wrong to impose criminal penalties on people who have sexual contact whilst married to each other. This policy has a much weaker application to persons who merely think that they are married. Furthermore, a defence of belief in marriage is not consistent with the requirement for the defence of marriage that the marriage should be one recognised by Scots law. Two people who enter into a marriage valid by their own personal law but which would not be recognised in Scots private international law would nonetheless be able to claim that they believed that they were married.

4.69 We also noted that at common law, it is not entirely clear to what extent Scots private international law recognises civil partnerships, or other relationships such as homosexual marriages, contracted abroad.⁸² But we argued that in principle any foreign civil partnership or a similar or analogous relationship which is regarded as valid by Scots law should afford a defence to offences of sexual activity involving older children. However, we now take the view that any such relationship under foreign law would be likely to be recognised under Scots private international law as a type of marriage or civil partnership and therefore no specific recommendation is needed on this point.

4.70 We recommend that:

- 33. There should be a defence to an offence relating to sexual activity with a child aged between 13 and 16 that the accused and the child were married or in a civil partnership recognised as valid under Scots law.**

(Draft Bill, section 27(1)(a))

Burden of proof

4.71 In the Discussion Paper we made two different proposals as to the burden of proving these defences. For the reasonable belief in age defence we suggested that the onus of proving the defence should lie on the accused as a legal, and not simply an evidential,

⁸¹ We repeat here the point that this defence would not apply to protective offences where the child is under 13 years of age.

⁸² See K Norrie, "Reproductive technology, transsexualism and homosexuality: new problems for international private law" (1994) 43 ICLQ 757.

burden.⁸³ We took the view that there is a clear social objective in the offences in question, namely the protection of children from sexual exploitation. Also putting a legal burden on the accused would not be a disproportionate measure. The steps taken by an accused contemplating having sex with a young person to discover that person's age might not involve the child directly and it would be difficult for the Crown to show that the accused failed to take reasonable steps to ascertain the child's age. We considered that these factors would ensure the compatibility of the legal burden of proof with the ECHR.⁸⁴

4.72 In respect of the defence of marriage or civil partnership we noted that such a defence would be based on events occurring outside Scotland. Accordingly there might be difficulties for the Crown establishing that the parties were not married or in another form of relationship. However, under the existing law in respect of girls under 16, the lack of marriage between the parties is part of the definition of the offence and hence the Crown must establish that the parties were not married. Moreover, there will be usually be official, State involvement in the processes leading to the creation of all of these types of relationship and once the issue has been raised, it should be relatively straightforward for the Crown to discover whether there is any basis for the accused claiming such a relationship. For these reasons we proposed that the accused should bear an evidential, but not a legal burden of establishing this defence.

4.73 On the whole consultees agreed with these proposals. However, there was some disagreement with the suggestion that there should be different rules on burden of proof for the defences. We have reconsidered this whole matter and have reached the conclusion that each of the two proposed defences should impose on the accused an evidential, but not a legal, burden of proof.⁸⁵ We have been influenced by two considerations. In the first place, we take the view that an evidential burden for each of these defences will require the accused to produce some evidence convincing enough to establish a basis for the issue to be considered. As has been pointed out by the House of Lords, an evidential burden is not an illusory one.⁸⁶ A second factor relates to compatibility with the ECHR. It is by no means a straightforward matter to determine whether a provision which imposes a legal burden of proof on an accused person is, or is not, in conformity with the Convention.⁸⁷ In respect of

⁸³ A party who bears a legal burden of proof is said to run the risk of non-persuasion in that if the appropriate standard required to prove the existence of any particular fact (ie 'beyond reasonable doubt' or 'on a balance of probabilities') is not met, that party will lose on that issue. By contrast, where a party bears only an evidential burden he or she must adduce enough evidence on a particular issue to entitle the court to treat the issue as one that it must consider. In a criminal trial where the accused has the legal burden of proving a defence the appropriate standard of proof is the balance of probabilities. It should be noted that an evidential burden can be discharged even though the party concerned has not provided sufficient evidence to satisfy either of the standards of proof.

⁸⁴ *Sheldrake v DPP; Attorney-General's Reference (No 4 of 2002)* [2005] 1 AC 264.

⁸⁵ Indeed we have reached the same conclusion in respect of all the defences which we recommend as part of this project.

⁸⁶ See *R v Lambert* [2002] 2 AC 545: "If the evidential burden were to be so slight as to make no difference - if it were to be enough, for example, for the accused merely to mention the defence without adducing any evidence - important practical considerations would suggest that in the interest of the community the burden would have to be a persuasive one. But an evidential burden is not to be thought of as a burden which is illusory. What the accused must do is put evidence before the court which, if believed, could be taken by a reasonable jury to support his defence." (Lord Hope of Craighead at para 90.)

⁸⁷ In one of the leading cases, *Sheldrake v DPP; Attorney-General's Reference (No 4 of 2002)* [2005] 1 AC 264, the House of Lords formulated two key principles: (a) whether a particular legal burden imposed on an accused person is Convention compatible depends to a very high degree on the specific facts and circumstances of the relevant legislation; (2) the court has to perform a delicate balancing act between upholding the principle of the presumption of innocence and the decision of Parliament to override that principle in pursuit of a clear statutory policy. In respect of this second point the House said that: "all that can be said is that for a reverse burden of

the defences of reasonable belief as to age and of marriage (as with other defences considered in this Report), we consider that the policy aims of each defence do not require removing the presumption of innocence and are served by placing an evidential burden on the accused. We are also of the view that there is no need for the statute to specify a burden on an accused for proving a defence when it is intended that the burden should be evidential rather than legal in nature.

4.74 We propose that:

- 34. The accused should bear an evidential, but not a legal, burden of establishing the defences set out in recommendations 31 and 33 and elsewhere in this Report.**

Proximity of age defence

4.75 We have earlier recommended that the offences which deal with consenting sexual activity with a child aged between 13 and 16 should not apply when both parties are in that age band. However, the situation may easily arise where two children under 16 have sexual contact with each other and the older one turns 16. The consequence would be that what has started as a sexual relationship which is not criminal becomes one which imposes criminal liability on one of the parties. We regard this outcome as undesirable especially if the relationship involves only lesser types of sexual touching, such as holding hands or kissing. To avoid this possibility we see merit in providing a proximity of age defence to the person who may face criminal prosecution. This defence would be that the accused at the time of the act was less than 2 years older than the child. We also recommend that the age difference should be calculated in terms of the age of the parties as of their last birthday.

4.76 We would stress the limits to this defence. It does not apply to offences where there is no consent to sexual activity, including offences against children under the age of 13. Nor does it apply to an offence involving penile penetration of a child aged between 13 and 16. We propose this limitation because, although we accept the need to prevent convictions for some forms of consenting sexual activity between someone under 16 and someone older, there are social policy objectives in seeking to restrict intercourse involving penile penetration. These include the possibility of pregnancy in the case of vaginal intercourse, and, in respect of all forms of penile penetration, the increased risk of sexually transmitted diseases which does not arise in other forms of sexual conduct. Furthermore, the defence will not be available where the parties wrongly believe that they are within the specified gap in their ages.

4.77 However we can identify a particular problem in applying any provision that allows for a defence defined in terms of a gap in the parties' respective ages as calculated by age at birthdays. This involves the fluctuation in the gap as each reaches his or her next birthday. Take the example of a defence which permits a proximity of 2 years in the ages of the parties. A is 16; his girlfriend B is 14. The defence applies. But if A's birthday falls before B's the defence would fly off because when A turns 17 the age gap becomes 3 years until B's 15th birthday and then the defence would apply again. We have therefore included a

proof to be acceptable there must be a compelling reason why it is fair and reasonable to deny the accused person the protection normally guaranteed to everyone by the presumption of innocence." (At para 302.)

recommendation to the effect that if A (when aged 16 or over) had had sexual contact with B whilst the gap in their ages was 2 years, the defence should continue to apply.

4.78 We recommend that:

35. **There should be a defence to an offence involving sexual activity with an older child that the accused was less than 2 years older than the child or had at some time earlier engaged in such activity and at that time was less than 2 years older than the child.**
36. **But this defence does not apply to an offence involving penile penetration of an older child.**

(Draft Bill, section 27(2), (3))

Problems with proof of age

4.79 We have identified a problem in respect of protective offences against children which may not arise frequently in practice but for which some provision is needed. There are two different sets of offences, one in relation to children under the age of 13, the other in relation to children aged between 13 and 16. What would happen in a trial where the Crown can prove that a child was under the age of 16 at the time of the actings in question but cannot prove whether at that time the child was below 13 or was 13 (or older)? This scenario could arise, for example, because there is some doubt about the actual date of those actings but the child's 13th birthday fell within the permitted latitude as to date. Where the problem was recognised in advance of the trial the Crown could indict on alternative charges but the matter might arise only as evidence is being led at the trial itself.

4.80 As the recommended maximum penalties for an offence against an older child are lower than the corresponding offence against a young child, we recommended that, where someone is charged with an offence against an older child and the only matter preventing the accused from being found guilty is the fact that it has not been proved that the child was 13 or more at the time of the offence (but it can be proved that he or she was under 16), the child shall be presumed to be aged 13 or over.⁸⁸

4.81 Furthermore, if someone is charged with an offence against a young child and the only matter preventing a finding of guilt is a failure to prove that the child was under 13 at the relevant time, provided that the Crown can prove that the child was under 16, the accused should be liable to be convicted of the corresponding offence against older children.

4.82 We recommend that:

37. **Where a charge has been brought of a protective offence against a child, and the Crown can establish that at the time of the offence the child was under the age of 16 but cannot establish the child's actual age, then:**

⁸⁸ In reaching this view we have taken account of the effect of article 7 of the ECHR, which prohibits the imposition of a heavier penalty than the one that was applicable when the offence was committed. If the law were to presume that, in cases of doubt as to age, the victim was under 13 then the offender would be liable to a higher maximum sentence than if the presumption operates as we recommend. In our view, this would open up a good argument that the accused's rights under article 7 were breached.

- (a) if the charge is of an offence against an older child, the child will be deemed to have been 13 at that time; and
- (b) if the charge is of an offence against a young child, the accused will be liable to be convicted of a corresponding offence against an older child.

(Draft Bill, section 28)

Offences concerning indecent conduct

4.83 The offence of lewd, indecent or libidinous practice and behaviour prohibits certain forms of indecent conduct used toward children. At common law the offence applies to conduct committed against children under the age of puberty (12 for girls and 14 for boys). In the case of girls, but not boys, statute has extended the scope of the offence to the age of 16.⁸⁹ The nature of the offence of lewd, indecent or libidinous practices was complicated by the existence of another offence, which was not restricted to child victims, namely shameless indecency. However, in *Webster v Dominick*⁹⁰ the High Court of Justiciary held that no such offence existed. Lord Justice Clerk Gill pointed out that certain types of shamelessly indecent conduct which were aimed at specific victims should be treated as examples of lewd, indecent or libidinous conduct. His Lordship noted:⁹¹

"In the modern law, where indecent conduct is directed against a specific victim who is within the class of persons whom the law protects, the crime is that of lewd, indecent and libidinous practices. It may be committed by indecent physical contact with the victim, but it need not. It may be committed by the taking of indecent photographs of the victim (eg *HM Advocate v Millbank* [2002 SLT 1116]); or by indecent exposure to the victim (*Lockwood v Walker* [1910 SC(J) 3]); or by the showing of indecent photographs or videos to the victim; or by other forms of indecent conduct carried out in the presence of the victim. It may be committed, in my opinion, by means of a lewd conversation with the victim, whether face to face or by a telephone call or through an internet chat-room. In each case, the essence of the offence is the tendency of the conduct to corrupt the innocence of the complainer."

4.84 In the Discussion Paper we pointed to several problems about the offence of lewd, indecent or libidinous conduct. The nature of the offence is inherently vague, especially in its current form of 'conduct which tends to corrupt the innocence of the victim'. Moreover the examples given by the Court in *Webster v Dominick* tend to overlap with other offences (indecent exposure; nuisance telephone calls), some of which are not, and in principle should not, be limited to cases of child victims. The same points can also be made in respect to homosexual acts of 'gross indecency' committed against boys under 16.

4.85 In our view a preferable approach would be to replace a broad offence of indecent behaviour towards children with more specific offences.⁹² Indeed some of the examples of

⁸⁹ Under the Criminal Law (Consolidation) (Scotland) Act 1995, s 13, there is an offence of homosexual gross indecency in respect of boys under 16. We later recommend the repeal of this provision. See paras 5.5-5.10.

⁹⁰ 2005 1 JC 65. The leading opinion was given by Lord Justice Clerk Gill.

⁹¹ Para 49.

⁹² We later recommend that the statutory offence of gross indecency between males should be abolished (see paras 5.5-5.10).

this type of conduct should be criminal where a victim of any age does not consent. We have earlier recommended that there should be offences of rape and other sexual assaults.⁹³ In addition various forms of coercive sexual conduct should be made criminal.⁹⁴ We also recommended that there should be special versions of these offences to apply where the victim is either a child below the age of 13 and is aged between 13 and 16.⁹⁵

4.86 We take the view that the vast majority of types of conduct which are currently labelled as lewd, indecent or libidinous behaviour would be covered by the recommendations made in this Report. Examples are sexual assault; indecent exposure; sexual touching with children under 16; sexual activity with a child in breach of trust; performing a sexual act in front of a child. Other types would be included in more general offences applicable to adults and children (for example, nuisance phone calls;⁹⁶ harassment;⁹⁷ displaying obscene materials in a public place;⁹⁸ and child pornography offences⁹⁹). Furthermore there are provisions which deal with procuring children for sexual purposes.¹⁰⁰ In these circumstances we see no need for the continued existence of the common law crime of lewd, indecent or libidinous behaviour.¹⁰¹

4.87 We recommend that:

38. The crime of lewd, indecent or libidinous practice and behaviour towards children should be abolished.

(Draft Bill, section 40(a))

B. Persons with mental disorder

4.88 The challenge in making provision for sexual activity with people with mental disorder is to recognise the rights of those persons to engage in sexual activity and promote their sexual autonomy as far as possible. This aim must be balanced with the need to protect vulnerable persons from sexual exploitation and to recognise that in certain situations mental disorder may act as a barrier to meaningful understanding of, and valid consent to, sexual activity. The difficulties which this balancing involves have been widely recognised.¹⁰²

4.89 In Scotland, these issues were most recently explored in the comprehensive review of the law on mental disorder by the Millan Committee,¹⁰³ and the subsequent Mental Health

⁹³ See paras 3.23-3.47.

⁹⁴ See paras 3.48-3.63.

⁹⁵ See paras 4.22-4.25; 4.43-4.51.

⁹⁶ Communications Act 2003, s 127.

⁹⁷ Protection from Harassment Act 1997, s 8.

⁹⁸ Civic Government (Scotland) Act 1982, s 51(1).

⁹⁹ *Ibid*, ss 52 and 52A.

¹⁰⁰ Most recently in the Protection of Children and Prevention of Sexual Offences (Scotland) Act 2005.

¹⁰¹ Section 6 of the Criminal Law (Consolidation) (Scotland) Act 1995 extends this common law crime to include indecent behaviour towards girls aged between 12 and 16. We also recommend that this provision should be repealed (see Draft Bill, section 44(2); schedule 4).

¹⁰² "The law must balance between two competing interests – protecting people with impaired mental functioning from sexual exploitation, and giving maximum recognition to their sexual rights. The difficulty for the legal system in striking an appropriate balance between these interests is compounded by the considerable diversity of people with mental impairment in terms of extent of impairment, living circumstances, and sexual interest and knowledge." (Law Reform Commission of Victoria, *Sexual Offences Against People with Impaired Mental Functioning* (Report No 15 (1988)), p 3.) This passage was quoted in the Australian Model Criminal Code, para 5.2.28; and in *Setting the Boundaries*, para 4.1.3.

¹⁰³ *New Directions: Report on the Review of the Mental Health (Scotland) Act 1984* by a Committee chaired by the Rt Hon Bruce Millan (SE/2001/56).

(Care and Treatment) (Scotland) Act 2003.¹⁰⁴ The 2003 Act creates two offences in respect of sexual activity involving persons with a mental disorder.¹⁰⁵ Section 311 makes it an offence for a person to engage in a sexual act with a person who suffers from a mental disorder and who either does not consent to that act or is incapable of consenting to the act. There is a further offence, under section 313, for a person who is in a position of care over a person who suffers from a mental disorder to engage in a sexual act with that person.

4.90 Section 311 of the 2003 Act makes two notable innovations to the existing law on sexual offences. The first is the introduction of a definition of consent which is more detailed than that used in the common law:¹⁰⁶

"(3) For the purposes of subsection (1)(a) above, a person shall be regarded as not consenting if the person purports to consent as a result of -

(a) being placed in such a state of fear; or

(b) being subjected to any such -

(i) threat;

(ii) intimidation;

(iii) deceit; or

(iv) persuasion,

as vitiates that person's consent."

4.91 The second is a statutory test of being incapable of consenting to a sexual act by reason of mental disorder:¹⁰⁷

"(4) For the purposes of subsection (1)(b) above, a person is incapable of consenting to an act if the person is unable to -

(a) understand what the act is;

(b) form a decision as to whether to engage in the act (or as to whether the act should take place); or

(c) communicate any such decision."

4.92 In the Discussion Paper we stated that the recommendations of the Millan Committee were made against the background of the existing law on sexual offences, including the definition of consent used in that law. The Committee noted the problems which were

¹⁰⁴ The Act came into force in October 2005.

¹⁰⁵ 'Mental disorder' is defined in s 328 of the Act as "any (a) mental illness (b) personality disorder or (c) learning disability, however caused or manifested."

¹⁰⁶ 2003 Act, s 311(3).

¹⁰⁷ Section 311(4).

encountered when the existing general law covering sexual offences was applied in cases where a person has a mental disorder:¹⁰⁸

"The fundamental problem is that most sexual offences concerning adults can only be established if a lack of consent by the victim can be proved. Where a person is severely mentally impaired, it may be difficult to establish such a lack of consent."

"The problem is not simply one of possible incapacity to consent, but also one of vulnerability. It may well be possible for a man to coerce a woman with learning disabilities into having a sexual relationship without having to use threats of a degree which would be sufficient to sustain a rape charge."

4.93 Indeed, the Committee also noted that if the definition of consent in sexual offences generally were to be re-defined as something similar to 'free agreement' the need for specific offences in respect of people with mental disorders could be avoided.¹⁰⁹

4.94 In the Discussion Paper we suggested that if our own proposed model of consent were to be made law there would be no need for the provisions of section 311 of the 2003 Act. Our view was that everything which those measures state is included in our more general proposals. And, as we have already noted, the Millan Committee itself made the recommendations for a specific offence in relation to persons with a mental disorder because of inadequacies with the general law on rape and sexual assaults.

4.95 There was general agreement among consultees with this proposal, although one body argued that there was value in having provisions on consent to sexual activity in the statute which sets out the law relating to people with mental disorders. We have now reached the view that our original proposal was too sweeping. We consider that it would be confusing if the law used one definition of consent to sexual activity for general application and a different definition where the person in question has a mental disorder. We therefore recommend that the part of section 311 of the 2003 Act which defines consent should be repealed without replacement as the issues it deals with are covered by the consent model which we have considered in Part 2. However, we take the view that there is value in having a provision on the capacity of someone with a mental disorder to give consent. Clearly where a person lacks such a capacity then any sexual activity is done without his or her consent. In such a situation there is no need to apply the consent model. The fact that someone has a mental disorder does not mean that he or she necessarily or always lacks the capacity to give consent. Much depends on the nature of the disorder at the relevant time. We are therefore in favour of restating the 2003 Act provisions which define the capacity of a mentally disordered person to consent to sexual activity.

4.96 We therefore propose that:

39. Section 311 of the Mental Health (Care and Treatment) (Scotland) Act 2003 should be repealed.

(Draft Bill, section 44(2); schedule 4)

¹⁰⁸ Report of the Millan Committee, paras 21.22 and 21.25.

¹⁰⁹ "An alternative approach to the special offences discussed above would be to redefine consent generally in relation to sexual behaviour to something closer to 'free agreement'. This approach could avoid the need for special offences to protect people with mental disorders, by bringing abuse of this group within the definition of generally applicable crimes such as rape." (Ibid, para 21.55.)

40. There should be a definition of the capacity of a person with a mental disorder to consent to sexual activity.

(Draft Bill, section 13)

An offence against sexual exploitation of people with mental disorder?

4.97 In the Discussion Paper we noted that there may be a gap in the protection of people who have a mental disorder. This situation may arise where the sexual activity is consensual but is exploitative in a way that does not involve a breach of trust.¹¹⁰ The Draft Criminal Code contained a section on sexual exploitation of a person with a mental disorder, which creates criminal liability in two situations. The first is where the accused has a position of trust over that person. The second is defined as follows:¹¹¹

"A person who engages in sexual activity with, or procures for sexual activity, a person with such mental disorder as to be unable to guard against sexual exploitation and who -

(b) takes advantage of that person's disorder in order to engage in, or procure that person for, the activity

is guilty of the offence of sexual exploitation of a person with a mental disorder."

4.98 In the Discussion Paper we accepted that there could be an advantage in having a specific offence which protects persons with a mental disorder from exploitation. At the same time we were concerned whether such an offence could be drafted with sufficient precision. The version in the Draft Criminal Code uses the expressions 'unable to guard against sexual exploitation' and 'take advantage of', which might be thought to be too vague. Nor is it clear what defences there should be to such an offence. The Draft Criminal Code makes it a requirement of liability that the person engaging in the exploitation knew, or was reckless as to whether, the other person had a mental disorder of a type which made him unable to guard against sexual exploitation. The Code also proposes that marriage should be a defence to a charge under this provision but it is not clear why a relationship such as marriage should bar criminal liability for sexual activity based on exploitation of the victim.

4.99 The approach of English law is that offences in respect of persons with a mental disorder parallel the protective offences relating to children over 13.¹¹² The offences apply in respect of persons who have a mental disorder 'impeding choice'. These disorders are not defined in the English Act. However, this approach seems to involve an overlap with offences where there is no consent by the person with a mental disorder rather than cases where the person consents but the giving of it involves exploitation.

4.100 In the Discussion Paper we did not reach a concluded view on this issue. We asked whether in addition to offences based on abuse of trust (which we consider next), there should be a separate offence of taking advantage of the condition of a person with a mental disorder which prevents that person from guarding against sexual exploitation. Although

¹¹⁰ We consider offences involving breach of trust in relation to people with a mental disorder at paras 4.121-4.125.

¹¹¹ Section 69(1)(b).

¹¹² Sexual Offences Act 2003, ss 9-12 and ss 30-33.

consultees expressed general support for an offence of this nature, we are not recommending that such an offence should be introduced. We are of the view that there are considerable difficulties in identifying the precise mischief that the offence is to remedy. Where a person with a mental disorder is subject to threats or deceptions, the offences based on lack of consent, including attempts to commit those offences, will provide protection. Moreover if the criminal law were to intervene where a person with a mental disorder receives inducements to have sex, which result or may result in that person consenting to sex, the outcome would be diminish the sexual autonomy of people with mental disorders.

C. Persons in positions of trust

4.101 There are a number of statutory provisions which make it an offence for a person to have sexual contact with another person over whom he or she is in a position of trust.¹¹³

4.102 First, section 3 of the Criminal Law (Consolidation) (Scotland) Act 1995 states that a person over 16 who has sexual intercourse with a person under that age is guilty of an offence if he is a member of the same household as the child and is in a position of trust or authority in relation to that child.¹¹⁴ It is to be noted that this offence is restricted to sexual intercourse, that is penile-vaginal intercourse. Neither of the two defining elements (membership of the same household and position of trust) is defined in the Act. In its Report this Commission noted that other statutes had used the first of these expressions,¹¹⁵ and suggested that the use of this phrase in those Acts had not caused any difficulty. It added:¹¹⁶

"It will exclude casual visitors, babysitters and the like who are not members of the household, and the word 'household' will not extend to institutions such as residential schools or children's homes."

4.103 Defences to a charge under section 3 are that the accused (i) believed on reasonable grounds that the other person was 16 or older; (ii) did not consent to have sexual intercourse; or (iii) was married to the other person.

4.104 Secondly, section 3 of the Sexual Offences (Amendment) Act 2000 created an offence for a person of 18 or over to have sexual intercourse¹¹⁷ or to engage in any other sexual activity with a person under that age where there was a position of trust between the parties. 'Position of trust' is defined in section 4 as being involved in any of the following situations:¹¹⁸

¹¹³ In the Discussion Paper we referred to positions of trust and authority. Here we use the shorter and more accurate expression 'position of trust'.

¹¹⁴ Section 3 of the 1995 Act is derived from s 2C of the Sexual Offences (Scotland) Act 1976 (added by Incest and Related Offences (Scotland) Act 1986, s 1, which was based on the recommendations of this Commission). See Report on *The Law of Incest in Scotland* (Scot Law Com No 69 (1981)), para 4.36.

¹¹⁵ Social Work (Scotland) 1968, s 32(2)(e),(f) (now Children (Scotland) Act 1995, s 52(2)(e)-(f)). See *McGregor v Haswell* 1983 SLT 626 where the expression is described as: "a family unit or something akin to a family unit - a group of persons, held together by a particular kind of tie who normally live together" and *A v Kennedy* 1993 SC 131 where the court held that a person may be a member of a household even though not physically present. See also Criminal Procedure (Scotland) Act 1975, ss 168, 364 (now Criminal Procedure (Scotland) Act 1995, s 48).

¹¹⁶ Report on *The Law of Incest in Scotland* (Scot Law Com No 69 (1981)), para 4.33.

¹¹⁷ Under this provision sexual intercourse includes both vaginal and anal intercourse.

¹¹⁸ The Scottish Ministers have power by order to add further situations to this list (s 4(1) and s 7(2)).

- (a) Where the accused looks after persons under 18 who are detained in an institution by virtue of an order of a court or under an enactment.
- (b) Where the accused looks after persons under 18 who are resident in a home in which accommodation is provided by an authority under section 26(1) of the Children (Scotland) Act 1995.
- (c) Where the accused looks after persons under 18 who are accommodated and cared for in various types of institution (including a hospital, a care or nursing home, a community home or residential establishment).
- (d) Where the accused looks after persons under 18 who are receiving full-time education at an educational establishment.

4.105 Defences to a charge under section 3 of the 2000 Act are that the accused did not know and could not reasonably have known that the other person was under 18 or was a person over whom he held a position of trust; and that he was married to the person under 18 or was in a civil partnership with that person.

4.106 Thirdly, section 313 of the Mental Health (Care and Treatment) (Scotland) Act 2003 provides that it is an offence for a person to have sexual intercourse (whether vaginal or anal) or to engage in any other sexual act with a mentally disordered person where he or she is providing care services in respect of that other person.¹¹⁹ The Act does not use the expression abuse of trust but clearly that concept is at the core of this particular provision. Defences to a charge under this section are (i) that the accused did not know on reasonable grounds that the other person was mentally disordered or (ii) that that person was the spouse or civil partner of the accused or (iii) that there was a pre-existing sexual relationship between the parties.

4.107 The initial question to be asked about these provisions is whether they are necessary. We are not at this point concerned with criticism of substantive details of the existing provisions. Rather, we are considering a question of principle, and in particular whether these provisions add anything to what is already contained in other provisions, either existing or proposed in this Report. For example, section 3 of the 1995 Act makes it an offence to have sexual intercourse with a child under 16 where there was a position of trust between parties in the same household but under the existing law sexual intercourse (or sodomy) with a child under 16 is in any case criminal.¹²⁰ However, we consider that the abuse of trust offences do have their own specific rationale. One of the reasons given by this Commission when it proposed the introduction of what is now section 3 of the 1995 Act was that "other provisions of the criminal law fail to take specifically into account the element of breach of a position of authority and trust."¹²¹ We continue to believe that this reason provides a good general basis for offences relating to the specific context of abuse of trust. 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

¹¹⁹ Carer is defined as a person who provides care services to the mentally disordered person or a person who works in, or is a manager of, a hospital where the mentally disordered person is being given medical treatment.

¹²⁰ Section 3 does not overlap with other existing offences in respect of sexual intercourse by a woman with a boy under 16 but our earlier proposals would make such intercourse an offence in itself.

¹²¹ Scot Law Com No 69 (1981), para 4.31.

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. It is also worth noting that the Sexual Offences Act 2003 has widened the scope of abuse of trust offences for English law and the Draft Criminal Code contains a number of provisions which use this idea.¹²²

4.108 For these reasons we proposed in the Discussion Paper that as matter of general principle offences of this nature should, subject to appropriate amendment, be retained. Consultees expressed a virtually unanimous agreement with this proposal. Accordingly, we recommend that:

41. There should be offences which impose criminal liability on a person who has sexual activity with another person over whom he or she holds a position of trust.

(Draft Bill, sections 30-35)

4.109 We now consider the types of situation where this offence should apply.

(1) Abuse of trust in family settings

4.110 We deal first with abuse of trust within a family setting. Many people may find themselves in a highly vulnerable position in relation to other people who live in the same household. An obvious case is that of children in respect of parents and other adults. We note that section 3 of the 1995 Act is not restricted to cases where the parties are related to each other. The approach is wider and the provision applies to all persons who share the same household. In the Discussion Paper we stated that there is scope for expanding this provision to cover sexual abuse within any type of family unit. We have already recommended that there should be specific offences dealing with sexual activity where there is no consent by the victim,¹²³ and also where one of the participants is under the age of 16.¹²⁴ But we also consider that there is scope for protection of vulnerable members of a family unit who do not fall within the range of these offences.¹²⁵

Age of the parties

4.111 Section 3 of the 1995 Act is confined to cases where the victim is under the age of 16. As there are other offences which criminalise sexual activity with children below that age, there is little scope for application of this provision. We note below that for other existing offences which protect young persons who are in a relationship of trust, the relevant ages are that the offender must be 18 or older and the victim under that age. In the Discussion Paper we asked whether the age of 16 for the victim should be raised. Most consultees agreed with raising the age and many suggested that the age should be 18,

¹²² See Draft Criminal Code, s 7 (aggravated offences); s 65 (unlawful sexual activity with a young person); s 69 (sexual exploitation of person with a mental disorder).

¹²³ See Part 3.

¹²⁴ Paras 4.43-4.51.

¹²⁵ See for example *HM Advocate v RK* 1994 SCCR 499, a case involving sexual intercourse between a man and a girl who had been his foster daughter for some years. However, as the intercourse occurred when the girl was 16, the predecessor version of s 3 of the 1995 Act did not apply. A charge of shameless indecency was brought against the man. As noted earlier (para 4.83) there is now no such offence.

which as we have noted is the age used in other abuse of trust offences. A further matter, which we did not consider in the Discussion Paper, is the EU Council Framework Decision of 22 December 2003 on combating the sexual exploitation of children and child pornography.¹²⁶ This measure requires Member States to provide for the punishment of various forms of sexual exploitation of children, one of which is where "abuse is made of a recognised position of trust or authority of influence over the child." For purposes of the Framework Decision a child is defined as any person below the age of 18. We therefore recommend that the provisions as to age in other cases of abuse of trust should be extended to abuse of trust in a family setting.

Definition of relationship of trust

4.112 In the Discussion Paper we set out what we saw as two key elements of the proposed offence, namely that the parties share the same household; and that there was at the relevant time a position of trust between them. In its 1981 Report this Commission stated that these elements are essentially factual matters, and they are not defined in section 3 of the 1995 Act.¹²⁷ In the Discussion Paper on the current project, we said that we were not aware of any problems in practice caused by the lack of definition of these terms in the Act. We continue to hold that view in respect of the requirement that people who share the same household is sufficiently clear and that no statutory definition is required. In the Discussion Paper we also suggested that there may be advantages in setting out some non-exhaustive examples of situations where a position of trust can be said to exist. We gave two examples: first, where a person has or exercises parental responsibilities and rights in respect of someone else; the second was where one person treated another as a member of his family.

4.113 Most consultees supported the proposal about the definition of a relationship of trust in a family setting. However, we now take the view that the definition should be restricted to the two situations which we considered. It is not at all clear when, in the absence of these situations, there could be a position of trust between two people who share the same household. It is also undesirable in principle that a person may be liable to criminal prosecution and conviction for having sex with someone else when it might not be obvious that there was a relationship of trust between them. The holding or exercising of parental rights and responsibilities may in some cases end where the child reaches the age of 16. However, in the light of our view on the appropriate age for the parties covered by this offence, we also recommend that a relationship of trust should continue where parental rights had existed in the past.

Types of prohibited conduct

4.114 At present, section 3 of the 1995 Act prohibits only (heterosexual) sexual intercourse between the parties, but not other types of sexual activity. There is no obvious rationale for limiting protective offences in breach of trust cases in this way. In the Discussion Paper we

¹²⁶ 2004/68/JHA.

¹²⁷ The Commission stated that: "We would not attempt to give an exhaustive or comprehensive definition of the words 'trust or authority'; rather we would prefer that these words be given their ordinary meaning and that it be left to the court to decide as a matter of fact whether the relationship between the accused and the child can properly be described as being one of authority or trust." (Scot Law Com No 69 (1981), para 4.34.)

proposed that the new offence should extend to all types of sexual conduct, both heterosexual and homosexual. No dissent was expressed by consultees on this point.

4.115 We recommend that:

42. It should be an offence for a person aged 18 or older to engage in sexual activity with another person aged under 18 where:

- (a) the parties live in the same household; and**
- (b) there was a relationship of trust between the parties.**

(Draft Bill, section 31(1), (6))

43. There is a relationship of trust between two people who live in the same household where:

- (a) one person has or exercises parental responsibilities and rights in respect of the other person; or**
- (b) one person has in the past had or exercised parental responsibilities in respect of the other person; or**
- (c) one person is treating the other person as a child of his family.**

(Draft Bill, section 31(6))

Defences

4.116 Section 3 of the 1995 Act provides for three defences. One of them is a mistake as to the victim's age. We consider that provided that there are reasonable grounds for such a belief that it should continue to be a defence. A second defence is that the accused did not consent to the sexual intercourse with the person (a girl) under 16. In this scenario the girl may have committed an offence and this result would certainly follow if our recommendations in Part 3 on coercing sexual conduct were to be implemented. It should therefore be considered highly doubtful if the Crown would ever prosecute the victim of such an offence for a breach of trust offence. In any event the defence of coercion may be open to such an accused person.¹²⁸

4.117 The final defence in section 3 is that the parties were married. It is not entirely clear why marriage should be a defence where the wrong consists of sexual activity occurring as a result of breach of trust. It is worth noting that this Commission in recommending the introduction of a breach of trust offence did not examine the marriage defence specifically in relation to that offence but appeared to deal with marriage solely as a defence to incest.¹²⁹

¹²⁸ We will be examining the defence of coercion in our project on provocation and other defences. This project forms part of our Seventh Programme of Law Reform. See Scot Law Com No 198 (2005), paras 2.46-2.50.

¹²⁹ Report on *The Law of Incest in Scotland* (Scot Law Com No 69 (1981)), para 4.44.

There must be considerable doubt whether parties who are married could ever be said to fall within the definition of relationship of trust.¹³⁰

4.118 In the Discussion Paper we asked whether a marriage defence should apply for the proposed family setting breach of trust offences. Consultees were about evenly split in their responses. On reconsidering this issue we take the view that it is highly unlikely that there could be a relationship of trust in this sense between married people and we would view any such defence as unnecessary.

4.119 We also consider that there should be a defence that the accused did not know that there was a relationship of trust with the other party provided that there were reasonable grounds for such a belief. This defence broadly parallels that of mistake as to the other party's age.

4.120 We recommend that:

- 44. It should be a defence to a charge of abuse of trust between persons sharing the same household that the accused reasonably believed (i) that the other person was 18 or older or (ii) that he was not in a relationship of trust with that person.**

(Draft Bill, section 33(1))

- 45. But it should not be a defence that the accused was married to that person or that the parties were in a sexual relationship prior to the relationship of trust between them.**

(Draft Bill, section 33(2),(3))

(2) Breach of trust involving persons with a mental disorder

4.121 A further example of breach of trust provisions in the existing law is to be found in section 313 of the Mental Health (Care and Treatment) (Scotland) Act 2003. This provision makes it a criminal offence for persons providing care services to have sexual contact in certain circumstances with a person who has a mental disorder. As we noted earlier, although this provision does not use the expression abuse of trust that concept is clearly at its core. In the Discussion Paper we proposed that section 313 should be repealed but that similar provisions should be included within a broader offence of sexual abuse of trust. There was general agreement with this proposal among consultees. However, although we continue to believe that section 313 should be replaced by a provision which is explicitly based on the notion of abuse of trust, we now recommend that there should be a specific offence in relation to people with mental disorders. Our reasons are that there are issues in respect of protecting people with mental disorder which do not arise in other cases of abuse of trust (such as a limit on the ages of the parties). Furthermore we consider that it would be of value for people who provide and receive care services if there is provision which deals specifically with their situation. Whilst our recommended provision repeats much of what is

¹³⁰ For similar reasons we see no scope for a defence, which applies in other abuse of trust cases, that the parties were in a sexual relationship prior to the relationship of trust coming into being.

to be found in section 313, we have proposed alterations to the definition of the prohibited sexual activity.

4.122 We recommend that:

- 46. Section 313 of the Mental Health (Care and Treatment) (Scotland) Act 2003 should be repealed.**

(Draft Bill, section 44(2); schedule 4)

- 47. It should be an offence for a person to engage in a sexual activity with a mentally disordered person where he or she (a) is providing care services to the mentally disordered person or (b) works in, or is a manager of, a hospital where the mentally disordered person is being given medical treatment.**

(Draft Bill, section 34)

Defences

4.123 Section 313 of the 2003 Act provide for a defence that the parties were married to, or in a civil partnership with, each other. Earlier we argued that in the context of abuse of trust in a family unit there should not be a defence of this nature. In that situation there were doubts whether there could be a position of trust between spouse or civil partners. However, in the present context, the existence of a position of trust is defined by the specific role, namely a carer, which may well arise where the parties are married or are civil partners. In these circumstances, 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.

4.124 It is also a defence under the 2003 Act that the person in a relationship of trust with someone with a mental disorder did not know, on reasonable grounds, that the other person was mentally disordered.¹³¹ A further defence is that prior to the provision of care, which in effect constitutes the position of trust, the parties were in a sexual relationship with each other.¹³² The rationale of this provision appears to be that where care is provided by a sexual partner, especially in a relationship which long preceded the onset of the mental disorder, "it would be wrong and unreasonable to intrude into the private life of such couples."¹³³ We see the force of this point. In the Discussion Paper we proposed that the defences which are contained in section 313 of the 2003 Act should also apply to the proposed offence of abuse of trust of a person with a mental disorder. Consultees were, on the whole, content with this proposal.

4.125 We recommend that:

- 48. It should be a defence to the offence of sexual abuse of a person with a mental disorder that:**

¹³¹ Mental Health (Care and Treatment) (Scotland) Act 2003, s 313(3)(a)(i).

¹³² Ibid, s 313(3)(b). A similar defence appears in the Draft Criminal Code, s 69(3): "no offence is committed under subsection (1)(a) by the mere continuation of a consensual sexual relationship which existed immediately before the requirements of that provision were satisfied."

¹³³ Setting the Boundaries, para 4.8.17.

- (a) the person providing the care service did not know, on reasonable grounds, that the other person was mentally disordered;
- (b) the person providing the care service did not know, on reasonable grounds, that there was a relationship of trust with the other person;
- (c) the parties were married to, or in a civil partnership with, each other at the time of the sexual activity;
- (d) a sexual relationship existed between the parties at the time when the relationship of trust between them was constituted.

(Draft Bill, section 35)

(3) Breach of trust in other settings

4.126 We now consider breach of trust offences which do not involve persons living in the same family unit or persons with a mental disorder. Under the existing law these offences are to be found in sections 3 and 4 of the Sexual Offences (Amendment) Act 2000 which make it an offence for a person of 18 or older to engage in sexual activity with a person under 18 where there is a position of trust between them. Position of trust is defined as arising in four specific situations.¹³⁴

4.127 In the Discussion Paper we stated that we accepted the general principles of these offences. There was virtually unanimous agreement with this view among consultees. At the same time we indicated that we had some reservations on points of detail. A key component to the offence in the 2000 Act is that the offence applies only where the party committing the offence is older than 18 and the other party is below that age. The question is whether there should be a cut-off age for the offence. The intention of the 2000 Act was clearly to protect young persons but some people might think that a 24 year-old student is just as vulnerable to pressures from a lecturer as a 17 year-old student. We were inclined to the view that the offence should be restricted to protection of vulnerable young persons but sought comments on whether it should be extended to protect persons older than 18 or to persons of any age. Consultees expressed various opinions on this issue; some wanted no age limit at all, some argued for the age to be lowered to 16, and others called for no change to the present law. We have decided that the age should remain at 18. No clear principle was advanced for changing or removing the age limit. In any case lowering the age to an age below 18 would be incompatible with the requirements of the EU Council Framework Decision of 22 December 2003 on combating the sexual exploitation of children and child pornography.¹³⁵ We were also persuaded by the view expressed by one consultee that

¹³⁴ The situations are (a) where a person looks after people under 18 who are detained in an institution by virtue of an order of a court or under an enactment; (b) where a person looks after people under 18 who are resident in a home in which accommodation is provided by an authority under s 26(1) of the Children (Scotland) Act 1995; (c) where a person looks after people under 18 who are accommodated and cared for in various types of institution (including a hospital, a care or nursing home, a community home or residential establishment); (d) where a person looks after people under 18 who are receiving full time education at an educational institution (2000 Act, s 4).

¹³⁵ 2004/68/JHA. See para 4.111.

applying these offences to people over the age of 18 would be an unnecessary and unjustifiable restriction on adult sexual activity.

4.128 We recommend that:

49. It should be an offence for a person aged 18 or older to engage in sexual activity with another person where:

- (a) the person was in a position of trust in relation to that other person; and**
- (b) that other person was under the age of 18.**

(Draft Bill, section 30)

4.129 In the Discussion Paper we also noted that the 2000 Act had attracted critical comment of the way in which a position of trust is defined.¹³⁶ By listing only four specific positions, the Act can be criticised as being both too detailed yet also far from comprehensive. We pointed to a different approach taken in the Draft Criminal Code,¹³⁷ a 'position of trust' between two persons is defined as including, but not restricted to, cases where:¹³⁸

"(a) the person is the teacher, instructor or religious adviser of that other;

(b) the person provides care services to that other professionally or on behalf of a voluntary organisation;

(c) the person is actively engaged in the management of, works in, or is contracted to provide services to—

(i) a hospital where that other is being given treatment; or

(ii) an establishment where that other lives."

4.130 We asked whether this definition should be adopted for the offences under consideration. Most consultees thought that it should. However, on further reflection we have decided that the current method of defining a relationship of trust should be retained. We were concerned that a definition in general terms might impose criminal liability too widely, which would be undesirable in relation to consenting sexual activity between people over the age of 16. Moreover, one of the difficulties with the present definition is that some of the terms which it uses are out-of-date or inappropriate in a Scottish setting. We have therefore recommended changes to the interpretation to be given to some of the expressions used in defining a position of trust.¹³⁹

¹³⁶ J R Spencer, "The Sexual Offences Act 2003: (2) Child and Family Offences" [2004] Crim LR 347 at 355.

¹³⁷ In the Draft Criminal Code a position of trust is part of the definition of various offences, including unlawful sexual activity with a person under the age of 18 (section 65) and sexual exploitation of a person with a mental disorder (section 69).

¹³⁸ Section 112(2).

¹³⁹ These are contained in section 32 of the Draft Bill.

4.131 We have also recommended some changes of substance. The 2000 Act confines the protective offence in an educational setting to students in full-time education only. We can see no obvious rationale for this restriction and we consider that the offence should also apply to protect students who are receiving part-time education. Another proposed change is in respect of the requirement that the older person 'looks after' the younger person. Under the existing law this expression applies where the older person is regularly involved in caring for, training, supervising, or being in sole charge of persons under 18 generally. We consider that this provision is far too wide in its scope, and could lead to some highly questionable results.¹⁴⁰ We recommend instead that there should be a relationship of trust only where the older person looks after the particular young person with whom he or she has sexual activity.

4.132 We recommend that:

50. A position of trust should be restricted to the situations set out in section 4 of the Sexual Offences (Amendment) Act 2000 but:

- (a) a position of trust can arise in relation to a person receiving part-time education; and**
- (b) one person looks after another person where he or she regularly cares for, trains, supervises or is in sole charge of that other person.**

(Draft Bill, section 31)

4.133 The 2000 Act sets out three defences to the abuse of trust offences.¹⁴¹ These are that the accused (a) did not know, and could not reasonably have been expected to know, that the other person was under 18; (b) did not know, and could not reasonably have been expected to know, that there was a relationship of trust between him and the other person; and (c) was lawfully married to, or the civil partner of, the other person. In the Discussion Paper we proposed that these defences should apply to the reformulated abuse of trust offences which we were proposing. We also suggested that the rationale of the third defence applied equally where at the time the relationship of trust came into being a sexual relationship existed between the parties. Consultees agreed with these proposals.

4.134 We therefore recommend that:

51. It should be a defence to an offence of sexual abuse of trust in recommendation 49 that:

- (a) the accused reasonably believed that the complainant was 18 or older;**
- (b) the accused reasonably believed that there was no relationship of trust with the complainant;**

¹⁴⁰ 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.

¹⁴¹ Section 3(2).

- (c) **that the accused was married to, or in a civil partnership with, the complainer;**
- (d) **that a sexual relationship existed between the accused and the complainer at the time when the relationship of trust between them was constituted.**

(Draft Bill, section 33(1),(2),(4))

Immunity for counselling

4.135 An issue which attracted some attention during the passage of what became the Sexual Offences Act 2003 in England was the position of persons who gave sexual advice or counselling or who supplied contraceptives to children under the age of 16. Concern was expressed that a person who acted in one of these ways might be liable for an offence of aiding and abetting (or in Scotland being art and part in), or inciting the commission of, an offence involving sexual activity with a child. The possibility of such liability conflicted with the social goals of promoting sex education and of reducing the level of teenage pregnancies. The 2003 Act deals with this situation by granting an immunity from criminal liability where a person acts for the purpose of:¹⁴²

- (a) protecting the child from sexually transmitted infection;
- (b) protecting the physical safety of the child;
- (c) preventing the child from becoming pregnant; or
- (d) promoting the child's well-being by the giving of advice.

4.136 This immunity extends to a wide range of offences under the Act but not to any offence which is committed against a person who is 16 or over. It does not apply where the purpose of the person is to obtain sexual gratification or to cause or encourage the commission of the offence. It appears that the onus of proof on the accused in claiming the immunity is merely an evidential, rather than a legal, burden.¹⁴³

4.137 In the Discussion Paper we argued that a similar defence should apply in Scots law. But we also saw no reason for excluding from its scope offences involving sexual activity with young persons aged 16 or over.¹⁴⁴ There was virtually unanimous agreement among consultees with this proposal. In addition to the limits to the exclusion used in English law (where the purpose was to obtain sexual gratification or to cause or encourage the commission of the offence) we would add a further limit, namely the purpose of humiliating, distressing or alarming the other person. We recommend that:

¹⁴² Section 73.

¹⁴³ Card, *Sexual Offences: The New Law* (Revised Edition) (2004), p 17.

¹⁴⁴ We have recommended that the abuse of trust provisions (other than those involving people with a mental disorder) should apply to persons under the age of 18. See paras 4.115; 4.128.

52. (1) There should be an exclusion from liability for incitement or art and part involvement in any offence concerning sexual activity with a child or young person for persons providing counselling, support or treatment on matters of sexual health.

(2) The exclusion from liability does not apply where the person acts with the purpose of:

- (a) obtaining sexual gratification;**
- (b) humiliating, distressing or alarming the child or young person; or**
- (c) causing or encouraging the commission of an offence.**

(Draft Bill, section 39)

Part 5 Offences based on public morality

Introduction

5.1 In this Part we examine various offences which, historically at least, are based or thought to be based on a principle of public morality other than the consent principle and the protective principle. In the Discussion Paper the offences which we considered under this heading were:

- (1) homosexual offences;
- (2) incest;
- (3) public indecency;
- (4) sado-masochistic practices;
- (5) bestiality and necrophilia.

Matters on which we make no recommendations for reform

5.2 In the light of the responses received during consultation we have decided not to make any recommendations for reform in relation to two of these offences.

Incest

5.3 In the Discussion Paper we asked whether, given the scope of the law (both current and that proposed elsewhere in the Discussion Paper) on offences based on the lack of consent by the victim and offences based on the protective principle, there should continue to be a separate offence of incest. Although some consultees considered that there was no need for a separate offence and others were unsure, the majority favoured retaining the offence. However, there was no suggestion from those consultees that the current definition of incest should be expanded. Accordingly we make no proposal for any change to the existing law in relation to the offence of incest.

Bestiality

5.4 In the Discussion Paper we also proposed that the offence of bestiality should be reformulated so that sexual activity with an animal would attract criminal liability only where it was a form of public indecency or of cruelty to animals. The majority of consultees disagreed with this proposal but none argued that the current law should be altered in any way. Again, we make no proposal for change to the law on bestiality.

Homosexual offences

5.5 Offences relating to homosexual conduct are regulated by the common law and by statute. The main common law crime is the prohibition of acts of sodomy between two males. This crime applies to both participants, and the fact that the parties consented is

irrelevant. A significant development of the law on homosexual conduct was section 11 of the Criminal Law Amendment Act 1885, which rendered criminal acts of gross indecency between two or more men. A major change to the law was brought about by section 80 of the Criminal Justice (Scotland) Act 1980, which now appears as section 13 of the Criminal Law (Consolidation) (Scotland) Act 1995. Section 13 contains two main provisions:

"(1) Subject to the provisions of this section, a homosexual act¹ in private shall not be an offence provided that the parties consent thereto and have attained the age of sixteen years.

(5) Subject to subsection (3) above,² it shall be an offence to commit or to be a party to the commission of, or to procure or attempt to procure the commission of a homosexual act –

(a) otherwise than in private;

(b) without the consent of the parties to the act; or

(c) with a person under the age of sixteen years."

5.6 Despite the wording of these provisions, it is generally assumed that the common law offence of sodomy still exists.³ The 1885 Act offence of gross indecency between males was abolished by the 1980 Act, though it is likely that the interpretation of 'gross indecency' as used in section 13 of the 1995 Act will draw on cases decided in relation to the earlier statutory offence.⁴

5.7 It should be noted that both at common law and under statute there have been no offences which specifically make female homosexual conduct criminal.⁵

5.8 In the Discussion Paper we stated our view that there is no need for any offence which deals with homosexual conduct. Where homosexual conduct involves the lack of consent of one of the parties, it would fall within the scope of such offences as rape, sexual assault and sexual coercion. Offences which fall within the scope of the protective principle, such as sexual activity with children under 13 and with children under 16, or abuse of trust within family units, or sexual activity involving a position of trust, all apply to homosexual sexual activity.

5.9 We also considered that it is wrong in principle that offences should be based on sexual orientation rather than on forms of wrong. We therefore proposed that all existing offences which relate to homosexual conduct should be removed. For the avoidance of doubt, this would include the abolition of any existing common law crimes. The statutory

¹ A homosexual act is defined as "sodomy or an act of gross indecency or shameless indecency by one male person with another male person" (s 13(4)). The crime of shameless indecency no longer exists as a common law offence (*Webster v Dominick* 2005 1 JC 65). The reference to shameless indecency did not appear in the 1980 Act. The definition used there was "sodomy or an act of gross indecency by one male person with another male person."

² Subsection (3) concerned the nature of consent given by persons suffering from 'mental deficiency'. It was repealed by the Mental Health (Care and Treatment) (Scotland) Act 2003 (sch 5, part 1).

³ Gordon, vol II, p 519; Gane, p 123.

⁴ *R v Hunt* [1950] 2 All ER 291; *R v Preece* [1977] QB 370.

⁵ Some types of female homosexual conduct might constitute the offence of lewd, indecent or libidinous behaviour where one of the participants was under the age of 16.

offences are contained in section 13 of the 1995 Act. However, two of the offences in this section, namely those relating to procuring and trading in prostitution and brothel keeping, deal with matters beyond the scope of this project and should be retained.⁶

5.10 There was virtually unanimous agreement to these proposals among consultees.⁷ We recommend that:

- 53. Any existing common law offence relating to homosexual conduct should be abolished.**

(Draft Bill, section 40(a))

- 54. (Except for the provisions relating to procuring and related offences), section 13 of the Criminal Law (Consolidation) (Scotland) Act 1995 should be repealed.**

(Draft Bill, section 44(2); schedule 4)

Public indecency and sexual exposure

5.11 Prior to the decision of the High Court of Justiciary in *Webster v Dominick*,⁸ various types of sexual practice were characterised as 'shameless indecency' and prosecuted as such. In that case the Court held that there was no offence of shameless indecency. Rather, there are two separate types of offence involving indecent conduct. One is where the conduct is aimed at a specific victim; the other where the conduct causes public offence. As regards the second of these offences the Court emphasised that the crime was a public order offence and although it might involve sexual activity, the essence of the offence is that the conduct affronts public sensibility. As the offence of public indecency is not, as such, a sexual offence, we do not propose to make recommendations in relation to it.⁹

5.12 Prior to *Webster v Dominick* various types of sexual conduct had been treated as shamelessly indecent and therefore criminal. One was (consenting) sexual conduct between family members which did not fall within the scope of the law on incest.¹⁰ In Part 4 we have made recommendations for an offence of sexual activity involving abuse of trust within a family unit which would deal with this type of conduct.¹¹ In *Webster v Dominick* the Court pointed out that instances of indecent conduct directed against a specific victim, formerly categorised as shameless indecency, would tend to fall within the scope of some

⁶ 1995 Act, s 13(9)-(11). In the Discussion Paper we proposed that those subsections should be repealed but re-stated as part of wider offences which apply to heterosexual conduct. However, as we are not considering procuring and related offences in this project our approach now is for the relevant provisions of section 13 to be retained.

⁷ Only one consultee expressed opposition to them.

⁸ 2005 1 JC 65.

⁹ We are not to be understood as endorsing what the Court said of public indecency in *Webster v Dominick*. This aspect of the Court's decision has been subject to strong criticism. See, for example, J Chalmers and C Gane, "The aftermath of shameless indecency" (2003) 8 SLPQ 310; J Burchell and C Gane, "Shamelessness Scotched: The Domain of Decency after Dominick" (2004) 8 Edin L Rev 231.

¹⁰ See for example, *R v HM Advocate* 1988 SLT 623 (sexual activity, short of intercourse, between a man and his 16 year-old daughter); *HM Advocate v K* 1994 SCCR 499 (sexual intercourse between a man and his foster daughter who was over the age of 16).

¹¹ Paras 4.110-4.120.

other offence, including lewd, indecent or libidinous conduct. We have also recommended the introduction of several offences to replace that crime.¹²

5.13 Our view is that these proposals cover most of the situations in which 'indecent' sexual conduct, as opposed to public order conduct, should attract criminal liability. However, there is one situation which we believe requires further consideration. This is indecent exposure. The exposure of a sexual organ can occur both as conduct directed toward a specific victim and as a public order offence (such as nude sunbathing or streaking). The offence of public indecency would deal with the second but it is unclear what offence applies to the first.¹³ 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.¹⁴

5.14 We proposed that it should be an offence for someone to expose his or her genitals with the purpose of causing alarm and distress. There was broad agreement with this proposal among consultees. One consultee argued that the existing law of breach of the peace was sufficient to deal with this conduct. However, our view is that sexual exposure is a specific type of wrong and should be labelled as such. A number of consultees argued that there should be criminal liability only where the accused acted for the purpose of obtaining sexual gratification. We do not agree. Such a restriction would exclude cases where the accused's purpose in exposing his genitals was to demean or humiliate the victim.

5.15 We are concerned, however, that the offence should be treated as a sexual offence and not as one relating to public order or public decency (as where a man exposes his penis in a public place in order to urinate). We are therefore of the view that for purposes of the offence the exposure should itself be sexual in nature and that the test for what counts as sexual should be the same as that used throughout the Bill, namely what the reasonable person would regard as sexual.

5.16 Accordingly we recommend that:

55. It should be an offence for a person to expose his or her genitals in a sexual manner with the intention of causing alarm or distress to someone else or being reckless as to causing these effects.

(Draft Bill, section 7(1), (2))

5.17 A possible concern about the scope of this provision is that it might extend to body exposure done in the course of a theatrical performance. Some instances of exposure in the course of a play might escape liability by virtue of the requirement that the exposure must be sexual in nature or that there must be intention or recklessness as to causing alarm or distress. But not all would. We have noted the provisions of the Theatres Act 1968 which

¹² See para 4.86.

¹³ Gordon, vol II, p 532.

¹⁴ The Home Office Review Group stated that: "We were impressed by the evidence of research amongst victims that it can indeed be a very traumatic experience. It is not just the unpleasantness of the experience: in incidents where the exposed penis is erect or being masturbated, the effect is to induce fear, shock, disgust and a powerful fear of rape or death." (Setting the Boundaries, para 8.2.3.)

sets out a general policy that actors are exempt from prosecution for common law offences of indecency if what they did was in the course of a performance of a play and conformed to the directions of the director of the play.¹⁵ The same policy has been expressed in various statutes.¹⁶ We are of the view that this policy should apply in respect of the proposed offence of sexual exposure.

5.18 We therefore recommend that:

- 56. It should be a defence to a charge of sexual exposure that the accused's actings were done in the performance of a play and conformed to the directions of the presenter or director of the play.**

(Draft Bill, section 7(3), (4))

Sado-masochistic practices

5.19 One of the guiding principles for this project is the idea that sexual practices involving consent should not, unless there are weighty overriding reasons, be subject to legal sanction.¹⁷ Difficult issues arise when applying this general principle to sexual activities which consist of the infliction or receipt of acts of violence (usually referred to as sado-masochistic practices). In general terms the Scots law of assault treats the consent of the victim as irrelevant. The essence of the crime is that the accused attacked another person with an 'evil' intent, such as to cause injury or bodily harm. In some situations, for example contact sports played according to the rules of the game, such evil intent is said to be absent. In addition, indecent assaults require the lack of consent by the victim. In *Smart v HM Advocate*,¹⁸ it was held that 'sexual touchings' did not constitute an offence where the victim consented. However, it is not clear whether the consent of the victim is relevant where the assault involves a more serious invasion of the victim's body. In English law it has been held that consent to participating in sado-masochistic practices was not a defence to charges involving the infliction of serious bodily harm,¹⁹ but may be to lesser types of assault.²⁰

5.20 We must stress that our current terms of reference are not concerned with general issues about consent in the law of assault. However, we do consider that conduct done for purposes of sexual gratification does fall within the scope of this project. It is true that most analysis of sado-masochistic practices is made in the context of the general crime of assault rather than as part of the law on sexual offences. This approach has the consequence that

¹⁵ Theatres Act 1968, s 2 (as read with s 18).

¹⁶ See eg Indecent Displays (Control) Act 1981 which exempts from the Act anything included in a performance of a play (s 1(4)(d)). The offence of displaying obscene material in a public place under the Civic Government (Scotland) Act 1982, s 51 does not apply to anything included in a performance of a play.

¹⁷ See paras 1.25-1.27.

¹⁸ 1975 JC 30 at 33.

¹⁹ *R v Brown* [1994] 1 AC 212, a decision of the House of Lords by a 3-2 majority. The activities of the accused in this case consisted of maltreatment of the genitalia, ritualistic beatings, branding and the infliction of injuries which resulted in the flow of blood and which left scars. All of the acts were consensual, and were conducted in private and for pleasure. In a sequel case of *Laskey, Jaggard and Brown v United Kingdom* (1997) 24 EHRR 39, the European Court of Human Rights held that the prohibition of the activities of the appellants did not infringe article 8 of the ECHR (right to respect for private life).

²⁰ See, for example, *R v Wilson* [1997] QB 47 where a man was acquitted on a charge of assault causing actual bodily harm where, at his wife's request, he had used a hot knife to brand his initials on her buttocks. The Court of Appeal expressly stated that there was no requirement of public policy or public interest in attaching criminal liability to the accused's conduct.

principles appropriate to reform of sexual offences, such as respect for sexual autonomy and decisions based on the free choice of the parties, get lost sight of. For those reasons we argued in the Discussion Paper that a better perspective is to locate these practices as a form of sexual conduct and to ask whether there are any appropriate limiting factors on the exercise of sexual autonomy where assault on other persons is involved.²¹ We stressed that the situation under consideration is where there is genuine consent given by all the parties to the specific activities in question. In the Discussion Paper we proposed that the offence of assault should not be constituted by any activity to which all of the parties have given their consent for purposes of sexual gratification.

5.21 Furthermore we accepted that this exemption from the offence of assault could not apply to all forms of violent conduct. Clearly conduct which was intended to cause death should not escape criminal liability. Accordingly in the Discussion Paper we asked whether the proposed exemption should apply to conduct which resulted in serious injury or was likely to result in serious injury.

5.22 The proposal to allow an exemption for acts done for the purpose of sexual gratification from liability from assault received overwhelming support from consultees, though some thought that the existing law already achieved this result. By contrast there was a divergence of views as to the limits to any exemption. Some consultees would allow the exemption from assault to apply where there was a risk of serious injury provided that the parties had expressly agreed to this risk. Others proposed a wider scope for the proposed exemption, namely that a charge of assault should be available only if the activities resulted in permanent or disabling injury.

5.23 We have without any hesitation reached the conclusion that there should be an exemption from the law of assault for activities to which all parties have given their consent for purposes of sexual gratification. This position seems to reflect current understanding but we are of the view that the matter should be expressly stated in law to remove any doubt. However, we accept that there must be limits to this exemption. This is ultimately a question of social policy. A balance has to be struck between the protection of a person's physical integrity and the promotion of sexual autonomy. We believe that that balance is best achieved by the requirement that a violent act done with consent and for the purpose of providing sexual gratification is not a crime if it is unlikely to result in serious injury to the person on whom the violence is inflicted. The exemption should apply where an attack does in fact lead to serious injury but that outcome was unlikely; conversely, there would be no exemption where the parties took the risk of an attack which might lead to serious injury, even though in the event no such injury occurred. The question whether a particular attack was likely to lead to serious injury is to be answered by applying the test of what a reasonable person would consider to be the likely outcome of an attack of that nature.

5.24 A key element in defining the exemption is that the attack must have been done for the purpose of giving sexual gratification to one or other (or both) of the parties to the act. We envisage that the exemption is to be analysed in terms of two parties, one making the attack and the other receiving it. If neither of these parties has in mind the purpose of his or her achieving sexual gratification, the exemption does not apply. Thus an attack carried out

²¹ The characterisation of sado-masochistic practices as sexual rather than violent in nature is discussed in L Bibbings and P Aldridge, "Sexual Expression, Body Alteration, and the Defence of Consent" (1993) 20 J Law and Society 356, and N Bamforth, "Sado-Masochism and Consent" [1994] Crim LR 661.

for the purpose of giving sexual gratification to a third party onlooker would not be exempt from a charge of assault unless one of the parties to the attack itself had his or her own sexual gratification as its primary purpose. In order to ensure that the purpose of providing such gratification is present it is a requirement for the exemption to apply that both parties agree that this is purpose of the attack.

5.25 The parties to the attack must give their consent to it but, as noted earlier, consent in this context does not refer to the idea used in our recommendations for reform of the law of rape and other sexual assaults but rather to the concept of consent which is used in the law of assault.

5.26 We further recommend that both parties must be aged 16 or over. We did not consult on this issue but we consider that the recommendation is consistent with the general rules about the capacity to give consent.²²

5.27 Accordingly we recommend that:

57. It should not be the crime of assault for one person to attack another where:

- (a) both parties are 16 or older;**
- (b) 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;**
- (c) the person receiving the attack consents to its being carried out; and**
- (d) the attack is unlikely to result in serious injury.**

(Draft Bill, section 37)

Necrophilia

5.28 It is not entirely clear what offence is committed where a person has sexual contact with a dead body.²³ In the Discussion Paper we noted that the Draft Criminal Code contained a more general provision on unlawful interference with human remains,²⁴ which would apply to any form of sexual contact with a dead body. We saw merit in the introduction of such an offence to deal with sexual contact with a dead body. Our proposal to this effect was accepted by those consultees who responded to it. As the proposed offence covers more than sexual activity, it is beyond the scope of this project.

²² In Part 7 we propose that the exemption from criminal liability should have retrospective effect. See paras 7.5-7.6.

²³ In English law it is an offence for a person to sexually penetrate a corpse (Sexual Offences Act 2003, s 70).

²⁴ Section 104: "A person who, without reasonable excuse, interferes with human remains in such a way as to be likely to cause offence to a reasonable person is guilty of the offence of unlawful interference with human remains."

5.29 However, we see the advantage of a general offence of this nature. We therefore recommend that:

- 58. Consideration should be given to the creation of an offence of unlawful interference with human remains.**

Part 6 Evidence and sexual offences

Introduction

6.1 In this Part we consider aspects of the evidential requirements for proving rape and other sexual offences. In the Discussion Paper we gave particular attention to two topics, namely corroboration in the context of sexual offences and sexual history evidence, but we also took brief note of the wider question of the evidence of the bad character of accused persons. After consultation we have decided not to make any recommendations as to reforming the law of evidence in relation to the offences which are within the scope of this project. In saying this we should not be understood as advancing the view that the law of evidence as it relates to sexual offences does not require any examination or assessment. Rather, as we explain below, our conclusion is based on two main fundamental considerations: first, many of the topics which we considered (such as mutual corroboration and character evidence) are better suited for reform across the whole spectrum of criminal offences and not solely in the context of sexual offences; secondly, for topics which are specific (or mainly so) to sexual offences (such as sexual history evidence), the required detailed and thorough analysis cannot be made within the time-scale of this project.

Corroboration and sexual offences

6.2 In the Discussion Paper we examined how the rules on corroboration applied to cases of rape and other sexual offences. We then raised three issues about the possible reform of those rules. After the close of the period for response to the Discussion Paper we identified another aspect of corroboration which may have a particular bearing on the proof of some of the offences which we consider in this Report and on which we now offer some comment. The issues for discussion are:

- (1) whether corroboration should be abolished in respect of proof of sexual offences;
- (2) whether the law on corroboration by distress should be set out in statute;
- (3) whether the law on mutual corroboration (the so-called *Moorov* doctrine) should be reformed in respect of proof of sexual offences; and
- (4) the implications of a rule or rules that corroboration is not required in respect of procedural or incidental facts or of each step of a single course of acting.

Is corroboration necessary for sexual offences?

6.3 In the Discussion Paper we presented a number of arguments for and against removing the corroboration requirement for sexual offences, or at least certain types of sexual offence. Although we did not reach a concluded view on the matter, we were inclined to adopt the position that there should continue to be a requirement of corroboration for proof of guilt in sexual offences. In order to gauge the views of consultees, we posed the question whether corroboration should be abolished for proof of sexual offences, and if so for which

offences. The vast majority of our consultees, ranging over a wide spectrum of interests, rejected the idea that corroboration should be removed entirely,¹ though two respondents suggested that it should not apply in proving the mens rea of rape and similar offences, and two other respondents were of the view that corroboration should not be necessary where the victim of a sexual offence is a child.

6.4 Consultees who opposed abolition of the corroboration requirement gave several reasons for their view. One reason, stressed by many consultees, was the risk of miscarriage of justice if a conviction could proceed on the basis of uncorroborated evidence. A further point was stressed by several groups representing the interests of victims of sexual attacks: allowing convictions in cases where there was no corroborating evidence could result in successful appeals, which in turn might lead to a general perception that all convictions based solely on the word of the complainer are unsound. The overall effect could be to discourage victims from raising allegations that they had been sexually assaulted.

6.5 A fundamental issue, which we stressed in the Discussion Paper, is whether it makes sense to change the law on corroboration solely in respect of sexual offences. If the requirement for corroboration is to be altered or abolished, then that should be considered across the whole range of criminal offences. Moreover the corroboration requirement cannot be isolated from other aspects of the Scottish criminal justice system, such as the rule that a jury verdict of guilty can be based on 8 jurors out of a jury of 15 finding for the accused's guilt.² For these reasons we do not favour having special rules, solely for sexual offences, which remove the requirement for corroboration for mens rea or for child victims.

Corroboration by distress

6.6 The doctrine of corroboration by distress applies in other parts of the criminal law of evidence, but in practice it has particular significance in relation to proof of sexual offences. To take the example of the current law of rape, the Crown must prove beyond reasonable doubt (i) that the accused had sexual intercourse with the complainer without her consent (the actus reus) and (ii) that the accused knew that she was not consenting or was recklessly indifferent to whether she consented or not (the mens rea). In other words, there must be corroborative evidence of the actus reus and the accused's mens rea. In the vast majority of cases the accused's mens rea can only be inferred from the facts of the case.³ In talking of proof (and corroboration) of the accused's mens rea, what is meant is that there must be evidence of facts from which the inference of the accused's state of mind can be drawn.

6.7 It has long been accepted that evidence from a third party that the complainer was distressed shortly after the time of the alleged rape (known as de recenti distress) can provide corroboration that the complainer had experienced a distressful event shortly

¹ Only seven of the 52 consultees who responded to this issue favoured abolition of corroboration, though some expressed uncertainty.

² In the Discussion Paper we pointed out that in some legal systems, such as England and Wales, which do not have a requirement of corroboration, a jury cannot return a verdict of guilty unless at least 10 members of a jury of 12 agree that verdict.

³ *Spendiff v HM Advocate* 2005 SCCR 522: "The characterisation of mens rea as an inferential fact in a common law crime is hardly surprising or unusual. It can seldom be anything else." (Lord Penrose at 534.)

before.⁴ However, in itself, the complainer's distress cannot corroborate the identity of accused or the complainer's account of the sexual conduct alleged to have taken place. But if the identity of the accused can be corroborated and there is independent evidence, for example medical evidence, that sexual intercourse took place, evidence from a third party of the complainer's de recenti distress can be significant. If the complainer's evidence was that the accused used force (or the threat of force) in order to have sexual intercourse, evidence of her de recenti distress can corroborate the use of force and the consequent absence of her consent.⁵ In addition, because the accused had resorted to force, evidence of the complainer's de recenti distress could corroborate the inference from her evidence that the accused knew that the complainer did not consent. Put another way, where force is alleged, evidence of the complainer's distress *indirectly* corroborates the mens rea of the accused.⁶

6.8 A difficulty arises when the complainer does not allege that the accused used or threatened force in order to have sexual intercourse with her. Instead she maintains simply that she did not consent to having (or continuing to have) sexual intercourse with the accused. Here evidence of the complainer's distress *after* the alleged rape corroborates her evidence that she found sexual relations with the accused distressful and that she did not consent to the sexual relationship. But in the absence of allegations of violence to compel her to have sexual intercourse, it has been doubted whether evidence of the complainer's distress after intercourse has taken place can amount to corroborative evidence from which it can be inferred that when intercourse began the accused knew that (or was reckless as to whether) the complainer was not consenting.⁷

6.9 It is thought that as a matter of logic and principle there is no reason why the complainer's de recenti distress cannot corroborate the accused's mens rea.⁸ It depends on what the complainer alleges and the specific context in which the distress is said to have arisen. For example, the complainer may allege that the accused began to have sexual intercourse with her while she was asleep. Evidence of her distress is consistent with the complainer's account of waking up to discover the accused having sexual intercourse and therefore can corroborate her statement that she did not consent to sexual intercourse because she was asleep. As there is now corroborative evidence that she was asleep, there is corroborative evidence of facts from which the jury can infer that the accused knew she was asleep and was therefore unable to consent to having sexual intercourse with him. In this way de recenti distress can indirectly corroborate the accused's mens rea of rape.⁹

⁴ *Smith v Lees* 1997 JC 73 at 80 (Lord Justice General Rodger).

⁵ *Ibid.*

⁶ Before the *Lord Advocate's Reference (No 1 of 2001)* 2002 SLT 466 the reasoning in respect of corroboration of the accused's mens rea was largely implicit in the case law as force or the threat of force constituted part of the actus reus of the crime of rape. If force could not be established the crime was not rape: if it was established, the accused's mens rea would be readily inferred.

⁷ *McKearney v HM Advocate* 2004 JC 87 (Lord Justice Clerk Gill at 91). Lord Gill's views are clearly obiter.

⁸ J Chalmers, "Distress as Corroboration of Mens Rea" 2004 SLT (News) 141. For a contrasting view see M E Scott QC, "Redefined Rape and the Difficulties of Proof" 2005 SLT (News) 65.

⁹ *Spendiff v HM Advocate* 2005 SCCR 522. It should be noted that Lord Justice Clerk Gill was a member of the Court in this case although the opinion of the Court was given by Lord Penrose. See also *Fox v HM Advocate* 1998 JC 94 (a clandestine injury case where force was not used as the victim was asleep: this would, of course, now be treated as rape). It is open to the accused to argue that he honestly believed that the complainer would have consented if she had been awake, for example, if she had agreed to have sexual intercourse with him shortly before she went to bed and fell asleep. In *McNairn v HM Advocate* 2005 SLT 1071, the trial judge took the view that evidence of the accused's distress could not corroborate the complainer's account that she had been asleep or apparently asleep at the time of the intercourse and could not corroborate the accused's mens rea. On appeal, under reference to *Spendiff*, the Court rejected the proposition that evidence of distress could

6.10 A similar argument is applicable where the complainer's evidence is that she was incapable of consenting because she was insensible as a result of drink or drugs and was subsequently distressed to find the accused having, or having had, non-consensual sexual intercourse with her. It is thought that the requirement of corroboration of the accused's mens rea would also be satisfied by the complainer's de recenti distress where she alleges that she told him that she did not wish to have sexual intercourse with him but he did so, or continued to do so, without having to use force or threaten to use force against the complainer.

6.11 If de recenti distress can corroborate allegations of force and therefore absence of consent and the inference of the accused's mens rea, it is difficult to see how it cannot corroborate the complainer's evidence that she was incapable of consenting (because she was asleep or insensible through drink or drugs) or had expressly refused consent and the consequent inference that the accused knew that she was not consenting when he had sexual intercourse with her.

6.12 In the Discussion Paper we raised the issue whether reform is needed of this part of the law of evidence. We noted that it would be possible to restate the law of corroboration by distress in statutory form. Such restatement could clarify issues about which there exists doubt or misunderstanding, for example whether distress can corroborate evidence of the accused's mens rea in cases where, in the absence of evidence of force, the complainer alleges that she did not consent. However, we also pointed out that the common law on this topic continues to develop and it might be thought preferable to leave it to the courts to adapt the rules on distress evidence in the light of the facts and circumstances of particular cases.

6.13 There was a division of view among consultees on this issue, with a slight majority in favour of a legislative statement of the law. However, some of those who supported statutory rules made the point that care would have to be taken to avoid giving the erroneous message that where a complainer displayed distress only some time after sexual contact or did not show any outward signs of distress, then such a complainer must have consented to the sexual activity. Other consultees who supported legislative restatement in principle noted that there would have to be further consideration, and consultation, on the detail of the proposed rules.

6.14 We have come to the conclusion that at least for the time being the rules on corroboration by distress should remain governed by the common law. Given the present state of the law any statutory rule would have to be in general terms, confirming that distress can in certain circumstances corroborate evidence of the actus reus and the mens rea of rape and other sexual attacks. Whether distress does have this effect in any particular case depends very much on the context in which the distress occurred and this in turn depends on the facts and circumstances of each case. We therefore take the view that the exact scope of any rule on distress as corroboration is best left for the courts to develop.

'Mutual' corroboration: the Moorov doctrine

6.15 There is a general rule of the law of evidence that in certain circumstances where a person is charged with a series of offences, evidence, even from a single source, in respect

not in any circumstances be relevant to the issue of mens rea but did not rely on such evidence for the purpose of the appeal.

of any one of those offences can corroborate the evidence in relation to another of them. The rule is not confined to sexual offences but an example of the rule would be where B alleges that she was raped by A. The prosecution cannot go ahead unless there is corroborative evidence of the actus reus and A's mens rea. But if, for example, A is accused of raping C as well as B, then the *uncorroborated* evidence of C that she was raped by A may corroborate B's evidence that she was raped by A and vice versa. This is known as the *Moorov* doctrine. In *Moorov v HM Advocate*, Lord Justice General Clyde explained when the doctrine could be used:¹⁰

"Before the evidence of single credible witnesses to separate acts can provide material for mutual corroboration, the connexion between the separate acts (indicated by their external relation in time, character, or circumstance) must be such as to exhibit them as subordinates in some particular and ascertained unity of intent, project, campaign, or adventure which lies beyond or behind – but is related to – the separate acts. The existence of such an underlying unity, comprehending and governing the separate acts, provides the necessary connecting link between them, and becomes a circumstance in which corroboration of the evidence of the single witnesses in support of the separate acts may be found – whether the existence of such underlying unity is established by independent evidence, or by necessary inference from the evidence of the single witnesses themselves, regarded as a whole."

6.16 Thus before the doctrine applies B and C must have been the victim of acts by the accused which are similar in the sense that they demonstrate an underlying unity, for example because of the locus or the nature of the assault. In addition the two acts must normally be close in time. As the two acts are being treated as though they were, in effect, a single course of criminal conduct, both charges must be made on the same indictment.

6.17 It will be clear that the scope of the doctrine is narrow. The accused's acts must take the same or similar form in respect of each victim. The need for the acts to be close in time means that it might not be possible to use the *Moorov* doctrine in, for example, cases of child sexual abuse where there are gaps of several years between the incidents of alleged abuse on the children concerned. Nor can the doctrine apply where the victim of the related offences is the same person. Finally, where the accused has been previously convicted of a similar offence that conviction cannot be used to establish corroboration by utilising the *Moorov* doctrine.¹¹

6.18 Even within its narrow compass, the *Moorov* doctrine can be useful in establishing corroboration of complainers' evidence that they were the victims of rape and other sexual offences. It seems unlikely that the doctrine will be further extended by judicial development.¹² The issue for consideration is whether and in what ways the *Moorov* doctrine should be reformed. Unlike corroboration by distress, which in practice is used mainly in relation to sexual offences, the *Moorov* doctrine has been applied over a wide range of offences. In the Discussion Paper we asked whether there should be changes to the existing law on the *Moorov* doctrine but we also stated our view that if reform is required, it should not be done only in the context of sexual offences. Although some consultees thought that there were aspects of the law on mutual corroboration which should be re-

¹⁰ 1930 JC 68 at 73.

¹¹ For discussion of possible changes to the law relating to the use of an accused's previous convictions as evidence see paras 6.34-6.37.

¹² See for example *Johnstone v HM Advocate* 2004 SCCR 727, 732 (para 8) (Lord Justice General Cullen).

examined, including the view that the *Moorov* doctrine should be abolished, there was virtually no support for the idea of reforming the law solely in respect of sexual offences. Accordingly we make no proposals for consideration of the *Moorov* doctrine in the context of the present project.

Corroboration in respect of procedural or incidental facts or of different parts of a course of acting

6.19 We now examine a further rule, or rules, on corroboration which we did not consider in the Discussion Paper but which may have implications in respect of the proof of some of the offences on which we make recommendations elsewhere in this Report. The law of evidence draws a distinction between essential or crucial facts (*facta probanda*) and various types of non-essential facts. In criminal trials an important example of this second category are procedural (or incidental) facts. The rule is that whereas corroboration is required in respect of essential facts, there is no need to corroborate procedural or incidental facts. What is less certain is which facts are treated as being procedural or incidental in nature. There is some old authority that where a crime is committed under aggravating circumstances, while the main elements of the offence must be corroborated, no corroboration is needed to prove the aggravation.¹³

6.20 In the context of sexual offences the most obvious application of this rule is in respect of indecent assault, which has been described as an "assault aggravated by indecency in the manner of its commission."¹⁴ The rule on corroboration has the effect that while corroboration is needed in respect of proof of the assault itself, none is required of the indecency. For example, where A is charged that he pushed B to the ground and touched B's breasts, provided that there is corroborating evidence of the pushing, A can be convicted of indecent assault solely on the basis of B's evidence as to the touching. We are not convinced that this result is entirely satisfactory. In Part 3 we stated our view that the current law on indecent assault fails to capture the wrong involved in conduct where someone is the victim of a sexual attack (for example, penile penetration of the victim's anus). Characterising the sexual element of the attack as an assault under aggravation fails to capture the violation done to the victim's sexual integrity. Furthermore, it is questionable whether the accused should face not only conviction but also the consequent notification requirements on the basis of uncorroborated evidence as to the sexual element of the attack.¹⁵ Where A is charged that he pushed B to the ground and penetrated her vagina with his fist, the core element of the offence is the penetration. Yet applying the rule has the effect that this element is merely an aggravation and does not require corroboration.

6.21 Furthermore it is not entirely clear why aggravating circumstances should not be corroborated. In *HM Advocate v Davidson*,¹⁶ the court suggested that aggravating circumstances would be difficult to prove if corroboration was required but this argument can apply just as much to the essential facts of many offences. A more fundamental question is

¹³ *HM Advocate v Davidson* (1839) 2 Swinton 447 (charge of theft by housebreaking: fact that house was locked need not be corroborated); *HM Advocate v Cameron* (1841) 2 Swinton 630 (charge of theft by opening lockfast places: no corroboration required that chest contained the goods stolen).

¹⁴ *Grainger v HM Advocate* 2005 SCCR 175, 179 (Lord Justice Clerk Gill).

¹⁵ See Sexual Offences Act 2003, Sch 3, para 40 which lists 'indecent assault' as one of the offences conviction for which triggers the notification requirements. Here, as with other statutory references to the offence, indecent assault is treated as an offence in its own right and not as an assault with aggravating circumstances.

¹⁶ (1839) 2 Swinton 447, 448 (Lord Justice Clerk Boyle).

why all aggravating circumstances should be treated as procedural facts.¹⁷ We accept that there are many aspects of the rule about corroboration of aggravating circumstances which are problematic but we are not making any proposals for its reform in this project as the rule has a much wider scope than that of sexual offences. However, we wish to make one comment on the application of the rule to the sexual assault offences which we have recommended in Part 3.¹⁸ One of the problems of classifying the sexual element in indecent assaults as procedural only is that this so-called aggravating fact is at the core of the offence. Indeed, that is the basis for our recommendation on the offence of sexual assault. If our recommendations on rape and sexual assault were to be implemented, then in our view corroboration would be required to prove the act of penetration, touching etc specified in the charge against the accused. At the same time where rape or a sexual assault is committed with aggravating circumstances, then the rule that no corroboration is required for proof of those circumstances would apply.¹⁹

6.22 There is another rule on matters for which corroboration is not required.²⁰ Where an offence consists of a single course of conduct involving a number of acts there is no need to corroborate each act. In *Campbell v Vannet*,²¹ A was charged with striking B, causing her to fall to ground, seizing hold of her, and swinging her about. In addition to B's evidence, there was evidence from another witness that A had struck B with his hand but there was nothing further in respect of the other actings. It was held that there was sufficient evidence to convict A on the entire charge. The Court justified this conclusion on the basis that the case did not involve two distinct incidents and the matter was "all of a piece".²² It is not entirely clear what principle the Court is invoking in this argument but a similar approach has been taken in a case involving sexual touching. In *Stirling v McFadyen*,²³ A was charged with lewd, indecent or libidinous practices against B (a 9 year-old girl) in that he induced B to put her hand inside his open trousers and to touch his penis. In addition to B's evidence, evidence was led that when the allegations were put to him, A had responded by saying that he fooled about with children. The court held that this admission was sufficient to corroborate B's evidence but the court also made more general comments that not every item in a charge of assault required corroboration.²⁴ A contrasting case is *Smith v Lees*.²⁵ Here the charge was that A used lewd, indecent or libidinous practices towards B (a girl aged 13) by placing his hand on hers and causing her to handle his naked penis. In this

¹⁷ The distinction between essential and non-essential facts has been questioned by commentators. See, for example, Davidson, *Evidence* (2007), p 669: "There appears to be no satisfactory basis on which to distinguish procedural from crucial facts."

¹⁸ See paras 3.36-3.47.

¹⁹ A possible example is a sexual offence committed in racially aggravating circumstances as defined in the Crime and Disorder Act 1998, s 96(2). The 1998 Act repeats the common law rule that this type of aggravation does not require corroboration.

²⁰ This rule may simply be a different formulation of the rule just discussed. However, we treat it as a separate rule as the authorities for each are different and each has a separate logic.

²¹ 1998 SCCR 207.

²² *Ibid* at 209B.

²³ 2000 SCCR 239.

²⁴ *Ibid* at 242A-B: "Counsel's submission was the factum probandum in this case had to be corroborated specifically and this was not done. If what this means is that there must be specific evidence of each fact in a narrative of indecent assault, then plainly we cannot agree with that proposition. The question is whether there is corroborated evidence of an indecent assault. If so then it is not necessary to corroborate each individual item."

²⁵ 1997 JC 73.

case the court expressly pointed out that the placing by A of his hand on B and causing B to touch his penis were both crucial facts which required corroboration.²⁶

6.23 Again, the exact nature and scope of this rule is uncertain. While this rule may require consideration as to possible reform, for the same reasons as apply to the rule about corroboration of aggravating circumstances, we do not explore that issue here. However, we wish to express our views about the possible application of the rule to the new offence of sexual assault which we have recommended in Part 3.²⁷ At present it seems to be the law (though the matter is not entirely beyond doubt) that where, for example, as part of one course of acting A penetrates with his penis B's anus and her mouth, and also digitally penetrates her vagina, not every element of this charge requires to be corroborated. If that is so, then we would expect that the same rule would apply to a charge of our proposed offence of sexual assault which narrated such a course of conduct.

Sexual history evidence

6.24 It is a striking feature of sexual offence trials, and rape trials in particular, that there is often a sense of the victim being on trial as much as the accused.²⁸ If the accused claims in defence that the complainer consented to the act, then questioning in court is focussed upon whether the complainer was likely to have consented. The complainer may face cross-examination aimed at showing that although she claims she did not consent, she did in fact consent or her behaviour was such that it was reasonable for the accused to believe that she consented. This is likely to involve adducing evidence which intrudes upon the complainer's private life.

6.25 It is clear that the law has to give due weight to the interests of the complainer in a sexual offence trial.²⁹ Yet it is inherent in an adversarial system of criminal justice that, by pleading not guilty, inevitably the accused is challenging the truth of the complainer's allegations. In cross-examination of the complainer, counsel for the defence can seek to undermine the reliability of her testimony and suggest that the complainer is not to be believed. But as a general rule an accused cannot impugn the credibility of a Crown witness by producing collateral evidence of her character, for example extracts of previous criminal convictions. Similarly, the Crown cannot attack the credibility of defence witnesses by collateral evidence of their bad character. In Scots law, an accused is not obliged to give evidence. If he should choose to do so, however, an accused is also protected by the rule

²⁶ 1997 JC at 79E; 107F-G; 109H; 112A-B. The issue in this case was whether B's distress corroborated her evidence as to each of these facts. The court stressed that this was a difficult issue on the facts of the case. In these circumstances, it would have been surprising, if corroboration were not required of any part of the charge, that the court made no mention of it.

²⁷ See paras 3.36-3.47.

²⁸ This was noted by, for example, the Heilbron Committee, *Report of the Advisory Group on the Law of Rape*, Cmnd 6352 (1975), at para 91: "we have come to the conclusion that, unless there are some restrictions, questioning can take place which does not advance the cause of justice but in effect puts the woman on trial." It is also supported by research such as G Chambers and A Millar, *Prosecuting Sexual Assault* (Scottish Office Central Research Unit, 1986) and B Brown, M Burman and L Jamieson, *Sex Crimes on Trial: The Use of Sexual Evidence in the Scottish Courts* (1993).

²⁹ For example, the European Commission of Human Rights made the following comment concerning the subjection of witnesses in sexual offence cases to intrusive questioning: "In the assessment of the question whether or not in such proceedings an accused received a fair trial account must be taken of the right to respect for the victim's private life." (*Baegen v The Netherlands* App No 16696/90, 20 October 1994, para 77.)

on the inadmissibility of collateral evidence. Accordingly, in general terms the Crown cannot adduce evidence of the accused's previous criminal convictions.³⁰

6.26 At common law an important exception was made to the general rule that collateral evidence of a witness's bad character was inadmissible. In rape cases it was open to the accused to bring evidence of the complainer's bad moral character in order to undermine her credibility.³¹

"It is for the [accused] to show that at the time when the offence is said to have been committed, the woman was of loose and immoral character, not as a matter of defence, but as bearing very materially on the effect of the evidence on the minds of the jury. The law has done wisely in making an exception in the case of rape from the general rule, that you cannot raise up a collateral issue, and allow a proof of a witness' character and repute."

6.27 After the Criminal Evidence Act 1898,³² where an accused had attacked the character of a Crown witness, it became possible for the prosecution to seek to impugn the character of the accused. However, this rarely applied in cases of rape where the courts continued to allow the accused immunity from disclosure of previous convictions if his defence necessarily involved casting aspersions on the moral character of the complainer.³³ At a time when sexual impropriety was severely frowned upon, a rule under which the sexual character of the complainer could be attacked in this way must have discouraged women from making a complaint.

6.28 An attempt to strike a better balance was made by the introduction of rules on evidence in trials of certain types of sexual offence in the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985.³⁴ Evidence for the accused relating to the complainer's sexual history was prohibited.³⁵ But the accused could apply to the court to allow such evidence to be adduced on the following grounds:

- (i) in order to explain or rebut evidence led or to be led by someone other than the accused;
- (ii) where such evidence related to the events at the core of the charge against the accused or the defence of incrimination; or

³⁰ There are some exceptions to this rule where the previous conviction is an essential component of the offence of which the accused is charged: for example, in order to prosecute a charge of driving while disqualified it is necessary to disclose that the accused had previously been convicted of a driving offence for which he was disqualified from driving.

³¹ *HM Advocate v Reid* (1861) Irvine 124 at 129 (Lord Justice Clerk Inglis). The evidence of bad character could only be adduced if it related, or was continuously linked, to the time of the alleged offence. Thus evidence could be led that the complainer associated with prostitutes (*HM Advocate v Webster* (1874) Arkley 269); had sexual relationships with third parties where that was part of the events surrounding the act charged against the accused (*Dickie v HM Advocate* (1897) 2 Adam 331); evidence that the complainer had a sexual relationship with the accused before or after the alleged rape was not permitted unless it related to sexual relations which took place a short time before the alleged sexual attack (*HM Advocate v Blair* (1844) 2 Broun 167). The restrictions laid down in these rules came to be ignored in practice.

³² The provision is now s 266 of the Criminal Procedure (Scotland) Act 1995.

³³ It is now settled as a matter of general law that allowing the accused immunity from disclosure is for the discretion of the court: *Leggate v HM Advocate* 1988 JC 127.

³⁴ The 1985 Act added new sections to the Criminal Procedure (Scotland) Act 1975. The provisions of the 1975 Act were consolidated in the Criminal Procedure (Scotland) Act 1995.

³⁵ There was no restriction on the Crown adducing evidence of the complainer's sexual history, for example, that the complainer and the accused had lived together.

(iii) it would be contrary to the interests of justice to exclude such evidence.

6.29 However, research established that evidence of a complainer's sexual history continued be adduced in circumstances which were not justified under the Act.³⁶ After consultation,³⁷ the sexual evidence provisions of the Criminal Procedure (Scotland) Act 1995 were amended by the Sexual Offences (Procedure and Evidence) (Scotland) Act 2002.³⁸

6.30 The starting point of the provisions of the 2002 Act is a prohibition on evidence that the complainer is not of good character, including her sexual history, or that she had at any time engaged in sexual behaviour not forming part of the subject matter of the charge.³⁹ Nor can evidence be admitted that the complainer at any time (other than at or about the time of the acts at the basis of the charge) engaged in any non-sexual behaviour that might found an inference that the complainer is likely to have consented to those acts or that she is not a credible or reliable witness.

6.31 However, on an application in writing by either party made to the court not less than 14 clear days before the trial, the court may allow such evidence to be admitted if satisfied that:⁴⁰

- "(a) the evidence or questioning will relate only to a specific occurrence or occurrences of sexual or other behaviour or to specific facts demonstrating (i) the complainer's character; or (ii) any condition or predisposition to which the complainer is or has been subject;
- (b) that occurrence or occurrences of behaviour or facts are relevant to establishing whether the accused is guilty of the offence with which he is charged; and
- (c) the probative value of the evidence sought to be admitted or elicited is significant and is likely to outweigh any risk of prejudice to the proper administration of justice arising from its being admitted or elicited."

The 'proper administration of justice' includes appropriate protection of a complainer's dignity and privacy.⁴¹

6.32 It will be clear that the grounds for the admission of evidence of the complainer's sexual character and sexual history are relatively narrow and involve balancing the accused's right to a fair trial against the complainer's right to dignity and privacy. Early case law seemed to suggest that the courts were still reluctant to refuse to admit evidence if it

³⁶ B Brown, M Burman and L Jamieson, *Sexual History and Sexual Character Evidence in Scottish Sexual Offence Trials* (1992). It appears that in some cases such evidence was being admitted without any application by the defence to the court to allow them to do so. Even when an application was made and permission granted, the evidence was used to undermine the complainer's credibility and where she had been promiscuous that this implied that she had consensual sexual intercourse with the accused. There was also the problem that evidence which did not directly involve the complainer's sexual behaviour was being used in subtle ways to imply that she was of bad sexual character.

³⁷ Scottish Executive, *Redressing the Balance: Cross-Examination in Rape and Sexual Offence Trials* (2000).

³⁸ Criminal Procedure (Scotland) Act 1995, ss 274-275B (as added by the Sexual Offences (Protection and Evidence) (Scotland) Act 2002).

³⁹ 1995 Act, s 274 (as amended).

⁴⁰ *Ibid*, s 275.

⁴¹ *Ibid*, s 275(2)(b)(i).

appeared to be pertinent to the accused's defence.⁴² However, if an application is successful, the prosecutor must place before the presiding judge any relevant previous conviction of the accused: and unless the accused objects the previous convictions will be laid before a jury.⁴³ The grounds upon which the accused can object are limited but include the absence of a substantial sexual element in the previous offence and that disclosure of a previous conviction would be contrary to the interests of justice. In considering the latter, it is to be presumed that disclosure is in the interests of justice. It appears, however, that it is not too difficult to rebut this statutory presumption and that the decision whether or not disclosure would be contrary to the interests of justice is to be left to the discretion of the trial judge. The provisions have been held to be compatible with article 6 of the European Convention on Human Rights.⁴⁴

6.33 There is no doubt that the rules introduced by the 2002 Act were intended to find an appropriate balance between the complainer's right to dignity and privacy and the accused's right to a fair trial. In the Discussion Paper we noted that a study of the operation of these provisions had been undertaken on behalf of the Scottish Executive. We took the view that further consideration of the law on sexual history should not be made until the results of that research became available. Moreover, the likely timetable for publication of the research findings was such that any review of the law could not be done as part of our project. Consultees expressed broad, though not unanimous, agreement with our approach.⁴⁵ In fact, the findings of that study were published when the preparation of this Report was at an advanced stage, and unfortunately we have been unable to give detailed consideration to its findings.⁴⁶

Further topics in the law of evidence

6.34 In the Discussion Paper, we took note of two other topics in the law of evidence which were possibly relevant to this project. These were similar facts evidence and the use of previous convictions.

6.35 Each of these aspects of the law of evidence is concerned with the general principle that evidence of the bad character of an accused person is inadmissible. The rationale of this principle is that the potential prejudice to the accused which such evidence may bring outweighs its probative value. However, there are various exceptions to this principle. One, which is recognised in some common law systems, is the so-called similar facts rule. Under this rule, evidence is admissible where it relates to conduct of the accused, at some time other than the acts he is charged with, which shows his propensity or disposition to engage in misconduct. One category of this type of evidence is evidence that the accused had previously behaved in a way strikingly similar to his behaviour at the time of the alleged

⁴² *Cumming v HM Advocate* 2003 SCCR 261; *Kinnin v HM Advocate* 2003 SCCR 295. The provisions have been held to be compatible with article 6 of the European Convention on Human Rights: *MM v HM Advocate* 2005 1 JC 102.

⁴³ Criminal Procedure (Scotland) Act 1995, s 275A.

⁴⁴ *DS v HM Advocate* 2006 JC 47 (HCJ); 2007 SCCR 222 (PC).

⁴⁵ Two consultees argued that we should conduct a thorough review of law on sexual history evidence without waiting for the findings of the research study. A number of individual consultees stated that the provisions restricting the use of such evidence should be abolished.

⁴⁶ Michele Burman, Lynn Jamieson, Jan Nicholson and Oona Brooks, *Impact of Aspects of the Law of Evidence in Sexual Offence Trials: An Evaluation Study* (Scottish Government Social Research, 2007).

offence.⁴⁷ Although this rule looks like the *Moorov* doctrine, it is not concerned with corroboration. Similar fact evidence does not appear on the same indictment or complaint and acts as direct proof of the charge currently facing the accused. It is worth noting that some commentators have argued that the Scottish courts have applied a form of similar facts evidence, though its exact nature and scope are uncertain.⁴⁸

6.36 A particular example of similar facts evidence is where the accused has previously been charged or convicted of the same sort of offence. It is obvious that leading evidence of previous charges or convictions would often be highly relevant in proving the commission of a later offence of the same or similar type. However, the general rule of Scots law is that evidence that the accused has previously been charged or convicted is so prejudicial that it is not admissible.⁴⁹ There are various exceptions to this rule. Evidence of a previous conviction is allowed where it is an essential component of the crime for which the accused is charged.⁵⁰ A previous conviction may also be disclosed where the accused's character becomes an issue in court. Where the accused asks questions or leads evidence showing that he is of good character, or where his evidence impugns the character of the complainer, prosecutor or other witnesses, application may be made to the court to disclose his convictions. Furthermore, in a sexual offence case, if the accused succeeds in an application to lead evidence about the sexual history of the complainer his previous convictions must be laid before the jury, unless the court considers that disclosure would not be in the interests of justice.⁵¹

6.37 It is clear that both similar fact evidence and the use of any previous charges and convictions would have an impact on trials of sexual offences. However, in the Discussion Paper we were not inclined to include these topics as part of this present project. In the first place, neither of these topics could properly be restricted to proof of sexual offences only. Each has implications for the general law of evidence in criminal cases. Secondly, we doubted whether similar fact evidence and use of previous charges and convictions should be considered as isolated parts of the law of evidence. Each of these doctrines is part of a much wider issue, namely the extent to which the accused's character can be used as evidence against him. In England and Wales the common law rules on similar fact evidence have been abolished. Instead, the Criminal Justice Act 2003 contains extensive provisions which allow the admission of 'bad character' evidence, (which includes previous convictions).⁵² These provisions implemented recommendations of the Law Commission, who had conducted a detailed and comprehensive survey of this major part of the law of evidence.⁵³ We were of the view that any reform of Scots law in this area should be done in a similarly comprehensive way rather than in a piecemeal fashion. Accordingly we concluded that any consideration of the law relating to the character of a person accused of

⁴⁷ The classic example is *Makin v Attorney General for New South Wales* [1894] AC 57. The accused were charged with the murder of a baby which they had fostered and whose body was found buried in their back yard. The prosecution sought to lead evidence that the accused had already fostered other babies, whose bodies had been buried in the gardens of previous houses in which they had lived.

⁴⁸ P Duff, "Towards a Unified Theory of 'Similar Facts Evidence' in Scots Law" 2002 Jur Rev 143; F E Raitt, "The Evidential Use of 'Similar Facts' in Scots Criminal Law" (2003) 7 Edin LR 174.

⁴⁹ Criminal Procedure (Scotland) Act 1995, s 266(4).

⁵⁰ For example, it is intrinsic to the offence of driving while disqualified that the accused had a road traffic conviction which led to the disqualification.

⁵¹ Criminal Procedure (Scotland) Act 1995, s 275A. See para 6.32.

⁵² Bad character evidence is evidence of misconduct or a disposition towards misconduct (Criminal Justice Act 2003, s 98), and 'misconduct' is defined as "the commission of an offence or other reprehensible behaviour" (ibid, s 112(1)).

⁵³ Law Commission, Report on *Evidence of Bad Character in Criminal Proceedings* (Law Com No 273 (2001)).

a sexual offence should be conducted as part of a wider review of the law of evidence. There was broad agreement on this matter among consultees and we make no further comment on it.

Part 7 Miscellaneous issues

Introduction

7.1 In this Part we consider various matters in relation to sexual offences but which deal with issues other than the definitions of those offences. In particular, we focus on (1) commencement and transitional provisions; (2) continuity of the law; (3) penalties; (4) jurisdiction; and (5) alternative verdicts.

Commencement and Transitional Provisions

7.2 The Draft Bill contains a section which allows for its provisions to come into force on a date or dates to be specified by order made by the Scottish Ministers.¹ There is in addition a further section which gives power to the Scottish Ministers to make by order provisions as to a wide range of issues, including transitional matters.² Although the Draft Bill does not therefore specify what those transitional provisions are to be, we consider that it would be useful if we set out our views on certain transitional issues.

7.3 The appropriate fundamental principle, and one provided for by article 7 of the ECHR, is that no person can be found guilty of a criminal act which did not constitute a criminal offence at the time it was committed, nor can he or she be given a heavier penalty than the one applicable at the time the offence was committed. Accordingly we envisage that the offences which are created by the provisions of the Draft Bill will apply only to conduct which takes place after the time when the relevant provision comes into force.

7.4 However, the same reasoning does not apply to provisions in the Draft Bill which do not impose criminal liability.³ In our view there is no need to prevent retrospective effect in respect of section 29 of the Draft Bill (children requiring compulsory measures of care).⁴ That provision allows for a child to be referred to a children's hearing on the ground that he or she has engaged in sexual activity or has been subject to sexual activity with another person. As the children's hearings system is concerned with the welfare of the child and this ground of referral does not involve proof that the child committed a criminal offence, it is therefore appropriate that the provisions of section 29 of the Draft Bill should apply in respect of sexual activity occurring prior to the date on which those provisions come into force.⁵

7.5 There is another provision in the Draft Bill which we suggest should have pre-commencement effect and in relation to which we have recommended a provision in the Draft Bill itself. This is section 37 (consensual acts carried out for sexual gratification). This

¹ Draft Bill, s 45.

² Draft Bill, s 43.

³ The European Court of Human Rights has held that the Convention is not necessarily breached by a retrospective change in the criminal law which operates in the accused's favour (*Kokkinakis v Greece* (1994) 17 EHRR 397; *G v France* (1996) 21 EHRR 288).

⁴ For discussion of our recommendation on this point, see paras 4.52-4.57.

⁵ However, the ground of referral would not be available if the child who is to be referred to the hearing was committing an offence by engaging in the sexual activity in question. See *Constanda v M* 1997 SC 217, discussed at para 4.58.

provision removes criminal liability for certain types of attack done for purpose of obtaining sexual gratification.⁶ There is no question here of imposing criminal liability retrospectively and we can see no good reason for limiting this exemption to conduct occurring after the provision comes into force.

7.6 We therefore recommend that:

- 59. The removal of criminal liability for attacks carried out by persons for the purpose of obtaining sexual gratification should apply in respect of attacks which take place before or after the date on which the relevant provision comes into force but this rule should not affect convictions for assault before that date.**

(Draft Bill, section 37(3))

Continuity of the law

7.7 A problem in introducing new statutory offences to replace existing offences is illustrated by the experience of the Sexual Offences Act 2003 in English law. The problem arises where there is evidence, especially from the victim, that the offence took place within a particular period of time but the precise date when the conduct occurred cannot be established. If this time-frame includes the date on which the new provision came into force, the question is whether the accused can be convicted under the new law, the old law, or neither.

7.8 This problem is especially likely to arise in cases involving child victims who may have difficulties in remembering the exact date on which an offence had been committed. For example, in *R v Newbon*,⁷ a nine year-old boy complained that he had been anally raped by the accused "just before the bank holiday at the end of the month" but was unable to specify the exact date of the incident. The bank holiday in question fell on 3 May 2004 but the Sexual Offences Act 2003 came into force on 1 May 2004. The accused was charged (presumably alternatively) under the Sexual Offences Act 1956 (which was repealed by the 2003 Act) and under the 2003 Act. The court upheld a defence submission that as the Crown had failed to prove which statute was applicable to the accused's conduct he was not liable under either of them and should be acquitted.⁸

7.9 A solution to problem was provided by section 55 of the Violent Crime Reduction Act 2006. The provision applies to cases where it cannot be proved that the offence took place either before or after the commencement of the 2003 Act. In such cases it will now be presumed that the offence was committed after commencement, unless the maximum pre-commencement penalty is less than the maximum penalty under the 2003 Act, in which case the conduct will be deemed to have taken place before the repeal of the pre-2003 offence.

⁶ We discussed this matter at paras 5.19-5.27.

⁷ Unreported, 24 February 2005 in the Crown Court in Stoke on Trent. The case is summarised in [2005] Crim L Rev 738.

⁸ The court stated that it would uphold the submission "although it seemed nonsensical and outrageous [but] it was necessary to prove which statutory provision applied and the Crown had failed to do so." The same problem, with the same result, arose in *R v A (Prosecutor's Appeal)* [2006] 1 Cr App R 28 and *R v Christopher H* [2006] EWCA Crim 2898.

7.10 We consider that a similar problem might well arise in cases relating to conduct which occurs around the date when particular provisions of the Draft Bill are brought into force and we see merit in adopting the model used in English law to deal with it. Accordingly we recommend that:

- 60. Where the accused is charged with an offence under the Act and with an offence under the law in force prior to the Act, and the actual date on which the accused's conduct took place cannot be proven, the accused is liable to be convicted of an offence under the Act unless the maximum penalty for the offence under the prior law is less than that for the offence under the Act.**

(Draft Bill, section 41)

Penalties

7.11 The Draft Bill makes provision for the maximum penalty which the court can impose on a person who is convicted of an offence introduced by the Draft Bill.⁹ In selecting the penalties we took note of the relevant provisions in the Sexual Offences Act 2003 and the Draft Criminal Code for Scotland as well as those for offences in the current law which correspond to the offences in the Draft Bill. We also took into account the provisions of the Criminal Proceedings etc (Reform) (Scotland) Act 2007, which increase the sentencing powers of a sheriff sitting in summary proceedings.¹⁰ We have also added to the powers of a court in solemn cases the option of substituting or adding a fine to a sentence of imprisonment, though we accept that in many cases a sentence of imprisonment alone will be the appropriate disposal of the case.

7.12 We wish to comment on only one aspect of the penalty provisions. We recommend that the maximum penalty for the offences of rape, sexual assault and sexual coercion (as set out in sections 1 to 3 of the Draft Bill) should be life imprisonment (or a fine, or both). This is the most severe penalty which a Scottish court can impose.¹¹ We consider that these offences warrant such a severe penalty as they may all involve non-consensual penetration of the victim or some other party. Non-consensual penetration is a major infringement of a person's sexual and physical integrity and it is appropriate that the court can deal with cases involving this particular wrong by imposing the most severe penalty.

7.13 We consider that for similar reasons the same maximum penalty should apply to the offences of rape of a young child, sexual assault on a young child, and causing a young child to participate in sexual activity.¹² These offences are special instances of the conduct involved in rape, sexual assault, and sexual coercion but in these cases the victim who cannot, and does not, consent is a young child. By allowing for the imposition of life imprisonment the law will reinforce the signal that having any form of sexual contact with a child under 13 a serious form of wrongdoing.

⁹ Draft Bill, section 36; schedule 1.

¹⁰ The maximum period of imprisonment has been increased from 3 months to twelve months (Criminal Proceedings etc (Reform) (Scotland) Act 2007, s 43), and the maximum fine increased from £5,000 to £10,000 (s 48).

¹¹ We understand the term life imprisonment will cover all forms of indeterminate sentence, including (i) discretionary life sentence; (ii) an order for lifelong restriction; (iii) detention for life; and (iv) detention without limit of time.

¹² Draft Bill, sections 14-16.

Jurisdiction

7.14 We also have a recommendation as to the jurisdiction of the courts before which prosecution for offences may be brought. At present rape is one of the pleas of the Crown and can be tried only in the High Court of Justiciary. We see no need for a different approach on jurisdiction for the statutory offence of rape which we recommend should replace the common law crime. Allowing the proposed statutory offence of rape to be prosecuted in the sheriff court may be misinterpreted as downgrading it in comparison with the existing common law crime.

7.15 We also believe that the recommended offence of rape of a young child is a particular instance of rape, namely where the victim a child under the age of 13. We do not consider that there should any difference as to the matter of which courts should have jurisdiction in the prosecution of these two offences. We accept that under the present law the offence of having unlawful intercourse with a girl under the age of 13 may be prosecuted on indictment in either the High Court or the sheriff court but we consider that a similar rule for the recommended offence of rape of a young child might give the impression the offence is a lesser form of rape.

7.16 We recommend that:

61. The offences of rape and rape of a young child may be tried only in the High Court of Justiciary.

(Draft Bill, section 44(1); schedule 3, paragraph 5(2), (3))

7.17 We recognise that the question of the appropriate court in which a prosecution should be raised is in principle a matter for the discretion of the Crown, and apart from the cases of rape and rape of a young child, we recommend that the other offences in the Draft Bill can be prosecuted either on indictment or by summary procedure.

Alternative verdicts

7.18 Various statutes allow for the situation where an accused can be convicted of one offence although the indictment or complaint libels another.¹³ One example is section 14 of the Criminal Law (Consolidation) (Scotland) Act 1995, which applies where an accused has been indicted on a charge of rape or with having unlawful intercourse with a girl under 13. Where the jury are not satisfied that the accused is guilty of the offence charged, they may still, if satisfied of the accused's guilt, convict him or one of other specified offences, including having unlawful sexual intercourse with a girl under 16 or with indecent assault. Provisions of this nature are particularly useful where evidence at a trial does not completely prove one offence but does establish the commission of another offence, which usually is lesser though similar in nature. Where the Crown anticipates in advance that there may be problems in proving a constituent element of a particular offence it can indict in the alternative. But often such problems emerge during the course of a trial, and where no alternative verdict is provided in statute, the Crown may have to seek leave to amend the indictment or be forced to abandon proceedings.

¹³ *Renton & Brown's Criminal Procedure* (6th edn. by Gerald H Gordon assisted by James Chalmers), paras 8.79-8.84.

7.19 We take the view that provisions on alternative verdicts should be made in respect of the offences recommended in this Report. Many of those offences are overlapping in scope. Moreover, with sexual activity there is a high likelihood that the evidence which emerges during a trial will not match exactly what the Crown had anticipated from pre-trial precognitions. For example, a complainant may have said that the accused had forced her to watch live sexual activity but it emerges at the trial that he had in fact shown her sexual images. Also, there may be competing evidence on some key element of an offence. For example, a man is charged with raping a 15 year-old boy, but the evidence suggests that the boy consented to the sexual activity. In such cases it is appropriate that, despite such failures of proof, the accused is still liable to be convicted for the offence for which there is evidence.

7.20 However, we are concerned that provisions allowing for the use of alternative verdicts might contravene the requirements of article 6 of the ECHR, which guarantees the right to a fair trial.¹⁴ We consider that any problem of this nature could be dealt with by requiring that the accused on receiving an indictment or complaint should be given fair notice as to the possibility of being convicted of an alternative offence. We recommend that one way of giving such fair notice would be by service on the accused of a written notice, in a form to be prescribed, which specifies the possible alternative verdicts.

7.21 We recommend that:

62. Where in proceedings against an accused person in respect of one offence, that offence has not been proved, the accused may be convicted of another offence provided:

- (a) the court or jury are satisfied that he committed that other offence; and**
- (b) the accused had received notice that he was liable to be convicted of that other offence.**

(Draft Bill, section 38; schedule 2)

¹⁴ *Pélissier and Sassi v France* (1993) 30 EHRR 715.

Part 8 List of recommendations

1. A constituent element of the offences of rape and other sexual assaults and of offences involving coerced sexual activity should be the lack of consent by the victim.

(Paragraph 2.19; Draft Bill, sections 1(1); 2(1); 3(1); 4(1); 5(1); 6(1), (2))

2. There should be a definition of consent in respect of sexual offences which involve the lack of consent of any person.

(Paragraph 2.22; Draft Bill, sections 9-11)

3.
 - (a) For sexual offences in which the lack of consent on the part of the victim is a part of the offence, there should be a statutory definition of consent.
 - (b) Consent should be defined first by means of a general description of what consent means.
 - (c) Secondly the statutory definition should also provide a non-exhaustive list of situations where consent does not exist.

(Paragraph 2.35; Draft Bill, sections 9 and 10)

4. Consent as a constituent element of sexual assaults be defined in general terms as 'free agreement'.

(Paragraph 2.42; Draft Bill, section 9)

5. There should be a non-exhaustive statutory list of factual situations which define when a person has not consented to sexual activity. The situations should include the following:

- (a) where the person had taken or been given alcohol or other substances and as a result lacked the capacity to consent at the time of expressing or indicating consent unless consent had earlier been given to engaging in the activity in that condition;
- (b) where the person was unconscious or asleep and had not earlier given consent to sexual activity in these circumstances;
- (c) where the person agreed or submitted to the act because he or she was subject to violence, or the threat of violence, against him or her, or against another person;
- (d) where the person agreed or submitted to the act because at the time of the act he or she was unlawfully detained by the accused;

- (e) where the person agreed or submitted to the act because he or she was deceived by the accused about the nature or purpose of the activity;
- (f) where the person agreed to the act because the accused impersonated someone who was known to the person;
- (g) where the only expression of agreement to the act was made by someone other than the person.

(Paragraph 2.59; Draft Bill, section 10)

- 6. The giving of consent to one sexual act does not by itself constitute consent to a different sexual act.

(Paragraph 2.84; Draft Bill, section 11(2))

- 7. A person who has consented to a sexual act may at any time before or up until completion of that act indicate that he or she no longer consents, and if the act continues to take place it does so without that person's consent.

(Paragraph 2.86; Draft Bill, section 11(3),(4))

- 8. The provisions relating to notice of consent as a defence to a charge of a sexual offence in sections 78 and 149A of the Criminal Procedure (Scotland) Act 1995 should be repealed.

(Paragraph 2.88; Draft Bill, section 44(2); schedule 4)

- 9. Sexual assaults should not be subsumed within the general law of assault but should form a separate category of offence.

(Paragraph 3.8; Draft Bill, sections 1-2)

- 10. Sexual assaults should not be classified as one general type of offence but should be divided into specific types of offence.

(Paragraph 3.9; Draft Bill, sections 1-2)

- 11. The actings which constitute the offence of rape should be defined in terms of the penetration by a person with his penis of the vagina, anus or mouth of another person without that person's consent.

(Paragraph 3.29; Draft Bill, section 1)

12. (a) the common law offences of rape and clandestine injury to women should be abolished.
(Paragraph 3.35; Draft Bill, section 40(a))
- (b) section 7(3) of the Criminal Law (Consolidation) (Scotland) Act 1995 should be repealed.
(Paragraph 3.35; Draft Bill, section 44(2); schedule 4)
13. There should be an offence to be known as sexual assault.
(Paragraph 3.40; Draft Bill, section 2)
14. Sexual assault is constituted by the following conduct:
- (a) A sexually penetrates the vagina, anus or mouth of B without B's consent;
 - (b) A sexually touches B without B's consent;
 - (c) A has sexual contact with B without B's consent;
 - (d) A ejaculates semen onto B without B's consent.
- (Paragraph 3.40; Draft Bill, section 2(1), (2))
15. For purposes of the law on sexual assault a penetration, touching or contact is sexual if a reasonable person would consider it to be sexual.
(Paragraph 3.44; Draft Bill, section 2(3))
16. The common law on assault under circumstances of indecency should remain in effect except in relation to any conduct which constitutes the statutory offence of sexual assault or another offence in the Draft Bill.
(Paragraph 3.47; Draft Bill, section 40(b))
17. It should be an offence for a person to cause another person, without that person's consent, to participate in any sexual activity.
(Paragraph 3.51; Draft Bill, section 3)
18. It should be an offence for a person, acting for the purpose of obtaining sexual gratification or of humiliating, distressing or alarming another person, to cause that person, without his or her consent, to be present during a sexual activity.
(Paragraph 3.61; Draft Bill, section 4)

19. It should be an offence for a person, acting for the purpose of obtaining sexual gratification or of humiliating, distressing or alarming another person, to cause that person, without his or her consent, to look at an image of a sexual activity.

(Paragraph 3.61; Draft Bill, section 5)

20. It should be an offence for a person, acting for the purpose of obtaining sexual gratification or of humiliating, distressing or alarming another person:

- (a) to make a sexual communication with that person, without his or her consent, or
- (b) to cause that person, without his or her consent, to see or hear a sexual communication made to someone else.

(Paragraph 3.63; Draft Bill, section 6)

21. It should be an offence for a person to administer a substance to, or cause a substance to be taken by, another person without that person's knowledge where the purpose is to stupefy or overpower that person so as to enable having sexual activity with him or her.

(Paragraph 3.66; Draft Bill, section 8)

22. For any offence which requires that the accused lacked reasonable belief that another person consented, in assessing what was reasonable regard is to be had to the steps, if any, which the accused took to ascertain whether there was consent.

(Paragraph 3.78; Draft Bill, section 12)

23. The law on sexual offences relating to children should not make any distinction in terms of the gender of the child or of the perpetrator of such offences.

(Paragraph 4.17)

24. There should be special provisions in applying the law on rape and other sexual assaults and coerced sexual activity to children who have not reached the age of 13.

(Paragraph 4.25; Draft Bill, sections 14-19)

25. The offences involving rape and other sexual assaults and coerced sexual activity which apply to children under the age of 13 are based on the legal premise that children below that age lack capacity to consent to sexual activity.

(Paragraph 4.31; Draft Bill, sections 14-19)

26. It is not a defence to an offence involving rape or other sexual assaults and coerced sexual activity which apply to children under the age of 13 that the accused believed that the child was 13 or older.

(Paragraph 4.39; Draft Bill, section 20)

27. There should be no defence to offences involving rape or other sexual assaults and coerced sexual activity which apply to children under the age of 13 that the accused was married to, or in a civil partnership with, the child.

(Paragraph 4.42; Draft Bill, sections 14-19)

28. There should be special provisions applying the law on sexual penetration and other sexual assaults and on coerced sexual activity to children aged between 13 and 16 where the conduct involves the consent of the child.

(Paragraph 4.51; Draft Bill, sections 21-26)

29. The offences mentioned in recommendation 28 cannot be committed by a person who has not reached the age of 16.

(Paragraph 4.57; Draft Bill, sections 21(1); 22(1); 23(1); 24(1); 25(1); 26(1), (2))

30. There should be a ground of referral of a child to a children's hearing that the child has engaged in sexual activity with another person or has been subjected to sexual activity with another person.

(Paragraph 4.57; Draft Bill, section 29)

31. There should be a defence to an offence relating to sexual activity with a child aged between 13 and 16 that the accused believed on reasonable grounds that the child was 16 or older.

(Paragraph 4.64; Draft Bill, section 27(1)(b))

32. It should not be a defence to an offence relating to sexual activity with a child aged between 13 and 16 that the accused believed that the child was under 13 years of age.

(Paragraph 4.64; Draft Bill, section 27(4))

33. There should be a defence to an offence relating to sexual activity with a child aged between 13 and 16 that the accused and the child were married or in a civil partnership recognised as valid under Scots law.

(Paragraph 4.70; Draft Bill, section 27(1)(a))

34. The accused should bear an evidential, but not a legal, burden of establishing the defences set out in recommendations 31 and 33 and elsewhere in this Report.

(Paragraph 4.74)

35. There should be a defence to an offence involving sexual activity with an older child that the accused was less than 2 years older than the child or had at some time earlier engaged in such activity and at that time was less than 2 years older than the child.

(Paragraph 4.78; Draft Bill, section 28)

36. But this defence does not apply to an offence involving penile penetration of an older child.

(Paragraph 4.78; Draft Bill, section 27(2), (3))

37. Where a charge has been brought of a protective offence against a child, and the Crown can establish that at the time of the offence the child was under the age of 16 but cannot establish the child's actual age, then:

- (a) if the charge is of an offence against an older child, the child will be deemed to have been 13 at that time; and
- (b) if the charge is of an offence against a young child, the accused will be liable to be convicted of a corresponding offence against an older child.

(Paragraph 4.82; Draft Bill, section 28)

38. The crime of lewd, indecent or libidinous practice and behaviour towards children should be abolished.

(Paragraph 4.87; Draft Bill, section 40(a))

39. Section 311 of the Mental Health (Care and Treatment) (Scotland) Act 2003 should be repealed.

(Paragraph 4.96; Draft Bill, section 44(2); schedule 4)

40. There should be a definition of the capacity of a person with a mental disorder to consent to sexual activity.

(Paragraph 4.96; Draft Bill, section 13)

41. There should be offences which impose criminal liability on a person who has sexual activity with another person over whom he or she holds a position of trust.

(Paragraph 4.108; Draft Bill, sections 30-35)

42. It should be an offence for a person aged 18 or older to engage in sexual activity with another person aged under 18 where:

- (a) the parties live in the same household; and
- (b) there was a relationship of trust between the parties.

(Paragraph 4.115; Draft Bill, section 31(1), (6))

43. There is a relationship of trust between two people who live in the same household where:

- (a) one person has or exercises parental responsibilities and rights in respect of the other person; or
- (b) one person has in the past had or exercised parental responsibilities in respect of the other person; or
- (c) one person is treating the other person as a child of his family.

(Paragraph 4.115; Draft Bill, section 31(6))

44. It should be a defence to a charge of abuse of trust between persons sharing the same household that the accused reasonably believed (i) that the other person was 18 or older or (ii) that he was not in a relationship of trust with that person.

(Paragraph 4.120; Draft Bill, section 33(1))

45. But it should not be a defence that the accused was married to that person or that the parties were in a sexual relationship prior to the relationship of trust between them.

(Paragraph 4.120; Draft Bill, section 33(2),(3))

46. Section 313 of the Mental Health (Care and Treatment) (Scotland) Act 2003 should be repealed.

(Paragraph 4.122; Draft Bill, section 44(2); schedule 4)

47. It should be an offence for a person to engage in a sexual activity with a mentally disordered person where he or she (a) is providing care services to the mentally disordered person or (b) works in, or is a manager of, a hospital where the mentally disordered person is being given medical treatment.

(Paragraph 4.122; Draft Bill, section 34)

48. It should be a defence to the offence of sexual abuse of a person with a mental disorder that:

- (a) the person providing the care service did not know, on reasonable grounds, that the other person was mentally disordered;
- (b) the person providing the care service did not know, on reasonable grounds, that there was a relationship of trust with the other person;
- (c) the parties were married to, or in a civil partnership with, each other at the time of the sexual activity;
- (d) a sexual relationship existed between the parties at the time when the relationship of trust between them was constituted.

(Paragraph 4.125; Draft Bill, section 35)

49. It should be an offence for a person aged 18 or older to engage in sexual activity with another person where:

- (a) the person was in a position of trust in relation to that other person; and
- (b) that other person was under the age of 18.

(Paragraph 4.128; Draft Bill, section 30)

50. A position of trust should be restricted to the situations set out in section 4 of the Sexual Offences (Amendment) Act 2000 but:

- (a) a position of trust can arise in relation to a person receiving part-time education; and
- (b) one person looks after another person where he or she regularly cares for, trains, supervises or is in sole charge of that other person.

(Paragraph 4.132; Draft Bill, section 31)

51. It should be a defence to an offence of sexual abuse of trust in recommendation 49 that:

- (a) the accused reasonably believed that the complainant was 18 or older;
- (b) the accused reasonably believed that there was no relationship of trust with the complainant;
- (c) that the accused was married to, or in a civil partnership with, the complainant;
- (d) that a sexual relationship existed between the accused and the complainant at the time when the relationship of trust between them was constituted.

(Paragraph 4.134; Draft Bill, section 33(1),(2),(4))

52. (1) There should be an exclusion from liability for incitement or art and part involvement in any offence concerning sexual activity with a child or young person for persons providing counselling, support or treatment on matters of sexual health.

(2) The exclusion from liability does not apply where the person acts with the purpose of:

- (a) obtaining sexual gratification;
- (b) humiliating, distressing or alarming the child or young person; or
- (c) causing or encouraging the commission of an offence.

(Paragraph 5.5; Draft Bill, section 39)

53. Any existing common law offence relating to homosexual conduct should be abolished.

(Paragraph 5.10; Draft Bill, section 40(a))

54. (Except for the provisions relating to procuring and related offences), section 13 of the Criminal Law (Consolidation) (Scotland) Act 1995 should be repealed.

(Paragraph 5.10; Draft Bill, section 44(2); schedule 4)

55. It should be an offence for a person to expose his or her genitals in a sexual manner with the intention of causing alarm or distress to someone else or being reckless as to causing these effects.

(Paragraph 5.16; Draft Bill, section 7(1), (2))

56. It should be a defence to a charge of sexual exposure that the accused's actings were done in the performance of a play and conformed to the directions of the presenter or director of the play.

(Paragraph 5.27; Draft Bill, section 7(3), (4))

57. It should not be the crime of assault for one person to attack another where:

- (a) both parties are 16 or older;
- (b) 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;
- (c) the person receiving the attack consents to its being carried out; and
- (d) the attack is unlikely to result in serious injury.

(Paragraph 5.27; Draft Bill, section 37)

58. Consideration should be given to the creation of an offence of unlawful interference remains.

(Paragraph 5.28)

59. The removal of criminal liability for attacks carried out by persons for the purpose of obtaining sexual gratification should apply in respect of attacks which take place before or after the date on which the relevant provision comes into force but this rule should not affect convictions for assault before that date.

(Paragraph 7.6; Draft Bill, section 37(3))

60. Where the accused is charged with an offence under the Act and with an offence under the law in force prior to the Act, and the actual date on which the accused's conduct took place cannot be proven, the accused is liable to be convicted of an offence under the Act unless the maximum penalty for the offence under the prior law is less than that for the offence under the Act.

(Paragraph 7.10; Draft Bill, section 41)

61. The offences of rape and rape of a young child may be tried only in the High Court of Justiciary.

(Paragraph 7.16; Draft Bill, section 44(1); schedule 2, paragraph 5(2), (3))

62. Where in proceedings against an accused person in respect of one offence, that offence has not been proved, the accused may be convicted of another offence provided:

- (a) the court or jury are satisfied that he committed that other offence; and
- (b) the accused had received notice that he was liable to be convicted of that other offence.

(Paragraph 7.22; Draft Bill, section 38; schedule 2)

APPENDIX A

Sexual Offences (Scotland) Bill

[DRAFT]

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Sexual Offences (Scotland) Bill

[DRAFT]

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

PART 1

RAPE ETC.

Rape

1 Rape

- (1) If a person (“A”), with A’s penis and—
 - (a) without another person (“B”) consenting, and
 - (b) without any reasonable belief that B consents,penetrates to any extent, either intending to do so or reckless as to whether there is penetration, the vagina, anus or mouth of B then A commits an offence, to be known as the offence of rape.
- (2) For the purposes of this section, penetration is a continuing act from entry until withdrawal of the penis; but this subsection is subject to subsection (3).
- (3) In a case where penetration is initially consented to but at some point of time the consent is withdrawn, subsection (2) is to be construed as if the reference in it to a continuing act from entry were a reference to a continuing act from that point of time.
- (4) In this Act—

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

“vagina” includes—

 - (a) the vulva, and
 - (b) an artificial vagina (together with any artificial vulva), if it forms part of B, having been created in the course of such treatment.

NOTE

Section 1 creates a statutory offence of rape. This means that, for the first time, rape is defined in statute rather than at common law. Its constituent elements are also redrawn.

Historically, rape in Scots law was defined as sexual intercourse by a man with a woman after he had forcibly overcome her will. However, the High Court of Justiciary, in *Lord Advocate's Reference (No 1 of*

2001) 2002 SLT 466, defined rape as sexual intercourse by a man with a woman without her consent. This places the emphasis on a lack of consent as opposed to the use of force.

Subsection (1) implements recommendation 11 and expands the current definition of rape so that the crime is now constituted by the intentional or reckless penetration, with the accused's penis, of the victim's vagina, anus or mouth in circumstances where the victim does not consent to the penetration and where the accused either knows that the victim does not consent, or has no reasonable belief that the victim is consenting. ("Consent" and "reasonable belief" are defined in sections 9-11 and 12 respectively.)

It follows from this statutory definition that the victim may be either male or female. It is also possible for the perpetrator to have an artificial penis. In this way, the crime is not one which is only capable of being committed by a man on a woman, as is the case at common law. This is an embodiment of the principle that, so far as possible, sexual offences should not make distinctions based on gender.

Subsection (2) defines "penetration" for the purposes of this section. It is a continuing act from the entry of the penis (into the victim's vagina, anus or mouth) until its withdrawal. One consequence of this is that penetration may commence with consent, but may still be continuing when that consent is withdrawn. (Section 11(3) provides that consent may be withdrawn at any time before a sexual activity is completed.) Subsection (3) provides that, in such a situation, the penetration needed to commit rape will only begin at the point at which consent is withdrawn.

Subsection (4) defines certain terms, and the definitions are referred to in section 42.

Rape charges for the new statutory offence may only be prosecuted in the High Court, as is the case at present for common law rape charges. This is achieved, in the Bill, by means of the amendments in paragraphs 5(2) and (3) of schedule 3.

Sexual assault and other sexual offences

2 Sexual assault

- (1) If a person ("A")—
 - (a) without another person ("B") consenting, and
 - (b) without any reasonable belief that B consents,does any of the things mentioned in subsection (2), then A commits an offence, to be known as the offence of sexual assault.
- (2) Those things are, that A—
 - (a) penetrates sexually, by any means and to any extent, either intending to do so or reckless as to whether there is penetration, the vagina, anus or mouth of B,
 - (b) intentionally or recklessly touches B sexually,
 - (c) engages in any other form of sexual activity in which A, intentionally or recklessly, has physical contact (whether bodily contact or contact by means of an implement and whether or not through clothing) with B,
 - (d) intentionally or recklessly ejaculates semen onto B.
- (3) For the purposes of—
 - (a) paragraph (a) of subsection (2), penetration is sexual,
 - (b) paragraph (b) of that subsection, touching is sexual,
 - (c) paragraph (c) of that subsection, an activity is sexual,

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

- (4) For the purposes of paragraph (a) of subsection (2), penetration is a continuing act from entry until withdrawal of whatever is intruded; but this subsection is subject to subsection (5).
- (5) In a case where penetration is initially consented to but at some point of time the consent is withdrawn, subsection (4) is to be construed as if the reference in it to a continuing act from entry were a reference to a continuing act from that point of time.
- (6) Without prejudice to the generality of paragraph (a) of subsection (2), the reference in the paragraph to penetration by any means is to be construed as including a reference to penetration with A's penis.

NOTE

Section 2 creates the offence of sexual assault. This implements recommendations 13 and 14. At present, much of the conduct which will fall under this new offence constitutes the common law offence of indecent assault, though other crimes may also be relevant.

The constituent elements of the offence are set out in subsections (1) and (2).

Subsection (1) requires that an offence is only committed if the victim did not consent to the conduct in question and the perpetrator had no reasonable belief that the victim was consenting. ("Consent" and "reasonable belief" are defined in sections 9-11 and 12 respectively.)

Subsection (2) sets out four sexual acts which fall within the offence of sexual assault. It also provides that, in each case, the perpetrator must either act intentionally or recklessly. (The test for recklessness will be an objective one, as is the general position in Scots law for mental elements.) The four sexual acts are:

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

Subsection (3) sets out a test for determining whether an activity falling within subsection (2) is sexual. This implements recommendation 15. It provides an objective test, namely a test which says that an activity is sexual if a reasonable person would, in all the circumstances of the case, consider it to be sexual. Subsections (4), (5) and (6) deal with penetration. Subsections (4) and (5) define penetration as a continuing activity and provide for the case where penetration is initially with consent but consent is withdrawn before penetration has ended. This is the same as the corresponding provisions in section 1. Subsection (6) provides that penetration can be with the perpetrator's penis. This means that there is an overlap between the conduct which constitutes sexual assault and that which constitutes rape. This overlap is deliberate. One use to which it may be put is the situation in which the victim knows that she has been penetrated but, because of darkness or a blindfold or other reason, is unable to say whether penetration was penile or not. In such a situation a conviction on a charge of sexual assault would be possible even evidence emerged that the penetration has been penile. The maximum penalty, in solemn proceedings, for sexual assault is the same as that for rape: see section 36 and schedule 1.

3 Sexual coercion

- (1) If a person ("A")—
 - (a) without another person ("B") consenting to participate in a sexual activity, and

(b) without any reasonable belief that B consents to participating in that activity, intentionally causes B to participate in that activity, then A commits an offence, to be known as the offence of sexual coercion.

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

NOTE

Section 3 creates the offence of sexual coercion. It implements recommendation 17.

This offence is committed if the perpetrator intentionally causes the victim to participate in a sexual activity without his or her consent and without the perpetrator having any reasonable belief that such consent has been given. ("Consent" and "reasonable belief" are defined in sections 9-11 and 12 respectively.) The test for whether an activity is sexual is what a reasonable person would consider to be sexual: see the corresponding term in the offence of sexual assault (section 2).

The scope of the offence is wide, as reflected by the maximum penalty of life imprisonment for an offence prosecuted on indictment: see section 36 and schedule 1. This is largely because the coercion which is involved may involve a very serious invasion of the victim's autonomy. It is, in theory, possible to charge conduct amounting to rape under this provision. And if a woman forces a man to penetrate her (so-called "female rape") then that act would constitute sexual coercion.

4 Coercing a person into being present during a sexual activity

- (1) If a person ("A")—

- (a) without another person ("B") consenting, and
(b) without any reasonable belief that B consents,

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

- (2) The purposes are—

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

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

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

- (a) to A engaging in a sexual activity in the presence of B, includes a reference to A engaging in it in a place in which A can be observed by B other than by B looking at an image, and
(b) to B being present while a third person engages in such an activity, includes a reference to B being in a place from which the third person can be so observed by B.

NOTE

Section 4 creates the offence of coercing a person into being present during a sexual activity. It implements recommendation 18.

Subsection (1) defines two circumstances in which the offence is committed. But there are common elements. First, the victim must not consent to being present during the activity, and the perpetrator must not have any reasonable belief that the victim was consenting. ("Consent" and "reasonable belief" are defined in sections 9-11 and 12 respectively.) Secondly, the activity must be sexual, for which the test is set out in subsection (3), namely what a reasonable person would consider to be sexual: see the corresponding term in the offence of sexual assault (section 2). Thirdly, the perpetrator must act for one of the purposes listed in subsection (2), that is the purpose of obtaining sexual gratification or the purpose of humiliating, distressing or alarming the victim (or for any combination of these purposes).

In addition to these requirements, the two circumstances in which an offence is committed under section 4 are, first, if the perpetrator intentionally engages in a sexual activity in the presence of the victim or, secondly, if the perpetrator causes the victim to be present while a third person engages in a sexual activity.

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

It may be that, in certain situations, the victim can see both the sexual activity and also an image of it. This might happen, for instance, if it takes place in a room with a mirror, or where the action is being recorded on a camera with a screen. In such a situation, the conduct may also amount to an offence under section 5.

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

- (1) If a person ("A") intentionally and for a purpose mentioned in subsection (2) causes another person ("B")—
 - (a) without B consenting, and
 - (b) without any reasonable belief that B consents,to look at an image (produced by whatever means and whether or not a moving image) of A engaging in a sexual activity or of a third person or imaginary person so engaging, then A commits an offence, to be known as the offence of coercing a person into looking at an image of a sexual activity.
- (2) The purposes are—
 - (a) obtaining sexual gratification,
 - (b) humiliating, distressing or alarming B.
- (3) For the purposes of subsection (1), an activity is sexual in any case if a reasonable person would, in all the circumstances of the case, consider the activity to be sexual.

NOTE

Section 5 creates the offence of coercing a person into looking at an image of a sexual activity. It implements recommendation 19.

Subsection (1), read with the other two subsections, defines the scope of the offence. It is committed if a person intentionally, and for the purpose of obtaining sexual gratification or for the purpose of humiliating, distressing or alarming the victim, causes the victim to look at an image of a person engaging in a sexual activity. The test for what counts as sexual is set out in subsection (3), namely what a reasonable person would consider to be sexual: see the corresponding term in the offence of sexual assault (section 2).

The definition of what qualifies as an image for these purposes is broad. It includes a still or a moving image, and it also includes images of imaginary persons. The images may be produced by any means. Therefore, computer-generated imagery will be included if the images resemble people. So will images which are broadcast, such as by a webcam or a CCTV system. Recordings will also be caught, for example if stored on a computer or mobile telephone.

6 Communicating indecently etc.

- (1) If a person (“A”), intentionally and for a purpose mentioned in subsection (3), sends, by whatever means, a sexual written communication to or directs, by whatever means, a sexual verbal communication at, another person (“B”)—
 - (a) without B consenting to its being so sent or directed, and
 - (b) without any reasonable belief that B consents to its being so sent or directed,then A commits an offence, to be known as the offence of communicating indecently.
- (2) If, in circumstances other than are as mentioned in subsection (1), a person (“A”), intentionally and for a purpose mentioned in subsection (3), causes another person (“B”) to see or hear, by whatever means, a sexual written communication or sexual verbal communication—
 - (a) without B consenting to seeing or as the case may be hearing it, and
 - (b) without any reasonable belief that B consents to seeing or as the case may be hearing it,then A commits an offence, to be known as the offence of causing a person to see or hear an indecent communication.
- (3) The purposes are—
 - (a) obtaining sexual gratification,
 - (b) humiliating, distressing or alarming B.
- (4) In this section—
 - (a) “written communication” means a communication in whatever written form, and without prejudice to that generality includes a communication which comprises writings of a person other than A (as for example a passage in a book or magazine), and
 - (b) “verbal communication” means a communication in whatever verbal form, and without prejudice to that generality includes—
 - (i) a communication which comprises sounds of sexual activity (whether actual or simulated), and
 - (ii) a communication by means of sign language.
- (5) For the purposes of this section, a communication or activity is sexual in any case if a reasonable person would, in all the circumstances of the case, consider it to be sexual.

NOTE

This section implements recommendation 20. It creates two offences, each relating to unwanted sexual communication. There are some common features shared by both offences. First, there is to be no consent. In other words, the victim must not consent to the activity and the perpetrator must have no reasonable belief that the victim is consenting. ("Consent" and "reasonable belief" are defined in sections 9-11 and 12 respectively.) In addition, in each case the perpetrator must act either for the purpose of obtaining sexual gratification or to humiliate, distress or alarm the victim. Thirdly, the communication must be sexual, and subsection (5) provides that the test for what counts as sexual is what a reasonable person would consider to be sexual: see the corresponding term in the offence of sexual assault (section 2).

Subsection (1) creates the offence of communicating indecently. It is committed if a person, in the circumstances described above, intentionally sends the victim a sexual written communication by whatever means or directs a sexual verbal communication at the victim, by whatever means. Subsection (4) defines "written communication" and "verbal communication". Both definitions are broad. The former includes, for example, text in a book or a magazine and also includes electronically generated text such as text messages or emails. Verbal communications include sign language as well as spoken words, and also include sounds of sexual activity (such as the sound track to a pornographic recording, or the noises made by sexual actors who are close by but who cannot be seen).

Subsection (2) creates the offence of causing a person to see or hear an indecent communication. It is committed if, in circumstances other than as described in subsection (1), a person causes the victim to see a sexual written communication or to hear a sexual verbal communication, in either case by whatever means and in the circumstances described in the first paragraph above. The definitions in subsection (4) of "written communication" and "verbal communication" apply.

7 Sexual exposure

- (1) If a person ("A") intentionally exposes A's genitals in a sexual manner to another person ("B") with the intention that B will see them and A either—
 - (a) intends that B will be caused alarm or distress by the exposure, or
 - (b) is reckless as to whether B will be caused alarm or distress by it,then A commits an offence, to be known as the offence of sexual exposure.
- (2) For the purposes of subsection (1), a manner of exposure is sexual in any case if a reasonable person would, in all the circumstances of the case, consider the manner of exposure to be sexual.
- (3) It is a defence to a charge under subsection (1) that what A did—
 - (a) was done in the course of a performance of a play, and
 - (b) conformed to the directions of the presenter or director of that performance.
- (4) In subsection (3)(a), "play" has the meaning given by section 18(1) of the Theatres Act 1968 (c.54) (interpretation of expressions used in that Act).

NOTE

Section 7 creates the offence of sexual exposure. It implements recommendations 55 and 56. This offence is designed to catch genital exposure which is directed at another person or people and which is intended to cause them alarm or distress. Other types of genital exposure will not be caught – such as that involved in streaking or nude sunbathing or urinating in a public place – although other criminal offences, for instance that of public indecency, might apply to such conduct. Exposure by a theatre actor will not be caught either, as explained below.

Subsection (1) states that the offence of sexual exposure is committed if a person intentionally exposes his or her genitals in a sexual manner to another person with the intention that that person will see them. In addition, the perpetrator must either intend that the victim will be caused alarm or distress as a result of the exposure, or must be reckless as to whether alarm or distress will be caused. The test for recklessness will be an objective one, as is the general position in Scots law for mental elements.

Subsection (2) provides that the test of whether the manner of exposure is sexual is an objective one, and is to ask whether a reasonable person would, in all the circumstances of the case, consider it to be sexual.

Subsection (3) creates a defence to a charge of sexual exposure. It is only available to those who expose their genitals in breach of this section and do so in the course of a performance of a play. As a further requirement, the director or presenter of the production must have directed the actor to expose his or her genitals in this way. This defence is in keeping with the spirit of the provisions of the Theatres Act 1968.

Subsection (4) defines "play" for the purposes of subsection (3).

8 Administering a substance for sexual purposes

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

- (a) without B knowing, and
- (b) without any reasonable belief that B knows,

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

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

- (a) an activity is sexual in any case if a reasonable person would, in all the circumstances of the case, consider the activity to be sexual, and
- (b) if A, whether by act or omission, induces in B a reasonable belief that the substance administered or taken is (either or both)—
 - (i) of a substantially lesser strength, or
 - (ii) in a substantially lesser quantity,

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

NOTE

Section 8 implements recommendation 21. Subsection (1) creates the offence of intentionally giving a victim an intoxicant, without the victim's knowledge and without reasonable belief that he or she knows, for the purpose of stupefying the victim in order to enable the perpetrator to engage in a sexual activity with him or her. It is immaterial whether or not any sexual activity actually takes place, and to that extent the offence is not strictly a sexual one but is preparatory in nature.

The offence is also committed if, instead of intentionally giving the intoxicant to the victim, the perpetrator causes it to be taken by the victim. So, for example, if a person puts a drug into a bottle with an innocent-looking label with the intention that the victim will take it, in ignorance of what it is, then that person, whilst not having directly administered the drug, has nonetheless caused the victim to take it.

It is a requirement that the accused lacked any reasonable belief that the victim knew about the substance being administered or taken. The test for reasonable belief is the same as that for reasonable belief as to the consent in offences based on the lack of the consent of the victim. See Note to section 12.

Subsection (2)(a) states that the test of whether an activity is sexual is what a reasonable person would consider to be sexual.

Subsection (2)(b) extends the offence to certain situations in which the victim does in fact know that he or she is taking an intoxicating substance. In such a situation, if a person induces in the victim a reasonable belief that the substance is either substantially weaker than it really is, or is of a substantially smaller quantity than is really the case, then the fact that the victim knows that he or she is taking an intoxicant is to be disregarded. The result is that the offence is committed in such a situation. This is so whether the perpetrator actively does something to induce the belief in the victim or if the perpetrator fails to act. So, for example, if a person asks their companion for a single shot of vodka and a mixer and the companion gives them a triple measure (or where a half pint of lager is requested and a half pint of strong German pilsner is provided), an offence is committed regardless of whether the companion falsely states that the drink is a single (or a lager) or simply fails to say anything when it would be reasonable for the person to assume that he or she was being given what was requested.

PART 2

CONSENT AND REASONABLE BELIEF

Consent

9 Meaning of “consent” and related expressions

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

NOTE

After the decision in *Lord Advocate's Reference (No 1 of 2001)* 2002 SLT 466 the crime of rape in Scots law was, for the first time, defined in terms of consent. However, no definition was given. Section 9, in implementation of recommendations 2, 3(a) and (b), and 4, defines consent as free agreement.

The definition applies to Parts 1 and 3. Part 1 contains all of the offences of which consent is a part; Part 3 deals with the capacity of those with a mental disorder to give consent. (In fact, the only other reference to consent in the Bill occurs in section 37, in Part 7, but this is to be understood as referring to the concept of consent as used in the law of assault.)

The definition of "consent" is to be read as applying also to variants such as "consents", "consenting" and so on. For example, "consents" is to be read as "freely agrees" or "gives free agreement".

10 Circumstances in which conduct takes place without free agreement

- (1) For the purposes of section 9, but without prejudice to the generality of that section, free agreement to conduct is absent in the circumstances set out in subsection (2).
- (2) Those circumstances are—
 - (a) where the only indication or expression of consent by B to the conduct occurs at a time when B is incapable, because of the effect of alcohol or any other substance, of consenting to it,

- (b) where, at the time of conduct, B is asleep or unconscious, in circumstances where B has not, prior to becoming asleep or unconscious, consented to the conduct taking place while B is in that condition,
 - (c) where B agrees or submits to the conduct because of violence used against B or any other person, or because of threats of violence made against B or any other person,
 - (d) where B agrees or submits to the conduct because B is unlawfully detained by A,
 - (e) where B agrees or submits to the conduct because B is mistaken, as a result of deception by A, as to the nature or purpose of the conduct,
 - (f) where B agrees or submits to the conduct because A induces B to agree or submit to the conduct by impersonating a person known personally to B, or
 - (g) where the only expression or indication of agreement to the conduct is from a person other than B.
- (3) References in this section to A and to B are to be construed in accordance with sections 1 to 6.

NOTE

Section 10, which implements recommendations 3(c) and 5, builds on the general definition of consent in section 9. In the particular situations which are set out in subsection (2) there is no free agreement, and hence no consent. However, this should not be understood as meaning that in situations which are not listed in subsection (2) there *is* free agreement. In any such case, the general definition in section 9 is to be used.

Subsection (3) provides that, in each of the paragraphs of subsection (2), the references to "A" and "B" are to be read in the same way as they are read in sections 1 to 6. In other words, "A" is the person accused of an offence and "B" is the victim or complainant.

Subsection (2)(a) states that there is no consent to sexual activity if B's only indication or expression of consent is given at a time when he or she is so intoxicated through alcohol or any other drug that he or she cannot consent. The exact point at which B reaches this level of intoxication will be a matter to be decided by the court but once it has been reached then any acting by B will not amount to consent. It does not matter whether B has voluntarily and knowingly taken the alcohol or drugs. However, if B has agreed in advance to sexual activity with A and has agreed that this activity can take place once B has become incapable through drink or drugs, then the definition in subsection (2)(a) does not apply and the general definition in section 9 must be used.

Subsection (2)(b) provides that, if B is asleep or unconscious (for whatever reason, including through having consumed excessive drink or drugs), then any sexual activity involving B will take place without consent. The only exception is when B has freely agreed, prior to falling asleep or becoming unconscious, to sexual activity taking place while he or she is in that state.

Subsection (2)(c) deals with situations in which B agrees or submits to sexual activity because of threats of violence, or actual violence, against him or her, or against any other person. The violence need not be contemporaneous, and could have occurred in the past (though it may be hard to prove that B submitted to the sexual activity *because of* the violence in such a case). Equally, a threat of violence could relate to a point in the future rather than being a threat of immediate violence if B does not co-operate.

Subsection (2)(d) provides that B does not consent to sexual activity if he or she agrees or submits to it because he or she is unlawfully detained by A. The detention need not involve any force or violence. Where a person is lawfully detained, or is unlawfully detained by a person other than A, the general definition in section 9 must be used.

Subsection (2)(e) provides that B does not consent to sexual activity when A has deceived him or her and, as a result, B is mistaken as to the nature or the purpose of the activity. This will cover, for instance, cases in which A falsely states that the activity is a necessary medical procedure (whereas it is in fact a sexual act with no medical purpose) and B agrees on this basis. Not all deceptions will be considered here: for example, if A deceives B about his or her sexual prowess (but not about the nature or purpose of the activity), or if the deception is practised by someone other than A, then the general definition of consent in section 9 must be used. Alternatively, subsection (2)(f) might be of use.

Subsection (2)(f) deals with the situation in which B agrees or submits to sexual activity with A because A impersonates someone known personally to B. 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.

Subsection (2)(g) states that B does not consent where the only expression or indication of consent to sexual activity is from someone other than B. This is designed to protect B's sexual autonomy, and may be considered a statement of the obvious. However, it is important to recognise it, in part because it reinforces the central idea that a sexual partner's consent must be obtained before A can be sure that the activity will not constitute an offence. Subsection (2)(g) does not prevent a third party conveying B's consent (as may be the case if B has communication difficulties) nor does it prevent a third party repeating B's consent. But in each case, A must be satisfied that B is in fact consenting.

11 Consent: scope and withdrawal

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

NOTE

Section 11 applies to sections 1 to 6, which are the offences in the Bill which are based on the requirement of consent. It deals with two separate aspects of consent.

First, in implementation of recommendation 6, subsection (2) states that where consent is given to particular sexual conduct then this does not, of itself, imply that the person consents to other sexual conduct. The main utility of this is to rule out any implied escalation of consent. People should be free to choose 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.

Secondly, subsections (3) and (4) deal with the withdrawal of consent. They implement recommendation 7. Subsection (3) has the effect that consent (within the meaning of the Bill) may be withdrawn at any time before the completion of the activity to which it relates. Consent may be withdrawn before the activity begins, or while it is taking place. Subsection (4) provides that, if consent is withdrawn, the activity takes place without consent. Where the activity has already begun when consent is withdrawn then the conduct must cease immediately if criminal liability under the Bill is to be avoided.

Reasonable belief

12 “Reasonable belief”

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

NOTE

Most of the offences in Part 1 of the Bill require the Crown to prove, in addition to the victim's lack of consent, that the accused had no reasonable belief that he or she was consenting to the conduct. It will be a matter for the jury or the court to determine in each particular instance what amounts to a reasonable belief, but section 12 sets out a framework to be used in reaching a decision. This implements recommendation 22.

The test is not a subjective one (which would focus just on the mental state of the particular accused) nor is it purely objective (which would ask whether a reasonable person would have believed that the victim was consenting), but it is a mixed test. The court or jury is required to decide whether the accused had a belief which was reasonable (which has an objective element), but in reaching this decision regard is to be had to whether the particular accused took steps (and if so, what they were) to ascertain whether the other party was consenting (which imports an element of subjectivity).

The same test applies to the requirement in section 8 (administering a substance for sexual purposes) that the accused lacked any reasonable belief that the victim knew about the substance being administered or taken.

PART 3

MENTALLY DISORDERED PERSONS

Mentally disordered persons

13 Capacity to consent

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

NOTE

Section 13, which implements recommendation 40, deals with the capacity of those with a mental disorder to consent to sexual activity.

By subsection (1), it relates to the offences in sections 1 to 6, where lack of consent is an essential element.

Subsection (2) states that a mentally disordered person is incapable of consenting to conduct (to be understood as any conduct which falls within sections 1 to 6) where, by reason of the mental disorder, he or she is unable to do any of the things listed in paragraphs (a) to (c). This test for capacity mirrors the one currently set out in section 311(4) of the 2003 Act (although this section is to be repealed by schedule 3 to the Bill).

The effect of this is that, where apparently consenting sexual contact involving a mentally disordered person takes place and, by subsection (2), that person is incapable of consenting, any consent will be disregarded for the purposes of sections 1 to 6.

By subsection (3), the definition of "mental disorder" is the same as that in section 328 of the Mental Health (Care and Treatment) (Scotland) Act 2003. In essence, this means a mental illness, a personality disorder or a learning disability, however caused or manifested.

PART 4

CHILDREN

Young children

14 Rape of a young child

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

NOTE

Section 14 creates the offence of rape of a young child. This implements recommendations 24 and 25. The conduct which amounts to rape is the same as that in section 1 (rape). However, there is no reference to consent, as it is presumed that a young child is incapable of consenting to penetration.

This provision replaces the current one, in section 5(1) of the Criminal Law (Consolidation) (Scotland) Act 1995 (which will be repealed by schedule 3 to the Bill). That offence is limited to sexual intercourse with a girl under the age of 13, whereas section 15 covers other forms of penile penetration and also covers male and female victims.

A charge of rape of a young child may only be prosecuted in the High Court. This is achieved, in the Bill, by means of the amendments in paragraphs 5(2) and (3) of schedule 3.

15 Sexual assault on a young child

- (1) If a person ("A") does any of the things mentioned in subsection (2) ("B" being in each case a child who has not attained the age of 13 years), then A commits an offence, to be known as the offence of sexual assault on a young child.
- (2) Those things are, that A—
 - (a) penetrates sexually, by any means and to any extent, either intending to do so or reckless as to whether there is penetration, the vagina, anus or mouth of B,
 - (b) intentionally or recklessly touches B sexually,

- (c) engages in any other form of sexual activity in which A, intentionally or recklessly, has physical contact (whether bodily contact or contact by means of an implement and whether or not through clothing) with B,
 - (d) intentionally or recklessly ejaculates semen onto B.
- (3) For the purposes of—
- (a) paragraph (a) of subsection (2), penetration is sexual,
 - (b) paragraph (b) of that subsection, touching is sexual,
 - (c) paragraph (c) of that subsection, an activity is sexual,
- in any case if a reasonable person would, in all the circumstances of the case, consider the penetration, or as the case may be the touching or the activity, to be sexual.
- (4) Without prejudice to the generality of paragraph (a) of subsection (2), the reference in the paragraph to penetration by any means is to be construed as including a reference to penetration with A's penis.

NOTE

Section 15 creates the offence of sexual assault on a young child. It implements recommendation 24 and 25.

Subsection (2) sets out four sexual acts which fall within the offence. It also provides that, in each case, the perpetrator must either act intentionally or recklessly. (We intend that the test for recklessness will be an objective one, as is the general position in Scots law for mental elements.) The four sexual acts are:

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

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

Subsection (4) provides that penetration can be with the perpetrator's penis. This means that there is an overlap between the conduct which constitutes sexual assault on a young child and that which constitutes rape of a young child. This overlap is deliberate. One use to which it may be put is the situation in which the victim knows that he or she has been penetrated but, because of darkness or a blindfold or other reason, is unable to say whether penetration was penile or not. The maximum penalty, in solemn proceedings, for sexual assault of a young child is the same as that for rape of a young child: see section 36 and schedule 1.

16 Causing a young child to participate in a sexual activity

- (1) If a person ("A") intentionally causes a child ("B") who has not attained the age of 13 years to participate in a sexual activity, then A commits an offence, to be known as the offence of causing a young child to participate in a sexual activity.
- (2) For the purposes of subsection (1), an activity is sexual in any case if a reasonable person would, in all the circumstances of the case, consider the activity to be sexual.

NOTE

Section 16 creates the offence of causing a young child to participate in a sexual activity. This implements recommendations 24 and 25.

Subsection (1) states that the offence is committed if the perpetrator intentionally causes the victim to participate in a sexual activity.

Subsection (2) provides the test for whether an activity is sexual, namely what a reasonable person would consider to be sexual: see the corresponding term in the offence of sexual assault on a young child (section 15).

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

- (1) If a person (“A”) either—
 - (a) intentionally engages in a sexual activity and for a purpose mentioned in subsection (2) does so in the presence of a child (“B”) who has not attained the age of 13 years, or
 - (b) intentionally and for a purpose mentioned in subsection (2) causes B to be present while a third person engages in such an activity,then A commits an offence, to be known as the offence of causing a young child to be present during a sexual activity.
- (2) The purposes are—
 - (a) obtaining sexual gratification,
 - (b) humiliating, distressing or alarming B.
- (3) For the purposes of subsection (1), an activity is sexual in any case if a reasonable person would, in all the circumstances of the case, consider the activity to be sexual.
- (4) Without prejudice to the generality of subsection (1), the reference—
 - (a) in paragraph (a) of that subsection to A engaging in a sexual activity in the presence of B, includes a reference to A engaging in it in a place in which A can be observed by B other than by B looking at an image, and
 - (b) in paragraph (b) of that subsection to B being present while a third person engages in such an activity, includes a reference to B being in a place from which the third person can be so observed by B.

NOTE

Section 17 creates the offence of causing a young child to be present during a sexual activity. This implements recommendations 24 and 25.

Subsection (1) defines two circumstances in which the offence is committed. But there are common elements. First, the activity at which the young child is present must be sexual. The test for this is set out in subsection (3), namely what a reasonable person would consider to be sexual: see the corresponding term in the offence of sexual assault on a young child (section 15). Secondly, the perpetrator's purpose in having the child present must be one of those listed in subsection (2), that is the purpose of obtaining sexual gratification or the purpose of humiliating, distressing or alarming the victim (or for any combination of these purposes). Thus, a person who causes a child to be present in other circumstances (such as when parents engage in sexual activity in the same room as their sleeping baby) will not be caught. Sexual gratification can include deferred gratification, as would be the case where the perpetrator coerces the victim to be present during sexual activity with the intention that he or she will then consent to

participate in sexual conduct with the perpetrator. The same applies to humiliation, distress and alarm, where the purpose need not be to cause these feelings to be immediately present.

In addition to these requirements, the two circumstances in which the present offence is committed are, first, if the perpetrator intentionally engages in a sexual activity in the presence of the victim or, secondly, if the perpetrator causes the victim to be present while a third person engages in a sexual activity.

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

It may be that, in certain situations, the victim can see both the sexual activity and also an image of it. This might happen, for instance, if it takes place in a room with a mirror, or where the action is being recorded on a camera with a screen. In such a situation, the conduct may also amount to an offence under section 18.

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

- (1) If a person (“A”) intentionally and for a purpose mentioned in subsection (2) causes a child (“B”) who has not attained the age of 13 years to look at an image (produced by whatever means and whether or not a moving image) of A engaging in a sexual activity or of a third person or imaginary person so engaging, then A commits an offence, to be known as the offence of causing a young child to look at an image of a sexual activity.
- (2) The purposes are—
 - (a) obtaining sexual gratification,
 - (b) humiliating, distressing or alarming B.
- (3) For the purposes of subsection (1), an activity is sexual in any case if a reasonable person would, in all the circumstances of the case, consider the activity to be sexual.

NOTE

Section 18 creates the offence of causing a young child to look at an image of a sexual activity. This implements recommendations 24 and 25.

Subsection (1), read with the other two subsections, defines the scope of the offence. It is committed if a person intentionally, and for the purpose of obtaining sexual gratification or for the purpose of humiliating, distressing or alarming the victim, causes the victim to look at an image of a person engaging in a sexual activity. The test for what counts as sexual is set out in subsection (3), namely what a reasonable person would consider to be sexual: see the corresponding term in the offence of sexual assault on a young child (section 15).

The definition of what qualifies as an image for these purposes is broad. It includes a still or a moving image, and it also includes images of imaginary persons. The images may be produced by any means. Therefore, computer-generated imagery will be included if the images resemble people. So will images which are broadcast, such as by a webcam or a CCTV system. Recordings will also be caught, for example if stored on a computer or mobile telephone.

19 Communicating indecently with a young child etc.

- (1) If a person (“A”), intentionally and for a purpose mentioned in subsection (3)—
 - (a) sends, by whatever means, a sexual written communication to, or
 - (b) directs, by whatever means, a sexual verbal communication at,a child (“B”) who has not attained the age of 13 years, then A commits an offence, to be known as the offence of communicating indecently with a young child.
- (2) If, in circumstances other than are as mentioned in subsection (1), a person (“A”), intentionally and for a purpose mentioned in subsection (3) causes a child (“B”) who has not attained the age of 13 years to see or hear, by whatever means, a sexual written communication or sexual verbal communication, then A commits an offence, to be known as the offence of causing a young child to see or hear an indecent communication.
- (3) The purposes are—
 - (a) obtaining sexual gratification,
 - (b) humiliating, distressing or alarming B.
- (4) In this section—
 - (a) “written communication” means a communication in whatever written form, and without prejudice to that generality includes a communication which comprises writings of a person other than A (as for example a passage in a book or magazine), and
 - (b) “verbal communication” means a communication in whatever verbal form, and without prejudice to that generality includes—
 - (i) a communication which comprises sounds of sexual activity (whether actual or simulated), and
 - (ii) a communication by means of sign language.
- (5) For the purposes of this sections a communication or activity is sexual in any case if a reasonable person would, in all the circumstances of the case, consider it to be sexual.

NOTE

Section 19 creates two offences, each relating to unwanted sexual communication. This implements recommendations 24 and 25.

There are some common features shared by both offences. First, in each case the perpetrator must act either for the purpose of obtaining sexual gratification or to humiliate, distress or alarm the victim. Secondly, the communication must be sexual, and subsection (5) provides that the test for what counts as sexual is what a reasonable person would consider to be sexual: see the corresponding term in the offence of sexual assault on a young child (section 15).

Subsection (1) creates the offence of communicating indecently with a young child. It is committed if a person, in the circumstances described above, intentionally sends the victim a sexual written communication by whatever means or directs a sexual verbal communication at the victim, by whatever means. Subsection (4) defines "written communication" and "verbal communication". Both definitions are broad. The former includes, for example, text in a book or a magazine and also includes electronically generated text such as text messages or emails. Verbal communications include sign language as well as spoken words, and also include sounds of sexual activity (such as the sound track to a pornographic recording, or the noises made by sexual actors who are close by but who cannot be seen).

Subsection (2) creates the offence of causing a young child to see or hear an indecent communication. It is committed if, in circumstances other than as described in subsection (1), a person causes the young child to see a sexual written communication or to hear a sexual verbal communication, in either case by whatever means and in the circumstances described in the second paragraph above. The definitions in subsection (4) of "written communication" and "verbal communication" apply.

20 Belief that child had attained the age of 13 years

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

NOTE

Section 20, which implements recommendation 26, states that an accused has no defence to a charge under sections 14 to 19 if he or she believed (wrongly) that the other party was aged 13 years or over. This contrasts with the position in relation to the offences against older children (i.e. those aged 13, 14 or 15), in respect of which a reasonable belief that the other party had attained the age of 16 is a defence. (See section 27(1)(b).)

Older children

21 Having intercourse with an older child

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

(a) has attained (or under section 28(1) is deemed to have attained) the age of 13 years, but

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

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

NOTE

Section 21 creates the offence of having intercourse with an older child. This implements recommendations 28 and 29.

The offence may only be committed by a person aged 16 or over. The other party must be aged 13, 14 or 15. The offence is committed by the intentional or reckless penetration, with the accused's penis, of the victim's vagina, anus or mouth.

22 Engaging in sexual activity with or towards an older child

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

(a) has attained (or under section 28(1) is deemed to have attained) the age of 13 years, but

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

then A commits an offence, to be known as the offence of engaging in sexual activity with or towards an older child.

- (2) Those things are, that A—
 - (a) penetrates sexually, by any means and to any extent, either intending to do so or reckless as to whether there is penetration, the vagina, anus or mouth of B,
 - (b) intentionally or recklessly touches B sexually,
 - (c) engages in any other form of sexual activity in which A, intentionally or recklessly, has physical contact (whether bodily contact or contact by means of an implement and whether or not through clothing) with B,
 - (d) intentionally or recklessly ejaculates semen onto B.
- (3) For the purposes of—
 - (a) paragraph (a) of subsection (2), penetration is sexual,
 - (b) paragraph (b) of that subsection, touching is sexual,
 - (c) paragraph (c) of that subsection, an activity is sexual,in any case if a reasonable person would, in all the circumstances of the case, consider the penetration, or as the case may be the touching or the activity, to be sexual.
- (4) Without prejudice to the generality of paragraph (a) of subsection (2), the reference in the paragraph to penetration by any means is to be construed as including a reference to penetration with A's penis.

NOTE

Section 22 creates the offence of engaging in sexual activity with or towards an older child. This implements recommendations 28 and 29.

Subsection (1) states that the offence may only be committed by a person aged 16 or over. The other party must be aged 13, 14 or 15.

Subsection (2) sets out four sexual acts which fall within the offence. It also provides that, in each case, the perpetrator must either act intentionally or recklessly. (The test for recklessness will be an objective one, as is the general position in Scots law for mental elements.) The four sexual acts are:

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

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

Subsection (4) provides that penetration can be with the perpetrator's penis. This means that there is an overlap between the present offence and that of having intercourse with an older child. As to the reason for such overlap, see the note to section 15.

23 Causing an older child to participate in a sexual activity

- (1) If a person (“A”), who has attained the age of 16 years, intentionally causes a child (“B”), who—
 - (a) has attained (or under section 28(1) is deemed to have attained) the age of 13 years, but
 - (b) has not attained the age of 16 years,to participate in a sexual activity, then A commits an offence, to be known as the offence of causing an older child to participate in a sexual activity.
- (2) For the purposes of subsection (1), an activity is sexual in any case if a reasonable person would, in all the circumstances of the case, consider the activity to be sexual.

NOTE

Section 23 creates the offence of causing an older child to participate in a sexual activity. This implements recommendations 28 and 29.

Subsection (1) states that the offence may only be committed by a person aged 16 or over. The other party must be aged 13, 14 or 15. Further, it provides that the offence is committed if the perpetrator intentionally causes the child to participate in a sexual activity.

Subsection (2) provides the test for whether an activity is sexual, namely what a reasonable person would consider to be sexual: see the corresponding term in the offence of engaging in sexual activity with or towards an older child (section 22).

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

- (1) If a person (“A”), who has attained the age of 16 years either—
 - (a) intentionally engages in a sexual activity and for a purpose mentioned in subsection (2) does so in the presence of a child (“B”), who—
 - (i) has attained (or under section 28(1) is deemed to have attained) the age of 13 years, but
 - (ii) has not attained the age of 16 years, or
 - (b) intentionally, and for a purpose mentioned in subsection (2) causes B to be present while a third person engages in such an activity,then A commits an offence, to be known as the offence of causing an older child to be present during a sexual activity.
- (2) The purposes are—
 - (a) obtaining sexual gratification,
 - (b) humiliating, distressing or alarming B.
- (3) For the purposes of subsection (1), an activity is sexual in any case if a reasonable person would, in all the circumstances of the case, consider the activity to be sexual.
- (4) Without prejudice to the generality of subsection (1), the reference—
 - (a) in paragraph (a) of that subsection to A engaging in a sexual activity in the presence of B, includes a reference to A engaging in it in a place in which A can be observed by B other than by B looking at an image, and

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

NOTE

Section 24 creates the offence of causing an older child to be present during a sexual activity. This implements recommendations 28-29.

Subsection (1) states that the offence may only be committed by a person aged 16 or over. The other party must be aged 13, 14 or 15. It also defines two circumstances in which the offence is committed. There are common elements. First, the activity at which the older child is present must be sexual. The test for this is set out in subsection (3), namely what a reasonable person would consider to be sexual: see the corresponding term in the offence of engaging in sexual activity with or towards an older child (section 22). Secondly, the perpetrator's purpose in having the child present must be one of those listed in subsection (2), that is the purpose of obtaining sexual gratification or the purpose of humiliating, distressing or alarming the older child (or for any combination of these purposes). Thus, a person who causes a child to be present in other circumstances (such as when parents engage in sexual activity in the same room as their sleeping baby) will not be caught.

In addition to these requirements, the two circumstances in which the present offence is committed are, first, if the perpetrator intentionally engages in a sexual activity in the presence of an older child or, secondly, if the perpetrator causes an older child to be present while a third person engages in a sexual activity.

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

It may be that, in certain situations, the older child can see both the sexual activity and also an image of it. This might happen, for instance, if it takes place in a room with a mirror, or where the action is being recorded on a camera with a screen. In such a situation, the conduct may also amount to an offence under section 25.

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

- (1) If a person (“A”), who has attained the age of 16 years, intentionally and for a purpose mentioned in subsection (2) causes a child (“B”), who—
 - (a) has attained (or under section 28(1) is deemed to have attained) the age of 13 years, but
 - (b) has not attained the age of 16 years,to look at an image (produced by whatever means and whether or not a moving image) of A engaging in a sexual activity or of a third person or imaginary person so engaging, then A commits an offence, to be known as the offence of causing an older child to look at an image of a sexual activity.
- (2) The purposes are—
 - (a) obtaining sexual gratification,
 - (b) humiliating, distressing or alarming B.

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

NOTE

Section 25 creates the offence of causing an older child to look at an image of a sexual activity. This implements recommendations 28 and 29.

Subsection (1), read with the other two subsections, defines the scope of the offence. It is committed if a person, aged 16 or over, intentionally causes a child aged 13, 14 or 15 to look at an image of a person engaging in a sexual activity and does so for the purpose of obtaining sexual gratification or for the purpose of humiliating, distressing or alarming the child. The test for what counts as sexual is set out in subsection (3), namely what a reasonable person would consider to be sexual: see the corresponding term in the offence of engaging in sexual activity with or towards an older child (section 22).

The definition of what qualifies as an image for these purposes is broad. It includes a still or a moving image, and it also includes images of imaginary persons. The images may be produced by any means. Therefore, computer-generated imagery will be included if the images resemble people. So will images which are broadcast, such as by a webcam or a CCTV system. Recordings will also be caught, for example if stored on a computer or mobile telephone.

26 Communicating indecently with an older child etc.

- (1) If a person (“A”), who has attained the age of 16 years, intentionally and for a purpose mentioned in subsection (3), sends, by whatever means, a sexual written communication to or directs, by whatever means, a sexual verbal communication at, a child (“B”) who—
 - (a) has attained (or under section 28(1) is deemed to have attained) the age of 13 years, but
 - (b) has not attained the age of 16 years,then A commits an offence, to be known as the offence of communicating indecently with an older child.
- (2) If, in circumstances other than are as mentioned in subsection (1), a person (“A”), who has attained the age of 16 years, intentionally and for a purpose mentioned in subsection (3), causes another person (“B”) who is a child described in paragraphs (a) and (b) of subsection (1) to see or hear, by whatever means, a sexual verbal communication or sexual verbal communication, then A commits an offence, to be known as the offence of causing an older child to see or hear an indecent communication.
- (3) The purposes are—
 - (a) obtaining sexual gratification,
 - (b) humiliating, distressing or alarming B.
- (4) In this section—
 - (a) “written communication” means a communication in whatever written form, and without prejudice to that generality includes a communication which comprises writings of a person other than A (as for example a passage in a book or magazine), and
 - (b) “verbal communication” means a communication in whatever verbal form, and without prejudice to that generality includes—

- (i) a communication which comprises sounds of sexual activity (whether actual or simulated), and
 - (ii) a communication by means of sign language.
- (5) For the purposes of this section, a communication or activity is sexual in any case if a reasonable person would, in all the circumstances of the case, consider it to be sexual.

NOTE

Section 26 creates two offences, each relating to sexual communication. This implements recommendations 28 and 29.

There are some common features shared by both offences. First, in each case the perpetrator, who must be aged 16 or over, must act in relation to a child aged 13, 14 or 15. Secondly, the perpetrator must act either for the purpose of obtaining sexual gratification or to humiliate, distress or alarm the child. Thirdly, the communication must be sexual, and subsection (5) provides that the test for what counts as sexual is what a reasonable person would consider to be sexual: see the corresponding term in the offence of engaging in sexual activity with or towards an older child (section 22).

Subsection (1) creates the offence of communicating indecently with an older child (in other words, a child aged 13, 14 or 15). It is committed if a person, in the circumstances described above, intentionally sends the child a sexual written communication by whatever means or directs a sexual verbal communication at him or her, by whatever means. Subsection (4) defines "written communication" and "verbal communication". Both definitions are broad. The former includes, for example, text in a book or a magazine and also includes electronically generated text such as text messages or emails. Verbal communications include sign language as well as spoken words, and also include sounds of sexual activity (such as the sound track to a pornographic recording, or the noises made by sexual actors who are close by but who cannot be seen).

Subsection (2) creates the offence of causing an older child to see or hear an indecent communication. It is committed if, in circumstances other than as described in subsection (1), a person causes the child to see a sexual written communication or to hear a sexual verbal communication, in either case by whatever means and in the circumstances described in the second paragraph above. The definitions in subsection (4) of "written communication" and "verbal communication" apply.

27 Defences in relation to offences against older children

- (1) It is a defence to a charge under any of sections 21 to 26 that—
 - (a) B was A's spouse or civil partner, or
 - (b) A reasonably believed that B had attained the age of 16 years.
- (2) Subject to subsection (3), it is a defence to a charge under any of sections 22 to 26 that—
 - (a) at the time when the conduct to which the charge relates took place, the difference between A's age expressed in whole years and B's age so expressed did not exceed 2, or
 - (b) before that time (but after A had attained the age of 16 years), such conduct involving A and B as is mentioned in any of those sections took place and at the time it took place the difference between A's age expressed in whole years and B's age so expressed did not exceed 2.
- (3) Subsection (2) does not apply in so far as a charge is founded on subsection (2)(a) of section 22 if penetration was with A's penis.

- (4) It is not a defence to a charge under any of sections 21 to 26 that A believed that B had not attained the age of 13 years.

NOTE

Section 27 provides two defences to any charge of an offence against an older child, and a further defence for certain of those charges. It implements recommendations 31 to 36.

Subsection (1)(a) states that, for any charge under section 21 to 26, it is a defence for A to show that B was his or her spouse or civil partner at the time of the conduct in the charge. Given that the lower age limit for marriage in Scotland is 16 this effectively restricts the defence to marriages conducted outwith Scotland.

Subsection (1)(b) provides that it is a defence if the accused reasonably believed, at the time of the conduct in the charge, that the other party was aged 16 or over. It is not enough that the accused simply says that he or she had this belief. Rather, the accused must show why this belief was a reasonable one, and unless he or she meets this test then the defence need not be considered further. However, as mentioned below, once the accused has brought forward sufficient evidence then it is for the Crown to disprove the evidence, to the usual criminal standard of proof, or else the defence will succeed.

Subsection (2), read with subsection (3), provides a defence based on "proximity of age" between the accused and the other party. It is only available to an accused who is charged under sections 22 to 26, but not if the charge is of penile penetration under section 22. Paragraph (a) sets out the basic form of the defence, which is that the gap between the ages of the two parties at the time of the conduct was no greater than 2 (and the age is determined by the age at the most recent birthday). For example, if the accused is 17½ then the defence is available provided that the other party had attained the age of 15 by the time of the conduct. It will be seen that, because the age gap can be no more than 2, the defence can only be available to an accused who is 16 or 17 (and in those cases will only succeed if the other party has attained the age of 14 or 15 respectively).

There is a refinement to the defence in paragraph (b) of subsection (2). This will apply when the age gap, as defined above, is greater than 2 at the time of the conduct in the charge but where the two parties had previously had sexual contact with each other at a time when the age gap between them (again, as defined above) was no greater than 2 and when the accused had reached the age of 16. In such a situation, the accused could have used the "proximity of age" defence in subsection (2)(a) if the charge had related to that earlier conduct and, in recognition of the fact that a lawful relationship should not arbitrarily become unlawful simply because of the birth dates of the parties, the accused will continue to be able to use the defence by virtue of the refinement in paragraph (b).

As a general point, the defences in this section require the accused to satisfy an evidential burden (as opposed to a legal burden). This means that the accused must put evidence before the court which, if believed, could be taken by a reasonable jury to support the defence. If the accused succeeds in this then he or she must be acquitted unless the Crown establish, beyond reasonable doubt, that the evidence which the accused has raised is not sound.

Subsection (4) provides that the accused has no defence to a charge under sections 21 to 26 if he or she reasonably (but wrongly) believed that the other party was under 13. If this defence were allowed, the accused could not be convicted of any offence. That is because the offences against children under 13, in sections 14 to 19, can only be committed if the child is in fact under 13 (for which see the note to section 20).

General

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

- (1) If in a trial where A is charged with an offence under any of sections 21 to 26 there is a failure to establish beyond reasonable doubt that B was a person who had attained the age of 13 years when the conduct to which the proceedings relate occurred, B is to be deemed for the purposes of the proceedings to be such a person.
- (2) If in a trial where A is charged with an offence under any of sections 14 to 19 there is a failure to establish beyond reasonable doubt that B was a person who had not attained the age of 13 years when the conduct to which the proceedings relate occurred, but the court (or, in the case of a trial of an indictment, the jury) is satisfied—
 - (a) in every other respect that A committed the offence charged, and
 - (b) that it is established beyond reasonable doubt that B was a person who had not attained the age of 16 years when that conduct occurred,

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

- (3) A may be acquitted of the charge but found guilty of an offence against B under—
 - (a) section 21 where A is charged with an offence under section 14,
 - (b) section 22 where A is charged with an offence under section 15,
 - (c) section 23 where A is charged with an offence under section 16,
 - (d) section 24 where A is charged with an offence under section 17,
 - (e) section 25 where A is charged with an offence under section 18,
 - (f) section 26(1) where A is charged with an offence under section 19(1), or
 - (g) section 26(2) where A is charged with an offence under section 19(2)

(A then being liable to be punished accordingly).

- (4) If, but for a failure to establish beyond a reasonable doubt that B had not attained the age of 13 years, a court or jury would, by virtue of section 38(1), find that A committed an offence mentioned in the second column of schedule 2, it may, provided that—
 - (a) the condition in section 38(2) has been fulfilled, and
 - (b) it is satisfied that B was a person who had not attained the age of 16 years when the conduct to which the proceedings relate occurred,

deal with A as mentioned in subsection (5).

- (5) A may be acquitted of the charge but found guilty of an offence against B under—
 - (a) section 22 where the offence mentioned in the second column of schedule 2 is an offence under section 15,
 - (b) section 23 where the offence so mentioned is an offence under section 16,
 - (c) section 24 where the offence so mentioned is an offence under section 17,
 - (d) section 25 where the offence so mentioned is an offence under section 18,
 - (e) section 26(1) where the offence so mentioned is an offence under section 19(1), or
 - (f) section 26(2) where the offence so mentioned is an offence under section 19(2),

(A then being liable to be punished accordingly).

- (6) Subsections (3) and (4) of section 38 apply for the purposes of this section as they apply for the purposes of that section.
- (7) A reference in this section to an offence includes a reference to—
 - (a) an attempt to commit,
 - (b) incitement to commit,
 - (c) counselling or procuring the commission of, and
 - (d) involvement art and part in,an offence.

NOTE

The offences in Part 4 of the Bill, which all involve sexual activity with a child, divide into two distinct groups: those where the child is under the age of 13 at the time of the conduct (sections 14 to 19), and those where the child has attained the age of 13 but is under 16 (sections 21 to 26). The question of which offence is appropriate in any particular case is determined solely by the age of the child at the relevant time and not by any other factor, such as the accused's belief as to the child's age. (See the note to section 20.) It is therefore crucial for the Crown to be able to prove what age the child was at the time of the alleged offence. In the vast majority of cases this will not cause any difficulty but section 28, which implements recommendation 37 provides for those cases in which this issue arises.

Subsection (1) deals with charges under sections 21 to 26, or in other words those charges relating to conduct involving an older child. If the Crown is unable to prove, beyond reasonable doubt, that the child had attained the age of 13 at the relevant time then the effect of this subsection is that the child will be deemed to have attained that age. The Crown must of course be able to prove that the child was under the age of 16 at the relevant time.

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

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

29 Children requiring compulsory measures of care

- (1) Section 52 of the Children (Scotland) Act 1995 (c.36) (which relates to the question of whether compulsory measures of care are necessary in respect of a child) is amended as follows.
- (2) In subsection (2) there is inserted after paragraph (b)—

“(bb) has at any time engaged in sexual activity with, or been subjected to sexual activity by, another person,”.
- (3) At the end there is added—

“(4) For the purposes of paragraph (bb) of subsection (2)—

- (a) an activity is sexual in any case if a reasonable person would, in all the circumstances of the case, consider the activity to be sexual,
- (b) engaging in sexual activity includes, for a purpose mentioned in subsection (5)—
 - (i) causing a child who has attained the age of 13 years but not the age of 16 years to be present while a third person engages in such an activity or to look at an image of a third person or imaginary person engaging in such an activity,
 - (ii) sending such a child, by whatever means, a sexual written communication or directing, by whatever means, a sexual verbal communication at such a child, and
 - (iii) otherwise causing such a child to see or hear, by whatever means, a sexual written communication or sexual verbal communication,
- (c) being subjected to sexual activity includes—
 - (i) being present while a person intentionally engages in such an activity, and
 - (ii) being caused to look at an image of a person or imaginary person engaging in such an activity,

if the purpose in having the child present, or as the case may be in having the child look at the image, was a purpose mentioned in subsection (5), and
- (d) being subjected to sexual activity also includes—
 - (i) being sent, by whatever means, a sexual written communication or having had directed at, by whatever means, a sexual verbal communication, or
 - (ii) otherwise having been caused to see or hear, by whatever means, a sexual written communication or sexual verbal communication,

if the purpose in having the child receive or otherwise see or hear the communication was a purpose mentioned in subsection (5).
- (5) The purposes are—
 - (a) obtaining sexual gratification,
 - (b) humiliating, distressing or alarming the child.
- (6) In subsection (4), the expressions “sexual written communication” and “sexual verbal communication” are to be construed in accordance with section 26(4) and (5) of the Sexual Offences (Scotland) Act 2008.”.

NOTE

Section 29, which implements recommendation 30, amends section 52 of the Children (Scotland) Act 1995 which sets out the grounds on which a child's case may be referred to the children's hearing system. This amendment is needed in consequence of the fact that no offence in Part 4 is committed if two children aged 13 to 15 (inclusive) have sexual contact with each other. The policy intention is that such conduct should be dealt with by means of a referral to the children's hearing system or – if there was no consent to the conduct – by way of a charge under an offence in Part 1 of the Bill.

Subsection (2) specifies an additional ground of referral to be added to the list in section 52(2) of the 1995 Act. That ground is that the child has, at any time, engaged in sexual activity with another person or been subjected to sexual activity by another person. If the other person is also a child then both children may be referred under this new ground.

Subsection (3) adds two subsections to section 52 of the 1995 Act, both of which are to be read with the additional ground of referral. These subsections provide that, for the purpose of the new ground of referral:

- The test of whether an activity is sexual is to be judged by reference to whether a reasonable person would, in all the circumstances, consider it to be so. This is the same test as is specified in certain of the offences elsewhere in the Bill.
- Cases where a child has "engaged in sexual activity" include (but are not limited to) cases involving conduct which, if the child had attained the age of 16, would have amounted to an offence under any of sections 24 to 26.
- Cases where a child has "been subjected to sexual activity by another person" include (but are not limited to) cases involving conduct done by that other person which would have fallen within any of sections 24 to 26 if that person had attained the age of 16.

PART 5

ABUSE OF POSITION OF TRUST

Children

30 Sexual abuse of trust

- (1) If a person ("A") who has attained the age of 18 years—
 - (a) intentionally engages in a sexual activity with or directed towards another person ("B") who is under 18, and
 - (b) is in a position of trust in relation to B,then A commits an offence, to be known as the offence of sexual abuse of trust.
- (2) For the purposes of subsection (1), an activity is sexual in any case if a reasonable person would, in all the circumstances of the case, consider the activity to be sexual.

NOTE

Section 30 creates the offence of sexual abuse of trust. It implements recommendations 41, 42, and 46. Essentially, this is a consolidation of the existing offences in section 3 of the Criminal Law (Consolidation) (Scotland) Act 1995 and in section 3 of the Sexual Offences (Amendment) Act 2000.

Subsection (1) states that a person commits the offence if he or she, having attained the age of 18 years, intentionally engages in a sexual activity with, or directed at, a person who is under 18 and in respect of whom the perpetrator is in a position of trust.

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

The definition of "position of trust" is contained in section 31.

31 Positions of trust

- (1) For the purposes of section 30, a person (“A”) is in a position of trust in relation to another person (“B”) if any of the five conditions set out below, or any condition specified in an order made by the Scottish Ministers by statutory instrument, is fulfilled.
- (2) The first condition is that B is detained by virtue of an order of court or under an enactment in an institution and A looks after B in that institution.
- (3) The second condition is that B is resident in a home or other place in which accommodation is provided by a local authority under section 26(1) of the Children (Scotland) Act 1995 and A looks after B in that place.
- (4) The third condition is that B is accommodated and cared for in—
 - (a) a hospital,
 - (b) accommodation provided by an independent health care service,
 - (c) accommodation provided by a care home service,
 - (d) a residential establishment, or
 - (e) accommodation provided by a school care accommodation service or a secure accommodation service,and A looks after B in that place.
- (5) The fourth condition is that B is receiving education at an educational establishment, and A looks after B in that establishment.
- (6) The fifth condition is that A—
 - (a) has any parental responsibilities or parental rights in respect of B,
 - (b) fulfils any such responsibilities or exercises any such rights under arrangement with a person who has such responsibilities or rights,
 - (c) had any such responsibilities or rights but no longer has such responsibilities or rights, or
 - (d) treats B as a child of A's family,and B is a member of the same household as A.
- (7) No order may be made under subsection (1) unless a draft of the order has been laid before and approved by a resolution of the Scottish Parliament.
- (8) A looks after B for the purposes of this section if A regularly cares for, trains, supervises, or is in sole charge of B.

NOTE

Section 31 defines "position of trust" for the purposes of the offence of sexual abuse of trust in section 30. It implements recommendations 42, 43, and 50.

Subsection (1) states that person A is in a position of trust in relation to person B if any of the five conditions set out in subsections (2) to (6) is fulfilled. It also creates a power for the Scottish Ministers to make an order specifying other conditions which constitute a position of trust, and A will be in a position of trust in relation to B if any of these conditions is fulfilled.

Subsection (2) sets out the first condition which constitutes a position of trust. It is satisfied if A looks after B when B is detained in an institution by virtue of a court order or under an enactment. This covers,

for example, situations in which A is a prison warder in a young offenders institution in which B is being detained.

Subsection (3) sets out the second condition. It is met if A looks after B when B resides in accommodation provided by a local authority under section 26(1) of the Children (Scotland) Act 1995.

Subsection (4) sets out the third condition. It is fulfilled if A looks after B when B is accommodated in any of the places described in paragraphs (a) to (e). Definitions of the terms used in this subsection are provided in section 32.

Subsection (5) sets out the fourth condition. It is met if A looks after B when B is receiving education at an educational establishment (which, in terms of the definition in section 32, includes higher education).

Subsection (6) sets out the fifth condition. This is fulfilled if A and B are members of the same household and A has (or had, or fulfils) parental rights or parental responsibilities in respect of B or if A treats B as a child of A's family.

Subsection (7) provides that any order made by the Scottish Ministers under the order-making power in subsection (1) does not become law unless it is approved by a resolution of the Scottish Parliament.

Subsection (8) defines what it means for A to "look after" B for the purposes of any of the conditions in subsections (2) to (5). The definition requires that A needs to care for, train, supervise or be in sole charge of B and to do so regularly before a position of trust arises. It will be a matter for the court or the jury to determine in any particular case whether A was "looking after" B at the relevant time.

32 Interpretation of section 31

In section 31—

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

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

- (a) a university,
- (b) a theological college,

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

“independent health care service” has the meaning given by section 2(5) of the 2001 Act (asp 8),

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

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

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

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

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

NOTE

Section 32 defines certain terms used in section 31.

33 Sexual abuse of trust: defences

- (1) It is a defence to a charge under section 30 that A reasonably believed—
 - (a) that B had attained the age of 18, or
 - (b) that B was not a person in relation to whom A was in a position of trust.
- (2) It is a defence to a charge under section 30—
 - (a) that B was A's spouse or civil partner, or
 - (b) that immediately before the position of trust came into being, a sexual relationship existed between A and B.
- (3) Subsection (2) does not apply if A was in a position of trust in relation to B by virtue of section 31(6).
- (4) For the purposes of subsection (2), a relationship is sexual in any case if a reasonable person would, in all the circumstances of the case, consider the relationship to be sexual.

NOTE

Section 33 implements recommendations 44, 45, and 51. It provides four defences to a charge under section 30 (sexual abuse of trust). Those in subsection (1) apply to any such charge, but those in subsection (2) do not apply where the abuse occurs within a family setting (in other words, where the fifth condition in section 31 applies).

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

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

It is not enough, for either of the defences in subsection (1), that the accused simply says that he or she had the relevant belief. Rather, the accused must show why this belief was a reasonable one, and unless he or she meets this test then the defence need not be considered further. However, as mentioned below, once the accused has brought forward sufficient evidence then it is for the Crown to disprove the evidence, to the usual criminal standard of proof, or else the defence will succeed.

Subsection (2) provides two further defences to a charge of sexual abuse of trust, though they are limited, by virtue of subsection (3), to situations other than those where the position of trust is as described in section 31(6). In other words, they do not apply where the abuse occurs within a family setting. That is because there is considerable doubt whether a position of trust, within the meaning of section 31(6), could ever arise between spouses or those in any other lawful sexual relationship.

Subsection (2)(a) states that it is a defence for the accused to show that the other party was his or her spouse or civil partner at the time of the conduct in the charge.

Subsection (2)(b) provides that, where the parties were not married nor were civil partners but were in a sexual relationship, the accused has a defence if he or she can show that that relationship was in existence immediately before the particular position of trust arose. Subsection (4) provides a test for whether a relationship is sexual, which is to be determined by reference to what a reasonable person would consider,

in all the circumstances of the case. This defence has been provided in order that those who are already in a sexual relationship (but who are not married to, or in civil partnership with, each other) at the time that a position of trust arises should be free to continue that relationship while the position of trust persists without committing a criminal offence.

As a general point, the defences in this section require the accused to satisfy an evidential burden (as opposed to a legal burden). This means that the accused must put evidence before the court which, if believed, could be taken by a reasonable jury to support the defence. If the accused succeeds in this then he or she must be acquitted unless the Crown establish, beyond reasonable doubt, that the evidence which the accused has raised is not sound.

Mentally disordered persons

34 Sexual abuse of trust of a mentally disordered person

- (1) If a person (“A”)—
 - (a) intentionally engages in a sexual activity with or directed towards a mentally disordered person (“B”), and
 - (b) is a person mentioned in subsection (2),then A commits an offence, to be known as sexual abuse of trust of a mentally disordered person.
- (2) Those persons are—
 - (a) a person providing care services to B,
 - (b) a person who—
 - (i) is an individual employed in, or contracted to provide services in or to, or
 - (ii) not being the Scottish Ministers, is a manager of,
a hospital, independent health care service or state hospital in which B is being given medical treatment.
- (3) For the purposes of subsection (1), an activity is sexual in any case if a reasonable person would, in all the circumstances of the case, consider the activity to be sexual.
- (4) References in this section to the provision of care services are references to anything done by way of such services—
 - (a) by,
 - (b) by an employee of, or
 - (c) in the course of a service provided or supplied by,
a care service, whether by virtue of a contract of employment or any other contract or in such other circumstances as may be specified in an order made by the Scottish Ministers by statutory instrument.
- (5) A statutory instrument containing an order made under subsection (4) is subject to annulment in pursuance of a resolution of the Scottish Parliament.
- (6) In this section—

“care service” has the meaning given by subsection (1)(a), (b), (e), (g), (h), (k) and (n) as read with subsections (2), (3), (6), (9), (10), (16) and (27) of section 2 of the Regulation of Care (Scotland) Act 2001 (asp 8),

“hospital” and “independent health care service” have the meanings given in section 32, and

“state hospital” means a hospital provided under section 102(1) of the National Health Service (Scotland) Act 1978 (c. 29).

NOTE

Section 34, which implements recommendation 47, creates the offence of sexual abuse of trust of a mentally disordered person. The definition of "mental disorder" is given in section 42. It is the same definition as in section 328 of the Mental Health (Care and Treatment) (Scotland) Act 2003.

Subsection (1) states that a person commits the offence if he or she intentionally engages in a sexual activity with, or directed at, a mentally disordered person. In addition, the perpetrator must be a person of a class mentioned in subsection (2).

Subsection (2) defines those classes of person who are mentioned in subsection (1). They are, essentially, those who provide care to a mentally disordered person within certain settings. The subsection catches those who provide a care service (as defined in subsection (6)) to a mentally disordered person and also those who are employed in, or are contracted to provide services in, or who are a manager of, a hospital in which a mentally disordered person is receiving medical treatment.

Subsection (3) sets out the test for determining whether an activity is sexual for the purposes of subsection (1). It provides an objective test, namely a test which says that an activity is sexual if a reasonable person would, in all the circumstances of the case, consider it to be sexual.

Subsection (4) explains what providing care services means for the purpose of subsection (2). It also gives the Scottish Ministers the power to make an order specifying additional circumstances which will give rise to care services being provided for the purpose of that subsection. Under subsection (5) the Scottish Parliament can annul any such order by passing a resolution for annulment.

Subsection (6) defines certain terms used elsewhere in this section.

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

- (1) It is a defence to a charge under section 34 that A reasonably believed—
 - (a) that B did not have a mental disorder, or
 - (b) that A was not a person specified in section 34(2).
- (2) It is a defence to a charge under section 34—
 - (a) that B was A’s spouse or civil partner, or
 - (b) in a case where A was—
 - (i) a person specified in section 34(2)(a), that immediately before A began to provide care services to B, a sexual relationship existed between A and B,
 - (ii) a person specified in section 34(2)(b), that immediately before B was admitted to the hospital (or other establishment) referred to in that provision or (where B has been admitted to that establishment more than once) was last admitted to it, such a relationship existed.
- (3) For the purposes of subsection (2)(b), a relationship is sexual in any case if a reasonable person would, in all the circumstances of the case, consider the relationship to be sexual.

NOTE

Section 35 provides four defences to a charge under section 34 (sexual abuse of trust of a mentally disordered person). It implements recommendation 48.

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

Subsection (1)(b) provides that it is a defence if the accused reasonably believed, at the time of the conduct, that he or she was not a person who fell within any of the classes of person specified in section 34(2).

It is not enough, for either of the defences in subsection (1), that the accused simply says that he or she had the relevant belief. Rather, the accused must show why this belief was a reasonable one, and unless he or she meets this test then the defence need not be considered further. However, as mentioned below, once the accused has brought forward sufficient evidence then it is for the Crown to disprove the evidence, to the usual criminal standard of proof, or else the defence will succeed.

Subsection (2)(a) states that it is a defence for the accused to show that the other party was his or her spouse or civil partner at the time of the conduct in the charge.

Subsection (2)(b) provides the accused with a defence where a sexual relationship existed between the parties immediately before the accused fell within either of the classes of person specified in section 34(2). The defence is drafted in two parts, to reflect the two classes of person specified in that section. This defence has been provided in order that those who are already in a sexual relationship (but who are not married or in a civil partnership) will not commit a criminal offence by continuing to engage in sexual activity if a professional relationship of care subsequently arises.

Subsection (3) provides a test for whether a relationship is sexual, which is to be determined by reference to what a reasonable person would consider, in all the circumstances of the case.

As a general point, the defences in this section require the accused to satisfy an evidential burden (as opposed to a legal burden). This means that the accused must put evidence before the court which, if believed, could be taken by a reasonable jury to support the defence. If the accused succeeds in this then he or she must be acquitted unless the Crown establish, beyond reasonable doubt, that the evidence which the accused has raised is not sound.

PART 6

PENALTIES

Penalties

36 Penalties

- (1) A person guilty of an offence mentioned in the first column of schedule 1 is liable—
 - (a) on summary conviction, to the penalty mentioned in the third column,
 - (b) on conviction on indictment, to the penalty mentioned in the fourth column.

NOTE

Section 36 introduces schedule 1, which sets out the maximum penalties which may be imposed for each of the offences created by the Bill. For those offences which may be tried under either summary or solemn procedure the maximum penalties are specified in the third and fourth column respectively. Two offences,

rape and rape of a young child, can only be tried under solemn procedure (and, furthermore, the trial must take place in the High Court, which is the effect of the amendments in paragraph 5(2) and (3) of schedule 3).

PART 7

MISCELLANEOUS AND GENERAL

Miscellaneous

37 Consensual acts carried out for sexual gratification

- (1) It is not the crime of assault for a person who is aged 16 years or over (“A”) to attack another person who is aged 16 years or over (“B”) where—
 - (a) the attack is carried out for, or primarily for, the purpose of providing sexual gratification to A and B or either of them,
 - (b) A and B agree as to the purpose of the attack,
 - (c) B consents to the attack being carried out, and
 - (d) the attack is unlikely to result in serious injury to B (whether or not it does in fact result in such injury).
- (2) For the purposes of subsection (1)(d), an attack is unlikely to result in serious injury in any case if a reasonable person would, in all the circumstances of the case, consider that the attack would be unlikely to result in serious injury.
- (3) This section—
 - (a) applies to attacks which take place before the date on which this section comes into force as well as to those which take place on or after that date, but
 - (b) does not affect convictions for assault before the date on which this section comes into force.

NOTE

Section 37 implements recommendations 57 and 59. It creates a limited exemption from the law of assault. The current position is that the consent of the victim does not prevent an attack being a common law assault, at least when it involves a serious invasion of the victim's body. In English law the House of Lords has held that consent to participation in sado-masochistic practices is not a defence to charges involving serious bodily harm (*R v Brown* [1994] 1 AC 212). Section 37 has the effect of allowing certain activity of a sado-masochistic nature to be exempt from the common law of assault.

Subsection (1) provides that certain activity will not constitute the crime of assault. There are various conditions which must be satisfied. First, the parties must be aged 16 or over. Secondly, the attack must be carried out primarily for the purpose of providing sexual gratification to one or to both parties, and they must agree beforehand as to the purpose of the attack. Thirdly, the victim must consent to the attack being carried out. Lastly, the attack must be unlikely to result in serious injury to the victim. (If it does in fact result in serious injury that will not mean that the attack is an assault. However, if no serious injury actually results, but it was likely that such injury would occur, then the attack will not be covered by the exemption in this section.)

Subsection (2) sets out the test for determining whether an attack is unlikely to result in serious injury. The test is based on what a reasonable person would consider, in all the circumstances of the case.

Subsection (3) is a transitional measure. It provides that the exemption in subsection (1) will apply to an attack regardless of when it was carried out. However, where an attack has already resulted in a conviction by the date on which this section is brought into force then that conviction will stand.

38 Power to convict for offence other than that charged

- (1) If, in a trial—
 - (a) on an indictment for an offence mentioned in the first column of schedule 2 the jury are not satisfied that the accused committed the offence charged but are satisfied that the accused committed the alternative offence (or as the case may be one of the alternative offences) mentioned in the second column, they may, or
 - (b) in summary proceedings for an offence mentioned in the first column of that schedule the court is not satisfied that the accused committed the offence charged but is satisfied that the accused committed the alternative offence (or as the case may be one of the alternative offences) mentioned in the second column, it may, provided that the condition in subsection (2) has been fulfilled, acquit the accused of the charge but find the accused guilty of the alternative offence in respect of which so satisfied (the accused then being liable to be punished accordingly).
- (2) The condition is that the accused was given fair notice of the effect which subsection (1) might have in the accused's case.
- (3) Without prejudice to the generality of subsection (2), the condition mentioned in that subsection is to be taken to be satisfied where a notice, in a prescribed form, of the alternative verdicts which would be available in the accused's case in the circumstances mentioned in subsection (1) is appended to the indictment or as the case may be to the complaint.
- (4) In subsection (3), "prescribed" means prescribed by Act of Adjournal.
- (5) A reference in this section to an offence includes a reference to—
 - (a) an attempt to commit,
 - (b) incitement to commit,
 - (c) counselling or procuring the commission of, and
 - (d) involvement art and part in,an offence.

NOTE

Section 38 provides that, where a charge is brought under certain provisions in the Bill but the court or the jury are not satisfied that the accused committed the offence in the charge, it may be open to convict the accused of a specified alternative offence. Schedule 2 specifies the available alternatives. This is in implementation of recommendation 62.

We recognise that there is a degree of overlap between certain offences in the Bill and also between those offences and other existing offences, notably at common law. Partly because of this and partly in order to avoid the necessity for the Crown routinely to bring alternative charges we consider that there should be provision to allow a court or a jury, in particular circumstances, to find the accused guilty of an offence other than that which was charged.

Subsection (1) sets out the main limits of this power. First, the court or jury must have at least a reasonable doubt as to whether the accused committed or attempted to commit the offence which is charged. This means that the accused cannot be convicted of it. Secondly, the court or jury must be

satisfied (to the normal criminal standard of proof) that the accused committed or attempted to commit one of the other offences specified, in schedule 2 to the Bill, as being an available alternative to the offence which was charged. A third requirement, which stems from the right to a fair trial in article 6 of the European Convention on Human Rights, is that fair notice of the possibility of being convicted of this alternative must have been given: see subsection (2). If all of these conditions are met, then the court or jury must acquit the accused of the offence which was charged but may find him or her guilty of the alternative offence. The person will then be punished in the same way as if the offence of which they are convicted had been charged in the indictment or complaint.

Subsections (3) and (4) set out a procedure by which the requirement to give fair notice may be met. It is not compulsory, and is without prejudice to any other method of giving notice to the accused, but if it is followed then fair notice will be deemed to have been given. A form will be prescribed by Act of Adjournal which the Crown, by appending it to the indictment or complaint, may use to set out the available alternative verdicts in any particular case.

Subsection (5) provides that those charged with attempting, inciting, counselling or procuring the commission of an offence, or with being art and part involved in an offence, may be convicted of an appropriate alternative offence.

39 Exceptions to inciting or being involved art and part in offences under Part 4 or 5

A person (“X”) is not guilty of inciting, or being involved art and part in, an offence under Part 4 or 5 if, as regards another person (“Y”), X acts—

- (a) for the purpose of—
 - (i) protecting Y from sexually transmitted infection,
 - (ii) protecting the physical safety of Y,
 - (iii) preventing Y from becoming pregnant, or
 - (iv) promoting Y’s emotional well-being by the giving of advice, and
- (b) not for the purpose of—
 - (i) obtaining sexual gratification,
 - (ii) humiliating, distressing or alarming Y, or
 - (iii) causing or encouraging the activity constituting the offence or Y’s participation in it.

NOTE

Section 39 provides that those involved in counselling or who otherwise give advice in sexual matters will not be guilty of offences under the Bill, provided that they act in good faith. It implements recommendation 52.

The section states that a person who acts for any of the purposes specified in paragraph (a) (which involve the protection of others from sexually transmitted infection or from physical harm, the prevention of pregnancy, and the promotion of others’ well-being) will not be guilty of any of the offences in the Bill provided that they are not also acting for any of the purposes in paragraph (b). If this provision were not included, there is a chance that such a person might be found guilty of inciting another person to commit an offence under the Bill or being art and part involved in such an offence. For example, those who counsel and provide contraception for young children will not be found guilty if the child then has intercourse with another young child.

However, in order to claim the exception the person must act in good faith. Paragraph (b) deals with this. If, in the course of giving advice or counselling, a person acts for any of the purposes in this paragraph

then the defence will not be available. So the defence is not available, for example, for someone who encourages another person to commit an offence under the Bill but who at the same time provides advice on how to protect them from infection as a result of the unlawful sexual conduct.

40 Common law offences

For all purposes not relating to offences committed before the coming into force of this section—

- (a) the common law offences of—
 - (i) rape,
 - (ii) clandestine injury to women,
 - (iii) lewd, indecent or libidinous practice or behaviour, and
 - (iv) sodomy,are abolished, and
- (b) without prejudice to paragraph (a), in so far as the provisions of this Act regulate any conduct they replace any rule of law regulating that conduct.

NOTE

Section 40 makes provision for offences committed on or after the day on which this section is commenced (which will be done by order made under section 45). Inter alia, it implements recommendations 12(a), 38, and 53.

By paragraph (a), certain common law offences are abolished. This means that, where conduct which would otherwise have constituted one of those offences is committed on or after the date of commencement, no common law offence will have been committed. Instead, the conduct will fall under one of the offences in the Bill. (The exception to this is where the common law offence of sodomy would have been charged. There is no equivalent offence in the Bill.)

The particular common law offences which are to be abolished are: rape, clandestine injury to women, lewd, indecent or libidinous practice or behaviour, and sodomy.

All other common law crimes remain in place. However, paragraph (b) provides a qualification to this. It states that, for any conduct which takes place on or after the commencement of this section and which constitutes an offence under one of the provisions of the Bill, it is only competent to bring a charge under the offence in the Bill. So, it is not competent to charge the offender under the common law nor under any other statutory offence in respect of that conduct. This means, for example, that conduct falling within section 2 must be charged as a sexual assault and not, say, as an indecent assault. However, the provision allows for the theoretical possibility of a conviction for indecent assault for conduct which does not constitute a sexual assault or another offence in the Bill.

41 Continuity of sexual offences

- (1) This section applies where, in any trial—
 - (a) the accused is charged in respect of the same conduct both with an offence under this Act (“the new offence”) and with an offence specified in subsection (2) (“the existing offence”),
 - (b) there is a failure to establish beyond reasonable doubt that—
 - (i) the time when the conduct took place was after the coming into force of the provision providing for the new offence, and

- (ii) the time when the conduct took place was before the abolishment or replacement of or, as the case may be, the coming into force of the repeal of the enactment providing for, the existing offence, and
 - (c) the court (or, in the case of a trial of an indictment, the jury) is satisfied in every other respect that the accused committed the offences charged.
- (2) The offences referred to in subsection (1)(a) are—
 - (a) rape (at common law),
 - (b) clandestine injury to women,
 - (c) lewd, indecent or libidinous practice or behaviour,
 - (d) any other common law offence which is replaced by an offence under this Act,
 - (e) an offence under section 3 of the Criminal Law (Consolidation) (Scotland) Act 1995 (c.39) (intercourse of person in position of trust with child under 16),
 - (f) an offence under section 5(1), (2) or (3) (intercourse with girl under 16) or 6 (indecent behaviour towards girl between 12 and 16) of that Act,
 - (g) an offence under section 3 of the Sexual Offences (Amendment) Act 2000 (c.44) (abuse of position of trust).
- (3) Where this section applies, A may be found guilty—
 - (a) if the maximum penalty for the existing offence is less than the maximum penalty for the new offence, of the existing offence,
 - (b) in any other case, of the new offence.
- (4) In subsection (3) the reference, in relation to an offence, to the maximum penalty is a reference to the maximum penalty by way of imprisonment or other detention that could be imposed on the accused on conviction of the offence in the proceedings in question.
- (5) A reference in this section to an offence includes a reference to—
 - (a) an attempt to commit,
 - (b) incitement to commit,
 - (c) counselling or procuring the commission of, and
 - (d) involvement in and part in,
 an offence.

NOTE

Section 41 is aimed at providing a smooth transition between the current law in respect of sexual offences and the new offences contained in the Bill. It implements recommendation 60.

The main purpose of this section is to make allowance for cases in which the conduct in the charge takes place around the time that the offences contained in the Bill come into force. It may not always be possible to prove exactly when it took place. In view of the effect of section 40, this issue could be determinative in certain situations. For a conviction of an offence under the Bill, it must be proved that the conduct took place after the Bill's commencement. Conversely, a person cannot be convicted of an existing sexual offence unless it can be shown that the conduct took place before commencement. In the absence of a provision such as section 41 some prosecutions could fail simply on the basis that conduct, although proved to have taken place, could not be proved to have taken place before (or, conversely, after)

a particular date. Such a failure would be fatal for a charge of an existing offence and also for a charge of an offence in the Bill.

Subsection (1) applies where a person is charged, in respect of the same conduct, with an existing offence and with an offence created by the Bill. (Subsection (2) lists what qualifies as an existing offence.) This is only likely to occur in respect of conduct committed around the time that the Bill comes into force, since otherwise only one or other of the charges will be appropriate. Further, the subsection requires that the court or jury is satisfied, in all respects other than as to the time on which the conduct took place, that the accused committed the offence.

Subsection (3) provides that, where subsection (1) applies, a conviction may result, despite the failure to prove whether the conduct took place before or after the Bill's commencement. It provides that the accused may be found guilty of the new offence in all situations other than those in which the maximum penalty for the existing offence is less than that for the new offence. In that case, the accused may be found guilty of the existing offence. Subsection (4) defines what is meant by the "maximum penalty" for these purposes.

Subsection (5) adds that references in this section to an offence are to be read as including references to attempting to commit the offence, inciting its commission, and being involved in and part in it.

General provisions

42 Interpretation

In this Act—

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

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

43 Transitional provision etc.

- (1) The Scottish Ministers may, by order made by statutory instrument, make such incidental, supplemental, consequential, transitional, transitory or saving provision as they consider necessary or expedient for the purposes of, or in consequence of, this Act.
- (2) Subject to subsection (4), a statutory instrument containing an order under subsection (1) is subject to annulment in pursuance of a resolution of the Scottish Parliament.
- (3) An order under subsection (1) may make different provision for different cases or for different classes of case.
- (4) An order under subsection (1), if it includes provision amending or repealing an enactment contained in an Act, is not made unless a draft of the statutory instrument containing the order has been—
 - (a) laid before, and
 - (b) approved by a resolution of,
the Scottish Parliament.

NOTE

Section 43 deals with transitional and other provisions.

Subsection (1) provides the Scottish Ministers with a power to make an order, by statutory instrument, which may contain such incidental, supplemental, consequential, transitional, transitory, or saving provisions as they consider necessary or expedient.

Under subsection (2) the Scottish Parliament can annul any such order by passing a resolution for annulment. However, subsection (4) qualifies this. It states that where the order includes provision which amends or repeals primary legislation then it does not become law unless it is approved by a resolution of the Scottish Parliament.

Subsection (3) states that an order under subsection (1) may make different provision for different cases or for different classes of case.

44 Minor and consequential amendments and repeals

- (1) Schedule 3 to this Act, which makes minor amendments and amendments in consequence of this Act, has effect.
- (2) The enactments mentioned in the first column of schedule 4 to this Act are repealed to the extent specified in the second column of that schedule.

45 Short title and commencement

- (1) This Act may be cited as the Sexual Offences (Scotland) Act 2008.
- (2) This Act (other than this section) comes into force in accordance with provision made by the Scottish Ministers by order made by statutory instrument.
- (3) Different provision may be made under subsection (2) for different purposes.

NOTE

Section 45 sets out how the Bill is to be cited. It also provides for its commencement by way of commencement order made by the Scottish Ministers. Such orders may make different provision for different purposes.

SCHEDULE 1
(introduced by section 36)

PENALTIES

<i>Offence</i>	<i>Section introducing offence</i>	<i>Maximum penalty on summary conviction</i>	<i>Maximum penalty on conviction on indictment</i>
Rape	Section 1		Life imprisonment or a fine (or both)
Sexual assault	Section 2	Imprisonment for a term not exceeding 12 months or a fine not exceeding the statutory maximum (or both)	Life imprisonment or a fine (or both)
Sexual coercion	Section 3	Imprisonment for a term not exceeding 12 months or a fine not exceeding the statutory maximum (or both)	Life imprisonment or a fine (or both)
Coercing a person into being present during a sexual activity	Section 4	Imprisonment for a term not exceeding 12 months or a fine not exceeding the statutory maximum (or both)	Imprisonment for a term not exceeding 10 years or a fine (or both)
Coercing a person into looking at an image of a sexual activity	Section 5	Imprisonment for a term not exceeding 12 months or a fine not exceeding the statutory maximum (or both)	Imprisonment for a term not exceeding 10 years or a fine (or both)
Communicating indecently	Section 6(1)	Imprisonment for a term not exceeding 12 months or a fine not exceeding the statutory maximum (or both)	Imprisonment for a term not exceeding 10 years or a fine (or both)
Causing a person to see or hear an indecent communication	Section 6(2)	Imprisonment for a term not exceeding 12 months or a fine not exceeding the statutory maximum (or both)	Imprisonment for a term not exceeding 10 years or a fine (or both)
Sexual exposure	Section 7	Imprisonment for a term not exceeding 12 months or a fine not exceeding the statutory maximum (or both)	Imprisonment for a term not exceeding 5 years or a fine (or both)
Administering a substance for sexual purposes	Section 8	Imprisonment for a term not exceeding 12 months or a fine not exceeding the statutory maximum (or both)	Imprisonment for a term not exceeding 5 years or a fine (or both)

<i>Offence</i>	<i>Section introducing offence</i>	<i>Maximum penalty on summary conviction</i>	<i>Maximum penalty on conviction on indictment</i>
Rape of a young child	Section 14		Life imprisonment or a fine (or both)
Sexual assault on a young child	Section 15	Imprisonment for a term not exceeding 12 months or a fine not exceeding the statutory maximum (or both)	Life imprisonment or a fine (or both)
Causing a young child to participate in a sexual activity	Section 16	Imprisonment for a term not exceeding 12 months or a fine not exceeding the statutory maximum (or both)	Life imprisonment or a fine (or both)
Causing a young child to be present during a sexual activity	Section 17	Imprisonment for a term not exceeding 12 months or a fine not exceeding the statutory maximum (or both)	Imprisonment for a term not exceeding 10 years or a fine (or both)
Causing a young child to look at an image of a sexual activity	Section 18	Imprisonment for a term not exceeding 12 months or a fine not exceeding the statutory maximum (or both)	Imprisonment for a term not exceeding 10 years or a fine (or both)
Communicating indecently with a young child	Section 19(1)	Imprisonment for a term not exceeding 12 months or a fine not exceeding the statutory maximum (or both)	Imprisonment for a term not exceeding 10 years or a fine (or both)
Causing a young child to see or hear an indecent communication	Section 19(2)	Imprisonment for a term not exceeding 12 months or a fine not exceeding the statutory maximum (or both)	Imprisonment for a term not exceeding 10 years or a fine (or both)
Having intercourse with an older child	Section 21	Imprisonment for a term not exceeding 12 months or a fine not exceeding the statutory maximum (or both)	Imprisonment for a term not exceeding 10 years or a fine (or both)
Engaging in sexual activity with or towards an older child	Section 22	Imprisonment for a term not exceeding 12 months or a fine not exceeding the statutory maximum (or both)	Imprisonment for a term not exceeding 10 years or a fine (or both)
Causing an older child to participate in a sexual activity	Section 23	Imprisonment for a term not exceeding 12 months or a fine not exceeding the statutory maximum (or both)	Imprisonment for a term not exceeding 10 years or a fine (or both)

<i>Offence</i>	<i>Section introducing offence</i>	<i>Maximum penalty on summary conviction</i>	<i>Maximum penalty on conviction on indictment</i>
Causing an older child to be present during a sexual activity	Section 24	Imprisonment for a term not exceeding 12 months or a fine not exceeding the statutory maximum (or both)	Imprisonment for a term not exceeding 5 years or a fine (or both)
Causing an older child to look at an image of a sexual activity	Section 25	Imprisonment for a term not exceeding 12 months or a fine not exceeding the statutory maximum (or both)	Imprisonment for a term not exceeding 5 years or a fine (or both)
Communicating indecently with an older child	Section 26(1)	Imprisonment for a term not exceeding 12 months or a fine not exceeding the statutory maximum (or both)	Imprisonment for a term not exceeding 5 years or a fine (or both)
Causing an older child to see or hear an indecent communication	Section 26(2)	Imprisonment for a term not exceeding 12 months or a fine not exceeding the statutory maximum (or both)	Imprisonment for a term not exceeding 5 years or a fine (or both)
Sexual abuse of trust	Section 30	Imprisonment for a term not exceeding 12 months or a fine not exceeding the statutory maximum (or both)	Imprisonment for a term not exceeding 5 years or a fine (or both)
Sexual abuse of trust of a mentally disordered person	Section 34	Imprisonment for a term not exceeding 12 months or a fine not exceeding the statutory maximum (or both)	Imprisonment for a term not exceeding 5 years or a fine (or both).

NOTE

This schedule sets out, in the first two columns, all of the offences in the Bill. Against every offence there is set out, in the third and fourth columns, the maximum penalty which may be imposed, respectively, on summary conviction and on conviction on indictment. In respect of the offences of rape (section 1) and rape of a young child (section 14) the prosecution must always be on indictment and so there is no entry in the third column.

SCHEDULE 2
(introduced by section 38)
 ALTERNATIVE VERDICTS

<i>Offence</i>	<i>Alternative offence</i>
Rape	Sexual assault Having intercourse with an older child Assault at common law
Sexual assault	Engaging in sexual activity with or towards an older child Assault at common law
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 Causing a person to see or hear an indecent communication Causing an older child to participate in a sexual activity Assault at common law

<i>Offence</i>	<i>Alternative offence</i>
Coercing a person into being present during a sexual activity	<p>Sexual coercion</p> <p>Coercing a person into looking at an image of a sexual activity</p> <p>Communicating indecently</p> <p>Causing a person to see or hear an indecent communication</p> <p>Sexual exposure</p> <p>Assault at common law</p>
Coercing a person into looking at an image of a sexual activity	<p>Sexual coercion</p> <p>Coercing a person into being present during a sexual activity</p> <p>Communicating indecently</p> <p>Causing a person to see or hear an indecent communication</p> <p>Sexual exposure</p> <p>Assault at common law</p>
Communicating indecently	<p>Sexual coercion</p> <p>Coercing a person into being present during a sexual activity</p> <p>Coercing a person into looking at an image of a sexual activity</p> <p>Causing a person to see or hear an indecent communication</p> <p>Sexual exposure</p>

<i>Offence</i>	<i>Alternative offence</i>
Causing a person to see or hear an indecent communication	<p>Sexual coercion</p> <p>Coercing a person into being present during a sexual activity</p> <p>Coercing a person into looking at an image of a sexual activity</p> <p>Communicating indecently</p> <p>Sexual exposure</p>
Rape of a young child	<p>Sexual assault on a young child</p> <p>Assault at common law</p>
Sexual assault on a young child	Assault at common law
Causing a young child to participate in a sexual activity	<p>Causing a young child to be present during a sexual activity</p> <p>Causing a young child to look at an image of a sexual activity</p> <p>Communicating indecently with a young child</p> <p>Causing a young child to see or hear an indecent communication</p> <p>Assault at common law</p>
Causing a young child to be present during a sexual activity	<p>Causing a young child to participate in a sexual activity</p> <p>Causing a young child to look at an image of a sexual activity</p> <p>Communicating indecently with a young child</p> <p>Causing a young child to see or hear an indecent communication</p>

<i>Offence</i>	<i>Alternative offence</i>
Causing a young child to look an image of a sexual activity	<p>Causing a young child to participate in a sexual activity</p> <p>Causing a young child to be present during a sexual activity</p> <p>Communicating indecently with a young child</p> <p>Causing a young child to see or hear an indecent communication</p>
Communicating indecently with a young child	<p>Causing a young child to participate in a sexual activity</p> <p>Causing a young child to be present during a sexual activity</p> <p>Causing a young child to look at an image of a sexual activity</p> <p>Causing a young child to see or hear an indecent communication</p>
Causing a young child to see or hear an indecent communication	<p>Causing a young child to participate in a sexual activity</p> <p>Causing a young child to be present during a sexual activity</p> <p>Causing a young child to look at an image of a sexual activity</p> <p>Communicating indecently with a young child</p>
Having 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	<p>Causing an older child to be present during a sexual activity</p> <p>Causing an older child to look at an image of a sexual activity</p> <p>Communicating indecently with an older child</p> <p>Causing an older child to see or hear an indecent communication</p>

<i>Offence</i>	<i>Alternative offence</i>
Causing an older child to be present during a sexual activity	<p>Causing an older child to participate in a sexual activity</p> <p>Causing an older child to look at an image of a sexual activity</p> <p>Communicating indecently with an older child</p> <p>Causing an older child to see or hear an indecent communication</p>
Causing an older child to look at an image of a sexual activity	<p>Causing an older child to participate in a sexual activity</p> <p>Causing an older child to be present during a sexual activity</p> <p>Communicating indecently with an older child</p> <p>Causing an older child to see or hear an indecent communication</p>
Communicating indecently with an older child	<p>Causing an older child to participate in a sexual activity</p> <p>Causing an older child to be present during a sexual activity</p> <p>Causing an older child to look at an image of a sexual activity</p> <p>Causing an older child to see or hear an indecent communication</p>
Causing an older child to see or hear an indecent communication	<p>Causing an older child to participate in a sexual activity</p> <p>Causing an older child to be present during a sexual activity</p> <p>Causing an older child to look at an image of a sexual activity</p> <p>Communicating indecently with an older child</p>

NOTE

This schedule sets out, in the first column, certain offences in the Bill. Against these offences there is set out, in the second column, one or more alternative offences of which a conviction is possible under the conditions set out in section 38. The majority of these alternative offences are offences contained in the

Bill but the common law offence of assault is also specified in places. Where an offence is not listed in the first column there is no available alternative to which section 38 will apply.

The selection of appropriate alternative offences is based in large measure on the fact that there is an overlap between certain offences in the Bill. For example, conduct amounting to rape will also fall within the crime of sexual assault. The latter is therefore specified as an alternative to the former, to allow for the situation in which, in the course of the trial, not all of the required elements of rape can be proved but the court or the jury is satisfied that the accused committed a sexual assault. (However, rape is not specified as an alternative to sexual assault as that would allow for conviction of the particular and very serious crime of rape without a charge of rape having been brought. As a rule, the alternative offences are not more serious than the offences which they may replace. In recognition of this, we would expect the courts not to impose a higher sentence under the alternative offence than they may competently impose under the offence in respect of which the accused is acquitted, since this may lead to a breach of Convention rights.)

Similarly, there is an overlap between rape of a young child and sexual assault on a young child; and also between having intercourse with an older child and engaging in sexual activity with or towards an older child. In each pairing, the latter offence is specified as an alternative verdict to a charge of the former.

There is also an overlap between conduct falling within the offences in sections 3 to 6 (and between conduct falling within the corresponding offences involving young children, and again as regards the corresponding offences involving older children). As a result, offences within each of these three groups are specified as alternatives for the other offences in the group. In addition, section 7 (sexual exposure) is specified as an alternative to offences under sections 4 to 6, in recognition of the fact that conduct falling under those latter sections may also amount to sexual exposure.

Finally, the common law offence of assault is specified as an available alternative verdict to charges under sections 1 to 5 and 14 to 16. This is because we consider that, if the conduct cannot be shown to be "sexual" within the meaning of those sections, then it is reasonable to allow for a conviction of assault. This will also allow for a verdict of assault under the aggravation of being carried out with intent to rape.

SCHEDULE 3 (introduced by section 44)

MINOR AND CONSEQUENTIAL AMENDMENTS

The Visiting Forces Act 1952 (c.67)

- 1 In paragraph 2 of the Schedule to the Visiting Forces Act 1952 (offences referred to in section 3 of that Act)—
 - (a) in sub-paragraph (a), after the word “rape” there is inserted “(whether at common law or otherwise)”,
 - (b) at the end of sub-paragraph (b) there is added—

“(v) the Sexual Offences (Scotland) Act 2008 (asp 00).”

The Firearms Act 1968 (c.27)

- 2 (1) In section 18(3) of the Firearms Act 1968 (carrying firearm with criminal intent), for the word “18” there is substituted “18A”.
- (2) In Schedule 2 to that Act (offences to which sections 17(2) and 18 of that Act apply), after paragraph 18 there is inserted—

“18A An offence against section 1 of the Sexual Offences (Scotland) Act 2008 (asp 00).”.

The Internationally Protected Persons Act 1978 (c.17)

- 3 In section 1(1A) of the Internationally Protected Persons Act 1978 (attacks and threats of attacks on protected persons)—
- (a) in paragraph (a), at the end there is added “(whether, in Scotland, at common law or otherwise)”, and
 - (b) after paragraph (g) there is added—
 - “(h) an offence under section 2 or 15 of the Sexual Offences (Scotland) Act 2008 (asp 00), where what was done included a thing mentioned in subsection (2)(a) of the section in question,
 - (i) an offence under section 3 or 16 of that Act, where an activity involving sexual penetration was caused,
 - (j) an offence under section 14 of that Act.”.

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

- 4 (1) The Criminal Law (Consolidation) (Scotland) Act 1995 is amended as follows.
- (2) In section 4 (Proceedings and penalties for offences under sections 1 to 3), in each of subsections (1) and (5), for “, 2 or 3” there is substituted “or 2”.

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

- 5 (1) The Criminal Procedure (Scotland) Act 1995 is amended as follows.
- (2) In section 3(6) (jurisdiction and powers of solemn courts), after the word “rape” there is inserted “(whether at common law or as defined by section 1(1) of the Sexual Offences (Scotland) Act 2008 (asp 00)), rape of a young child (as defined by section 14 of that Act)”.
- (3) In section 7(8)(b)(i) (district court: jurisdiction and powers), after the word “rape” there is inserted “(whether at common law or as defined by section 1(1) of the Sexual Offences (Scotland) Act 2008 (asp 00)), rape of a young child (as defined by section 14 of that Act)”.
- (4) In section 19A(6) (samples etc. from persons convicted of sexual and violent crimes), in the definition of “relevant sexual offence”—
- (a) in paragraph (a), after the word “rape” there is inserted “(whether at common law or as defined by section 1(1) of the Sexual Offences (Scotland) Act 2008 (asp 00))”,
 - (b) the word “and” which immediately follows paragraph (h) is repealed, and
 - (c) after paragraph (i) there is inserted “and
 - (j) any offence which consists of a contravention of any of the following provisions of the Sexual Offences (Scotland) Act 2008 (asp 00)—
 - (i) section 2 (sexual assault),
 - (ii) section 3 (sexual coercion),

- (iii) section 4 (coercing a person into being present during a sexual activity),
 - (iv) section 5 (coercing a person into looking at an image of a sexual activity),
 - (v) section 6(1) (communicating indecently),
 - (vi) section 6(2) (causing a person to see or hear an indecent communication),
 - (vii) section 7 (sexual exposure),
 - (viii) section 14 (rape of a young child),
 - (ix) section 15 (sexual assault on a young child),
 - (x) section 16 (causing a young child to participate in a sexual activity),
 - (xi) section 17 (causing a young child to be present during a sexual activity),
 - (xii) section 18 (causing a young child to look at an image of a sexual activity),
 - (xiii) section 19(1) (communicating indecently with a young child),
 - (xiv) section 19(2) (causing a young child to see or hear an indecent communication),
 - (xv) section 21 (having intercourse with an older child),
 - (xvi) section 22 (engaging in sexual activity with or towards an older child),
 - (xvii) section 23 (causing an older child to participate in a sexual activity),
 - (xviii) section 24 (causing an older child to be present during a sexual activity),
 - (xix) section 25 (causing an older child to look at an image of a sexual activity),
 - (xx) section 26(1) (communicating indecently with an older child),
 - (xxi) section 26(2) (causing an older child to see or hear an indecent communication),
 - (xxii) section 30 (sexual abuse of trust) but only if the condition set out in section 31(6) of that Act is fulfilled,
 - (xxiii) section 34 (sexual abuse of trust of a mentally disordered person);”.
- (5) In section 24A (bail conditions: remote monitoring of restrictions on movements), in each of subsections (2)(a), (3) and (5)(a), after the word “rape” there is inserted “(whether at common law or as defined by section 1(1) of the Sexual Offences (Scotland) Act 2008 (asp 00))”.
- (6) In section 78(2) (notice of special defences), for the words from “coercion” to “consent” there is substituted “or coercion”.

- (7) In section 210A(10) (extended sentences for sex and violent offenders), in the definition of “sexual offence”—
- (a) in paragraph (i), after the word “rape” there is inserted “(whether at common law or as defined by section 1(1) of the Sexual Offences (Scotland) Act 2008 (asp 00))”, and
 - (b) after paragraph (xxvi) there is inserted “and
(xxvii) an offence which consists of a contravention of any of the following provisions of the Sexual Offences (Scotland) Act 2008 (asp 00)—
 - (A) section 2 (sexual assault),
 - (B) section 3 (sexual coercion),
 - (C) section 4 (coercing a person into being present during a sexual activity),
 - (D) section 5 (coercing a person into looking at an image of a sexual activity),
 - (E) section 6(1) (communicating indecently),
 - (F) section 6(2) (causing a person to see or hear an indecent communication),
 - (G) section 7 (sexual exposure),
 - (H) section 8 (administering a substance for sexual purposes),
 - (I) section 14 (rape of a young child),
 - (J) section 15 (sexual assault on a young child),
 - (K) section 16 (causing a young child to participate in a sexual activity),
 - (L) section 17 (causing a young child to be present during a sexual activity)
 - (M) section 18 (causing a young child to look at an image of a sexual activity),
 - (N) section 19(1) (communicating indecently with a young child),
 - (O) section 19(2) (causing a young child to see or hear an indecent communication),
 - (P) section 21 (having intercourse with an older child),
 - (Q) section 22 (engaging in sexual activity with or towards an older child),
 - (R) section 23 (causing an older child to participate in a sexual activity),
 - (S) section 24 (causing an older child to be present during a sexual activity),
 - (T) section 25 (causing an older child to look at an image of a sexual activity),
 - (U) section 26(1) (communicating indecently with an older child),

- (V) section 26(2) (causing an older child to see or hear an indecent communication),
 - (W) section 30 (sexual abuse of trust),
 - (X) section 34 (sexual abuse of trust of a mentally disordered person);”.
- (8) In section 288C(2) (prohibition of personal conduct of defence in cases of certain sexual offences)—
- (a) in paragraph (a), after the word “rape” there is inserted “(whether at common law or as defined by section 1(1) of the Sexual Offences (Scotland) Act 2008 (asp 00))”, and
 - (b) after paragraph (j) there is added—
 - “(k) an offence under any of the following provisions of the Sexual Offences (Scotland) Act 2008 (asp 00)—
 - (i) section 2 (sexual assault),
 - (ii) section 3 (sexual coercion),
 - (iii) section 4 (coercing a person into being present during a sexual activity),
 - (iv) section 5 (coercing a person into looking at an image of a sexual activity),
 - (v) section 6(1) (communicating indecently),
 - (vi) section 6(2) (causing a person to see or hear an indecent communication),
 - (vii) section 7 (sexual exposure),
 - (viii) section 14 (rape of a young child),
 - (ix) section 15 (sexual assault on a young child),
 - (x) section 16 (causing a young child to participate in a sexual activity),
 - (xi) section 17 (causing a young child to be present during a sexual activity),
 - (xii) section 18 (causing a young child to look at an image of a sexual activity),
 - (xiii) section 19(1) (communicating indecently with a young child),
 - (xiv) section 19(2) (causing a young child to see or hear an indecent communication),
 - (xv) section 21 (having intercourse with an older child),
 - (xvi) section 22 (engaging in sexual activity with or towards an older child),
 - (xvii) section 23 (causing an older child to participate in a sexual activity),
 - (xviii) section 24 (causing an older child to be present during a sexual activity),

- (xix) section 25 (causing an older child to look at an image of a sexual activity),
 - (xx) section 26(1) (communicating indecently with an older child),
 - (xxi) section 26(2) (causing an older child to see or hear an indecent communication),
 - (xxii) section 30 (sexual abuse of trust) but only if the condition set out in section 31(6) of that Act is fulfilled,
 - (xxiii) section 34 (sexual abuse of trust of a mentally disordered person), and
- (l) attempting to commit any of the offences set out in paragraph (k) above.”.
- (9) In Schedule 1 (offences against children under the age of 17 years to which special provisions apply)—
- (a) after paragraph 1 there is inserted—
 - “1A Any offence under section 14 or 21 of the Sexual Offences (Scotland) Act 2008 (asp 00).
 - 1B Any offence under section 15 or 22 of that Act.
 - 1C Any offence under section 30 of that Act towards a child under the age of 17 years but only if the condition set out in section 31(6) of that Act is fulfilled.”, and
 - (b) after paragraph 4 there is inserted—
 - “4A Any offence under section 4, 5, 6 or 7 of the Sexual Offences (Scotland) Act 2008 (asp 00) towards a child under the age of 17 years.
 - 4B Any offence under any of sections 16 to 19 or 23 to 26 of that Act.”.
- (10) In paragraph 3 of Schedule 5A (offences for purposes of section 205A of that Act), at the end there is added “(in either case, whether at common law or otherwise)”.

The United Nations Personnel Act 1997 (c.13)

- 6 In section 1(2)(a) of the United Nations Personnel Act 1997 (attacks on UN workers), after the word “rape” there is inserted “(in Scotland, whether at common law or as defined by section 1(1) of the Sexual Offences (Scotland) Act 2008 (asp 00))”.

The Terrorism Act 2000 (c.11)

- 7 In each of sections 63B(2)(a) (terrorist attacks abroad by British nationals or residents: jurisdiction) and 63C(2)(a) (terrorist attacks abroad on UK nationals, residents and diplomatic staff etc: jurisdiction), after the word “rape” there is inserted “(in Scotland, whether at common law or as defined by section 1(1) of the Sexual Offences (Scotland) Act 2008 (asp 00))”.

The Sexual Offences Act 2003 (c.42)

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

- (a) in paragraph 36, at the end there is added “at common law”,
 - (b) after paragraph 59C there is inserted—
- “59D An offence under section 1 of the Sexual Offences (Scotland) Act 2008 (asp 00) (rape).
 - 59E An offence under section 2 of that Act (sexual assault).
 - 59F An offence under section 3 of that Act (sexual coercion).
 - 59G An offence under section 4 of that Act (coercing a person into being present during a sexual activity).
 - 59H An offence under section 5 of that Act (coercing a person into looking at an image of a sexual activity).
 - 59I An offence under section 6(1) of that Act (communicating indecently).
 - 59K An offence under section 6(2) of that Act (causing a person to see or hear an indecent communication).
 - 59L An offence under section 7 of that Act (sexual exposure).
 - 59M An offence under section 8 of that Act (administering a substance for sexual purposes).
 - 59N An offence under section 14 of that Act (rape of a young child).
 - 59O An offence under section 15 of that Act (sexual assault on a young child).
 - 59P An offence under section 16 of that Act (causing a young child to participate in a sexual activity).
 - 59Q An offence under section 17 of that Act (causing a young child to be present during a sexual activity).
 - 59R An offence under section 18 of that Act (causing a young child to look at an image of a sexual activity).
 - 59S An offence under section 19(1) of that Act (communicating indecently with a young child).
 - 59T An offence under section 19(2) of that Act (causing a young child to see or hear an indecent communication).
 - 59U An offence under section 21 of that Act (having intercourse with an older child).
 - 59V An offence under section 22 of that Act (engaging in sexual activity with or towards an older child).
 - 59W An offence under section 23 of that Act (causing an older child to participate in a sexual activity).
 - 59X An offence under section 24 of that Act (causing an older child to be present during a sexual activity).
 - 59Y An offence under section 25 of that Act (causing an older child to look at an image of a sexual activity).
 - 59Z An offence under section 26(1) of that Act (communicating indecently with an older child).

- 59ZA An offence under section 26(2) of that Act (causing an older child to see or hear an indecent communication).
- 59ZB An offence under section 30 of that Act (sexual abuse of trust) where (either or both)—
- (a) the offender is 20 or over,
 - (b) the condition set out in section 31(6) of that Act is fulfilled.
- 59ZC An offence under section 34 of that Act (sexual abuse of trust of a mentally disordered person).”, and
- (c) in paragraph 60, for the words “59C” there is substituted “59ZC”.

The Mental Health (Care and Treatment) (Scotland) Act 2003 (asp 13)

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

The Gambling Act 2005 (c.19)

- 10 In Schedule 7 to the Gambling Act 2005 (“relevant offences” for purposes of that Act), after paragraph 18C there is inserted—
- “18D An offence under any of the following provisions of the Sexual Offences (Scotland) Act 2008 (asp 00)—
- (a) section 1 (rape),
 - (b) section 2 (sexual assault),
 - (c) section 3 (sexual coercion),
 - (d) section 4 (coercing a person into being present during a sexual activity),
 - (e) section 5 (coercing a person into looking at an image of a sexual activity),
 - (f) section 6(1) (communicating indecently),
 - (g) section 6(2) (causing a person to see or hear an indecent communication),
 - (h) section 7 (sexual exposure),
 - (i) section 14 (rape of a young child),
 - (j) section 15 (sexual assault on a young child),
 - (k) section 16 (causing a young child to participate in a sexual activity),
 - (l) section 17 (causing a young child to be present during a sexual activity),
 - (m) section 18 (causing a young child to look at an image of a sexual activity),
 - (n) section 19(1) (communicating indecently with a young child),
 - (o) section 19(2) (causing a young child to see or hear an indecent communication),
 - (p) section 21 (having intercourse with an older child),
 - (q) section 22 (engaging in sexual activity with or towards an older child),

- (r) section 23 (causing an older child to participate in a sexual activity),
- (s) section 24 (causing an older child to be present during a sexual activity),
- (t) section 25 (causing an older child to look at an image of a sexual activity),
- (u) section 26(1) of that Act (communicating indecently with an older child),
- (v) section 26(2) (causing an older child to see or hear an indecent communication),
- (w) section 30 (sexual abuse of trust) but only if the condition set out in section 31(6) of that Act is fulfilled,
- (x) section 34 (sexual abuse of trust of a mentally disordered person).”.

The Protection of Vulnerable Groups (Scotland) Act 2007 (asp 14)

11 In schedule 1 to the Protection of Vulnerable Groups (Scotland) Act 2007 (relevant offences for purposes of Part 1 of that Act), at the end there is added—

- “(w) an offence under section 14 (rape of a young child) of the Sexual Offences (Scotland) Act 2008 (asp 00),
- (x) an offence under section 15 (sexual assault on a young child) of that Act,
- (y) an offence under section 16 (causing a young child to participate in a sexual activity) of that Act,
- (z) an offence under section 17 (causing a young child to be present during a sexual activity) of that Act,
- (za) an offence under section 18 (causing a young child to look at an image of a sexual activity) of that Act,
- (zb) an offence under section 19(1) (communicating indecently with a young child) of that Act,
- (zc) an offence under section 19(2) (causing a young child to see or hear an indecent communication) of that Act,
- (zd) an offence under section 21 (having intercourse with an older child) of that Act,
- (ze) an offence under section 22 (engaging in sexual activity with or towards an older child) of that Act,
- (zf) an offence under section 23 (causing an older child to participate in a sexual activity) of that Act,
- (zg) an offence under section 24 (causing an older child to be present during a sexual activity) of that Act,
- (zh) an offence under section 25 (causing an older child to look at an image of a sexual activity) of that Act,
- (zi) an offence under section 26(1) of that Act (communicating indecently with an older child) of that Act,
- (zj) an offence under section 26(2) (causing an older child to see or hear an indecent communication) of that Act,
- (zk) an offence under section 30 (sexual abuse of trust) of that Act.”.

NOTE

This schedule amends provisions in various enactments. It does so in consequence of the provisions on the Bill. Except where specifically noted below, the aim of the amendments is to bring existing legislation into line with the new offences created in the Bill. Thus, references in existing law to rape may require to be amended so that they include reference to the offence of rape in section 1 of the Bill. Also, where legislation defines certain consequences which follow conviction of an existing sexual offence, it is necessary to provide for the consequences of conviction of the corresponding offence or offences in the Bill. A good example of this is in paragraph 8, which amends the list of offences conviction of which will result in the offender being subject to the notification requirements of Part 2 of the Sexual Offences Act 2003 (colloquially referred to as their being placed on the sex offenders register). Our aim in all cases has been to preserve the policy which lies behind the legislation which is to be amended.

There are three amendments whose rationale differs from what is outlined above:

- (i) The amendments in paragraph 5(2) and (3) have the effect of requiring prosecutions for rape (section 1) and rape of a young child (section 14) to be brought in the High Court.
- (ii) Paragraph 5(6) amends section 78 of the Criminal Procedure (Scotland) Act 1995, which deals with special defences in solemn proceedings, so that it no longer applies to the defence of consent. This is to be read with the provision in schedule 4 which repeals subsections (2A) and (2B) of section 78. (The corresponding provision relating to summary proceedings, in section 149A of the 1995 Act, is also repealed by schedule 4.)
- (iii) Paragraph 9 amends a provision in the Mental Health (Care and Treatment) (Scotland) Act 2003 in consequence of the repeal, in schedule 4, of section 313 of that Act.

SCHEDULE 4
(introduced by section 44)

REPEALS

<i>Enactment</i>	<i>Extent of repeal</i>
Visiting Forces Act 1952 (c.67)	In the Schedule, paragraph 2(b)(i) and (ii).
Criminal Law (Consolidation) (Scotland) Act 1995 (c.39)	Sections 3, 5 and 6. Section 7(2) and (3). Section 13(1), (2), (5) to (8A) and (11). Section 14.
Criminal Procedure (Scotland) Act 1995 (c.46)	Section 78(2A) and (2B). Section 149A. In section 210A(10), in the definition of “sexual offence”, paragraphs (vii), (xx) and (xxi).

<i>Enactment</i>	<i>Extent of repeal</i>
Crime and Punishment (Scotland) Act 1997 (c.48)	In Schedule 1, paragraph 18(3).
Sexual Offences (Amendment) Act 2000 (c.44)	The whole Act.
Regulation of Care (Scotland) Act 2001 (asp 8)	In schedule 3, paragraph 25.
Convention Rights (Compliance) (Scotland) Act 2001 (asp 7)	In section 10, paragraph (b) and the word “and” immediately before that paragraph.
Sexual Offences (Procedure and Evidence) (Scotland) Act 2002 (asp 9)	Section 6(1)(b) and (2).
Sexual Offences Act 2003 (c.42)	In Schedule 6, paragraph 33.
Mental Health (Care and Treatment) (Scotland) Act 2003 (asp 13)	Sections 311 to 313 and 319.
Protection of Vulnerable Groups (Scotland) Act 2007 (asp 14)	In schedule 1, paragraph 1(p).

NOTE

This schedule repeals provisions of various enactments.

Paragraph 2(b)(i) and (ii) of the Schedule to the Visiting Forces Act 1952 refers to two enactments which have been repealed.

The repeals of various sections of the Criminal Law (Consolidation) (Scotland) Act 1995 implement recommendations 12(b) and 54.

Sections 78(2A) and (2B) and 149A of the Criminal Procedure (Scotland) Act 1995 are repealed in implementation of recommendation 8. The other repeal in respect of this Act removes references in section 210A to the offence of shameless indecency (which, as declared by the court in *Webster v Dominick* 2005 JC 65, is not an offence in Scots law) and to offences under section 3 of the Sexual Offences (Amendment) Act 2000 and section 311(1) of the Mental Health (Care and Treatment) (Scotland) Act 2003. As mentioned below, both of those sections are to be repealed by the Bill.

Paragraph 18(3) of Schedule 1 to the Crime and Punishment (Scotland) Act 1997 amends section 7(3) of the Criminal Law (Consolidation) (Scotland) Act 1995, which, as noted above, is to be repealed by the Bill. The amending provision therefore falls to be repealed.

The Sexual Offences (Amendment) Act 2000 was substantially repealed, for jurisdictions other than Scotland, by the Sexual Offences Act 2003. The remainder falls to be repealed as a consequence of the Bill.

Paragraph 25 of schedule 3 to the Regulation of Care (Scotland) Act 2001 amends section 4 of the Sexual Offences (Amendment) Act 2000. As mentioned above, that Act is to be repealed by the Bill and so the amending provision falls to be repealed too.

Section 10(b) of the Convention Rights (Compliance) (Scotland) Act 2001 amends section 13(5) of the Criminal Law (Consolidation) (Scotland) Act 1995. As noted above, that section is to be repealed and so the amending provision falls to be repealed too.

Section 6(1)(b) and (2) of the Sexual Offences (Procedure and Evidence) (Scotland) Act 2002 inserted sections 78(2A) and (2B) and 149A into the Criminal Procedure (Scotland) Act 1995. As mentioned above, those sections are to be repealed and so the amending provision falls to be repealed too.

Paragraph 33 of Schedule 6 to the Sexual Offences Act 2003 amends section 5(6) of the Criminal Law (Consolidation) (Scotland) Act 1995. As noted above, that section is to be repealed and so the amending provision falls to be repealed too.

Sections 311 and 313 of the Mental Health (Care and Treatment) (Scotland) Act 2003 are to be repealed in implementation of recommendations 39 and 46. Section 312 of that Act inserts paragraph (xxi) into the definition of "sexual offence" in section 210A(10) of the Criminal Procedure (Scotland) Act 1995. That paragraph is to be repealed by the Bill. Section 319 of the 2003 Act applies certain time limits to summary proceedings taken under sections 311 and 313 of the Act. As those sections are to be repealed, the time limits are no longer needed.

Paragraph 1(p) of schedule 1 to the Protection of Vulnerable Groups (Scotland) Act 2007 contains a reference to section 3 of the Sexual Offences (Amendment) Act 2000. As mentioned above, that Act is to be repealed by the Bill and so the reference is no longer needed.

Appendix B

List of consultees who submitted written comments on Discussion Paper No 131

Action for Change, Stirling
Alzheimer Scotland
Amina – the Muslim Women's Resource Centre
Julie Anderson
Libby Anderson
Association of Scottish Police Superintendents
The British Psychological Society (Division of Forensic Psychology)
The British Psychological Society (Lesbian and Gay Psychology Section)
Brook
Central Scotland Rape Crisis and Sexual Abuse Centre
James Chalmers, University of Aberdeen (now at University of Edinburgh)
Childline Scotland
Children 1st
James P Connolly, Glasgow Caledonian University
Susan Davie
Amy Duguid
East Ayrshire Council
Edinburgh University Students Association LGBT Campaign and Women of the World
Eighteen and Under
Enable
Engender
Equal Opportunities Commission Scotland
Edinburgh Women's Rape and Sexual Abuse Centre
Professor Lindsay Farmer, University of Glasgow
Professor Pamela Ferguson and Professor Fiona Raitt, University of Dundee
Fife Domestic and Sexual Abuse Partnership
Betty Findlay
Mary Forbes
Glasgow Bar Association
Gemma Gordon
James Gordon
Lilian Gordon
Linda Gordon
Judges of the High Court of Justiciary
The Law Society of Scotland
The Rt Hon Lord Marnoch
Mirabelle Maslin
Mark McCabe
John McGeechan
Hilda McGillivray
Carol Middleton
Margaret Middleton

Valerie Mooney
Dr Vanessa Munro, King's College London
North Lanarkshire Domestic Abuse Working Group
Rape Crisis Scotland
Rape Law Reform Group
Rape Reform Workshop: Open Letter from Participants
Keith Redford
Dr Mike Redmayne, London School of Economics
Professor Colin Reid, University of Dundee
Maureen Reith
Samantha Reith (and 329 signatories)
Timothy Roberts
The Sandyford Initiative
SASSIE (Sexual Abuse Survivor's Support in Edinburgh)
Say Women
Scottish Child Law Centre
Scottish Children's Reporter Administration
Scottish Police Federation
Scottish Women's Aid
Scottish Women's Convention
Soroptimist International, Scotland North Region
Spanner Trust
Tracy Spink
UK Men's Movement
Unfettered
Morag Wilson
Women's Support Project, Glasgow
YWCA Scotland

The Discussion Paper also elicited twelve confidential responses.

