



Scottish Law Commission
promoting law reform

(DISCUSSION

131)

Discussion Paper on Rape and Other Sexual Offences

discussion
paper



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Discussion Paper on Rape and Other Sexual Offences

January 2006

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The Commission would be grateful if comments on this Discussion Paper were submitted by 1 May 2006. Comments may be made (please see notes below) on all or any of the matters raised in the paper. All correspondence should be addressed to:

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NOTES

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¹ Amended by the Scotland Act 1998 (Consequential Modifications) (No 2) Order 1999 (SI 1999/1820).

² The term of office of Professor Kenneth G C Reid CBE expired on 31 December 2005 but he took part in discussions at Commission meetings about the draft of this Discussion Paper.

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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)

Macdonald

J H A Macdonald, *A Practical Treatise on the Criminal Law of Scotland* (5th edn, 1948)

Mackenzie

Mackenzie, *The Laws and Customs of Scotland in Matters Criminal* (1678)

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 This Discussion Paper represents the first formal consultation document to be issued as part of the project. However, since receiving the reference from the Scottish Ministers, we have been engaged in consultation and discussion. One method of doing this has been through participation in seminars. In October 2004 and April 2005, team members attended seminars which were organised by Rape Crisis Scotland, and at which Professor Maher presented papers exploring the work of the project. In addition, an Advisory Group was set up to aid us in our consideration of the law. The Group consists of members from various backgrounds whose expertise has been of great assistance in highlighting to us the important issues arising from the project, and in ensuring that these issues were taken into consideration in forming our proposals.² The Advisory Group's contribution has been invaluable in shaping the direction of the project and we wish to express our thanks to Group members for giving so much of their time to consult with us. We have also sought specific expert advice as necessary. For example, Dr John Crichton of the Royal Edinburgh Hospital and Dr Raj Darjee of the State Hospital Carstairs have contributed their expertise in forensic psychiatry and the treatment of sex offenders. We have also held discussions with officials at the Crown Office and Procurator Fiscal Service.³

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)*,⁴ 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 is 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 See further at para 1.13 where we discuss the Crown Office's own review of the investigation and prosecution of sexual offences.

⁴ 2002 SLT 466.

*Advocate*⁵ and *Cinci v HM Advocate*,⁶ 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.⁷

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 1989.⁸ 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.⁹

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).¹⁰

1.7 Over the past six years 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

⁵ 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.

⁶ 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.

⁷ Hume, I, 469 mentions the case of *Swan and Litster* decided in 1570.

⁸ *Stallard v HM Advocate* 1989 SLT 469.

⁹ 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)).

¹⁰ For a useful assessment of these reforms, see Temkin, chapter 3.

Territory published its Report on *the Laws Relating to Sexual Assault*.¹¹ 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*.¹² In 2004, the Victorian Law Reform Commission published a report on sexual offences.¹³ The focus of this report was wider than some of the other reviews as it included issues of criminal process such as the responses of the police and the justice system to complaints of rape.

1.8 Two further developments are of special significance to our own project. The first is the passing of the Sexual Offences Act 2003, which established a new legal framework for sexual offences in England and Wales.¹⁴ The 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*.¹⁵ Part 1 of the 2003 Act sets out a comprehensive model on sexual offences, covering such topics as rape and sexual assault, child sex offences, offences involving abuse of trust, offences against child family members or persons with mental disorder, child pornography, prostitution, and miscellaneous offences such as exposure and voyeurism.

1.9 A feature of the 2003 Act which is of particular interest for this project is the model of consent used in the definition of various offences. Sections 74, 75 and 76 of the 2003 Act provide a definition of, and list of evidential presumptions which apply to, consent. The overall effect is to provide a more detailed model of consent than that in the previous law (or in existing Scots law). This new model stresses the need to understand consent in terms of the overall interaction between the parties involved in sexual activity, and the 2003 Act contains illustrations of the types of situation where consent will be presumed (and in some cases, conclusively presumed) to be absent.

1.10 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 2003.¹⁶ The Code contained various provisions on sexual offences, some of which differed from the existing common law. As these provisions embodied an impressive amount of industry and reflection, we decided to hold a seminar with the aim of exploring how far we could build upon the work of the Code group for our own project. 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 express our gratitude to the speakers and other participants at the seminar.¹⁷

¹¹ ACT LRC Report No 18 (2001).

¹² SALC Project 107 (2002).

¹³ Victorian Law Reform Commission, *Sexual Offences: Final Report*, (2004).

¹⁴ Part 1 of the 2003 Act deals with the law on sexual offences in England and Wales. It came into effect in 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.

¹⁵ Home Office, (2000).

¹⁶ *A Draft Criminal Code for Scotland with Commentary* (2003, published under the auspices of the Scottish Law Commission).

¹⁷ The seminar was held at the University of Edinburgh on 24 March 2005. The speakers were Professor Jennifer Temkin, University of Sussex; Professor Christopher Gane, University of Aberdeen; Dr Victor Tadros,

Scope of the project

1.11 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.¹⁸

1.12 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.

1.13 *Prosecution policy and practice.* This project is not concerned with prosecution policy and practice. However, it is of interest to note that 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. To avoid any possible misunderstanding we would stress that our own project does not consider any questions relating to the ways in which the reporting of sexual offences by victims are handled and processed by the police or by the Crown Office.

1.14 *Prostitution.* 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.¹⁹ In any case, the law on prostitution is currently being reviewed by the Expert Group on Prostitution, which was set up by the Scottish Executive in 2003. The remit of the Group is to consider "the legal, policing, health and social justice issues surrounding prostitution in Scotland."²⁰ Its first stage report was published in December 2004, the focus of which is street prostitution.²¹ The report covers, amongst other issues, the offence of soliciting, which is currently contained within section 46 of the Civic Government (Scotland) Act 1982.

1.15 There are also provisions relating to prostitution within the Criminal Law (Consolidation) (Scotland) Act 1995. These provisions relate to trading in prostitution and brothel-keeping. In addition, section 22 of the Criminal Justice (Scotland) Act 2003 contains provisions on trafficking. These offences are also scheduled for review by the Expert Group

University of Edinburgh; and Professor Eric Clive, University of Edinburgh. Revised versions of the papers by Professor Temkin and Professor Clive will be published in the *Juridical Review* in 2006. A paper by Dr Tadros on the topic of his seminar presentation is to be published in (2006) *Oxford Journal of Legal Studies*.

¹⁸ Paras 1.19-1.31.

¹⁹ "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.)

²⁰ Scottish Executive, *Being Outside: Constructing a Response to Street Prostitution* (2004), p v.

²¹ *Ibid.*

in the next stages of its work. Since the Expert Group on prostitution is carrying out a comprehensive review of prostitution, including legal issues, we do not consider it necessary or appropriate to include this area within our own review.

1.16 *Pornography.* 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 do not intend to examine them in this Discussion Paper, as they involve much wider social issues than those of the present project.

1.17 As we explain later, the chief focus of our inquiry is with offences that involve sexual acts that are non-consensual or are exploitative due to the victim's lack of capacity.²² 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.²³ 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 1982,²⁴ 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 2005.²⁵

1.18 *Adult entertainment.* 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.²⁶ We doubt whether this form of activity would fall within the scope of our terms of reference but in any case, given the existence of the Working Group, this is not a subject which we examine in this Discussion Paper.

What are sexual offences?

1.19 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

²² Paras 1.29-1.31.

²³ 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).

²⁴ Sections 52 and 52A.

²⁵ The 2005 Act came into effect in October 2005.

²⁶ A consultation paper was issued on behalf of the Working Group in July 2005.

sexual offences. There are three possible sources to consult when considering this issue: definitions of the term sexual in the existing law; general classifications of sexual offences; and legal writings.

1.20 *Definitions of the term sexual.* We consider first how the word sexual is defined in the criminal law. As this term was not used in naming common law crimes, Scots law has avoided attempting to define the term sexual in relation to types of offence. A similar issue arises in respect of the common law crime of indecent assault, which because of the narrow definition of the crime of rape²⁷ extends to many types of sexual assaults. The courts proceed on a general assumption that whether an assault is indecent is a matter of facts and circumstances but that there has to be a sexual element to the assault.²⁸

1.21 Definitions of the term sexual have appeared as a constituent element of various statutory offences.²⁹ Although these definitions do throw some light on the nature of sexual offences we are of the view that the purpose of the relevant provisions is not to define a limit to a general class of offences. Rather they are concerned with indicating the nature of specific offences, in particular in demarcating a sexual element to offences or conduct of a wider ambit (for example, distinguishing sexual assault from assault generally). This is an issue which we consider later.³⁰

1.22 *General classifications of sexual offences.* The current law provides examples of the categorisation of sexual offences. For example section 288C of the Criminal Procedure (Scotland) Act 1995 sets out the following list which applies to various provisions of the Act:³¹

"(2) This section applies to the following sexual offences —

- (a) rape;
- (b) sodomy;
- (c) clandestine injury to women;
- (d) abduction of a woman or girl with intent to rape;
- (e) assault with intent to rape;
- (f) indecent assault;

²⁷ The only type of act which constitutes rape at common law is the penetration of a vagina by a penis.

²⁸ See Gane, p 58.

²⁹ For example, Sexual Offences (Amendment) Act 2000, s 3(5) (sexual activity involving the abuse of a position of trust); Protection of Children and Prevention of Sexual Offences (Scotland) Act 2005, s 19.

³⁰ Part 4 (sexual assaults); Part 6 (offences based on public morality).

³¹ The list in s 288C is referred to in the following sections of the 1995 Act: 17A (Right of person accused of sexual offence to be told about restriction on conduct of defence: arrest); 24 (Bail and bail conditions); 35 (Judicial examination); 66 (Service and lodging of indictment etc); 71 (First diet); 72 (Preliminary hearing: procedure up to appointment of trial diet); 72A (Preliminary hearing: appointment of trial diet); 72F (Engagement, dismissal and withdrawal of solicitor representing accused); 78 (Special defences, incrimination and notice of witnesses etc); 92 (Trial in presence of accused); 140 (Citation); 144 (Procedure at first diet); 146 (Plea of not guilty); 148A (Interim diet: sexual offence to which s 288C of this act applies); 149A (Notice of defence plea of consent); 271B (Further special provisions for child witnesses under the age of 12); 274 (Restrictions on evidence relating to sexual offences); 275 (Exception to restrictions under s 274); 275A (Disclosure of accused's previous convictions where court allows questioning or evidence under s 275); 275C (Expert evidence as to subsequent behaviour of complainer in certain cases); 288D (Appointment of solicitor by court in such cases); 288E (Prohibition of personal conduct of defence in certain cases involving child witnesses under the age of 12); and 288F (Power to prohibit personal conduct of defence in other cases involving vulnerable witnesses).

(g) indecent behaviour (including any lewd, indecent or libidinous practice or behaviour);

(h) an offence under section 311 (non-consensual sexual acts) or 313 (persons providing care services: sexual offences) of the Mental Health (Care and Treatment) (Scotland) Act 2003;

(i) an offence under any of the following provisions of the Criminal Law (Consolidation) (Scotland) Act 1995 (c 39)—

(i) sections 1 to 3 (incest and related offences);

(ii) section 5 (unlawful sexual intercourse with girl under 13 or 16);

(iii) section 6 (indecent behaviour toward girl between 12 and 16);

(iv) section 7(2) and (3) (procuring by threats etc);

(v) section 8 (abduction and unlawful detention);

(vi) section 10 (seduction, prostitution, etc of girl under 16);

(vii) section 13(5)(b) or (c) (homosexual offences);

(j) attempting to commit any of the offences set out in paragraphs (a) to (i) above.

(3) This section applies also to an offence in respect of which a court having jurisdiction to try that offence has made an order under subsection (4) below.

(4) Where, in the case of any offence, other than one set out in subsection (2) above, that court is satisfied that there appears to be such a substantial sexual element in the alleged commission of the offence that it ought to be treated, for the purposes of this section, in the same way as an offence set out in that subsection, the court shall, either on the application of the prosecutor or ex proprio motu, make an order under this subsection."

1.23 A further (but not identical) list of sexual offences is to be found in Schedule 3 to the Sexual Offences Act 2003 which deals with the notification and registration procedure for persons convicted of sex offences:

"Scotland

36 Rape.

37 Clandestine injury to women.

38 Abduction of woman or girl with intent to rape.

39 Assault with intent to rape or ravish.

40 Indecent assault.

41 Lewd, indecent or libidinous behaviour or practices.

42 Shameless indecency, if a person (other than the offender) involved in the offence was under 18.

43 Sodomy, unless every person involved in the offence was 16 or over and was a willing participant.

44 An offence under section 170 of the Customs and Excise Management Act 1979 (c 2) (penalty for fraudulent evasion of duty etc) in relation to goods prohibited to be imported under section 42 of the Customs Consolidation Act 1876 (c 36) (indecent or obscene articles), if the prohibited goods included indecent photographs of persons under 16.

45 An offence under section 52 of the Civil Government (Scotland) Act 1982 (c 45) (taking and distribution of indecent images of children) if —

(a) the child was under 16 and the offender —

(i) was 18 or over, or

(ii) is or has been sentenced in respect of the offence to imprisonment for a term of at least 12 months, or

(b) in imposing sentence or otherwise disposing of the case, the court determines that it is appropriate that the offender be regarded, for the purposes of Part 2 of this Act, as a person who has committed an offence under this paragraph.

46 An offence under section 52A of that Act (possession of indecent images of children) if —

(a) the child was under 16 and the offender —

(i) was 18 or over, or

(ii) is or has been sentenced in respect of the offence to imprisonment for a term of at least 12 months, or

(b) in imposing sentence or otherwise disposing of the case, the court determines that it is appropriate that the offender be regarded, for the purposes of Part 2 of this Act, as a person who has committed an offence under this paragraph.

47 An offence under section 106 of the Mental Health (Scotland) Act 1984 (c 36) (protection of mentally handicapped females).

48 An offence under section 107 of that Act (protection of patients).

49 An offence under section 1 of the Criminal Law (Consolidation) (Scotland) Act 1995 (c 39) (incest), if a person (other than the offender) involved in the offence was under 18.

50 An offence under section 2 of that Act (intercourse with a stepchild), if a person (other than the offender) involved in the offence was under 18.

51 An offence under section 3 of that Act (intercourse with child under 16 by person in position of trust).

52 An offence under section 5 of that Act (unlawful intercourse with girl under 16), save in the case of an offence in contravention of subsection (3) of that section where the offender was under 20.

53 An offence under section 6 of that Act (indecent behaviour towards girl between 12 and 16).

54 An offence under section 8 of that Act (abduction of girl under 18 for purposes of unlawful intercourse).

55 An offence under section 10 of that Act (person having parental responsibilities causing or encouraging sexual activity in relation to a girl under 16).

56 An offence under section 13(5) of that Act (homosexual offences) unless every person involved (whether in the offence or in the homosexual act) was 16 or over and was a willing participant.

57 An offence under section 3 of the Sexual Offences (Amendment) Act 2000 (c 44) (abuse of position of trust), where the offender was 20 or over.

58 An offence under section 311(1) of the Mental Health (Care and Treatment) (Scotland) Act 2003 (asp 13) (non-consensual sexual acts).

59 An offence under section 313(1) of that Act (persons providing care services: sexual offences).

59A An offence under section 1 of the Protection of Children and Prevention of Sexual Offences (Scotland) Act 2005 (asp 9) (meeting a child following certain preliminary contact) if —

(a) the offender —

(i) was 18 or over, or

(ii) is or has been sentenced in respect of the offence to imprisonment for a term of at least 12 months, or

(b) in imposing sentence or otherwise disposing of the case, the court determines that it is appropriate that the offender be regarded, for the purposes of Part 2 of this Act, as a person who has committed an offence under this paragraph.

59B An offence under section 9 of that Act (paying for sexual services of a child), if—

(a) the victim or (as the case may be) other party was under 16 and the offender —

(i) was 18 or over, or

(ii) is or has been sentenced in respect of the offence to imprisonment for a term of at least 12 months, or

(b) in imposing sentence or otherwise disposing of the case, the court determines that it is appropriate that the offender be regarded, for the purposes of Part 2 of this Act, as a person who has committed an offence under this paragraph.

59C An offence under any of sections 10 to 12 of that Act, if —

(a) the provider of sexual services or (as the case may be) person involved in pornography was under 16 and the offender —

(i) was 18 or over, or

(ii) is or has been sentenced in respect of the offence to imprisonment for a term of at least 12 months, or

(b) in imposing sentence or otherwise disposing of the case, the court determines that it is appropriate that the offender be regarded, for the purposes of Part 2 of this Act, as a person who has committed an offence under this paragraph.

60 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, determines for the

purposes of this paragraph that there was a significant sexual aspect to the offender's behaviour in committing the offence."

1.24 Further guidance on the scope of sexual offences can be derived from the Draft Criminal Code. Part 3 of the Code³² is headed "Sexual Offences". One section provides definitions of the terms used in that Part and two sections deal with general issues in offences where age is a defining element (namely that knowledge of age is not required for guilt and the offences do not apply where the parties are married). The remaining provisions are divided into two groups. The first is headed "Offences relating directly to sexual activity", and includes the following offences: rape; sexual penetration; sexual molestation; sexual intercourse by an adult with a minor; unlawful sexual activity with a young person; sexual intercourse between minors; and incestuous conduct. The second set, headed "Offences involving procuring or exploitation", includes procuring child for sexual activity; sexual exploitation of a person with a mental disorder; pimping; brothel keeping; and child pornography.

1.25 *Legal writings.* We have also considered how legal writings have sought to identify sexual offences. Mackenzie mentions incest, sodomy and bestiality; rape (or ravishing); adultery; and bigamy. The consideration of these offences consecutively within the text suggests that Mackenzie regarded them as being of the same or a similar nature. However there is little explanation of the reason for categorising the offences in this way. In his *Commentaries*, Hume groups the various sexual offences into (1) those concerning offences against the person (rape; assault with intent to ravish (under real injuries); and lewd, indecent and libidinous conduct) and (2) those dealing with crimes "against public policy or economy" (incest; adultery; bigamy (and clandestine marriages); fornication; and sodomy and bestiality (under the heading of unnatural lusts)³³). There is little on the criteria for classifying these offences. Neither the writings of Alison nor Macdonald offer discussion of the criteria for classifying offences as sexual, or for grouping such offences according to type. In Alison's treatment of sexual offences he considers rape (included in this section are indecent practices with female children;³⁴ and forcible abduction and marriage); bigamy; clandestine marriage; and incest and unnatural offences (sodomy and bestiality). The fifth edition of Macdonald³⁵ maintains the same broad approach, covering rape; indecent practices (included in this section are the offences of indecent exposure; lewd, indecent and libidinous behaviour; homosexual acts; and shameless indecency); incest; bigamy; sodomy; and bestiality. However, Macdonald adds the following crimes: brothel-keeping; procuring females for immoral purposes; and obscene publications or writings (classified as work "devised and intended to corrupt the morals of the community, and to create inordinate and lustful desires"³⁶).

1.26 As noted above, there is very little in the work of the older writers on the criteria for classifying an offence as sexual in nature. By contrast, this issue has been considered in

³² Draft Criminal Code, ss 60-74. Other provisions which might be thought to fall within the scope of sexual offences are dealt with in other parts of the Code. Offences under the heading of offensive conduct are: unlawful interference with human remains; soliciting; dealing with obscene material; and indecent conduct. The offence of sexual activity with an animal is contained in the provisions on offences involving animals.

³³ Hume, I, pp 468-70. This group of offences also includes drunkenness.

³⁴ Alison, I, pp 225-6.

³⁵ Macdonald, pp 119-121 and pp 148-153.

³⁶ *Ibid*, p 152.

the modern literature. Professor Gane has suggested that sexual offences can be placed into four different categories.³⁷ These are:

(1) Any offence which involves the actual or intended violation of the victim's sexual integrity. Gane suggests that rape, indecent assault and assault with intent to rape fall within this category but so do, though less clearly, offences such as persistent sexual harassment.

(2) Any offence which involves actual or presumed sexual exploitation of the victim. This category covers offences which protect vulnerable persons such as children and persons with a mental disorder but may also include other types of vulnerability (for example persons who are economically dependent on others where there is potential for sexual exploitation).

(3) Any offence which enforces a standard of sexual morality by directly or indirectly regulating consensual sexual conduct. Gane points out that the basis for this category of sexual offence, namely enforcing sexual morality, is highly contentious but has been advanced for such offences as incest and prohibition of homosexual conduct.

(4) Any offence which otherwise enforces a standard of sexual decency. Gane gives as an example of this category the offence of shameless indecency.³⁸

1.27 An important point about these categories is that they may overlap. For example, prohibiting sexual conduct between persons of the same sex where one of them is below a certain age may fall within type 2 and type 3, as would incest where one of the parties is a child.

1.28 Although we do not necessarily agree with all of the detail of this model, we find it of considerable assistance for determining the scope of our project. We would classify sexual offences into three broad categories.³⁹ 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). In Part 2 we provide more detailed consideration of the key ideas used in this framework (sexual autonomy, protection, and public morality) but for the time being we can set out the types of sexual offences which we will deal with as part of our project.

³⁷ Gane, pp 1-6.

³⁸ The courts have since held that there is no offence of this name in Scots law (*Webster v Dominick* 2005 JC 65). See Part 6 at paras 6.31-6.34.

³⁹ This approach is similar to that used in the article on Criminal Law in the Stair Memorial Encyclopaedia, vol 7, paras 294-320. That article uses a classification of sexual offences as (1) sexual assaults (rape; indecent assault); (2) offences against young persons (sexual intercourse and other sexual contact with persons below the age of consent; child pornography); (3) offences against public morality (homosexual offences; incest and related offences, including abuse of trust; bestiality). The article classifies the following offences as crimes against public order and decency, rather than sexual offences: shamelessly indecent conduct; indecent exposure; bigamy; statutory offences (ie prostitution and soliciting; homosexual offences; obscenity).

1.29 The first set of offences, which we consider in Part 4, 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.

1.30 The next category, considered in Part 5, 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 persons 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 and libidinous conduct), there are several statutory provisions specifically criminalising sexual activity with children. These are contained within sections 5(1),⁴⁰ 5(3),⁴¹ 6⁴² and 13⁴³ of the Criminal Law (Consolidation) (Scotland) Act 1995. Sections 311-313 of the Mental Health (Care and Treatment) (Scotland) Act 2003⁴⁴ make provision in respect of persons who are mentally disordered, criminalising both non-consensual sexual acts⁴⁵ with such persons, as well as sexual acts (regardless of consent) involving the carers of such persons.⁴⁶ 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.⁴⁷

1.31 The final range of sexual offences, discussed in Part 6, 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 in Part 2, 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.⁴⁸

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.⁴⁹ 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,

⁴⁰ Unlawful sexual intercourse with a girl under the age of 13.

⁴¹ Unlawful sexual intercourse with a girl over the age of 13 and under the age of 16.

⁴² Extension of the offence of lewd, indecent and libidinous conduct to include girls aged between 12 and 16.

⁴³ Homosexual offences: this section would cover homosexual acts with a boy under the age of 16 (s 13(5)(c)).

⁴⁴ The relevant provisions of this Act came into force on 5 October 2005.

⁴⁵ Mental Health (Care and Treatment) (Scotland) Act 2003, s 311.

⁴⁶ *Ibid*, s 313.

⁴⁷ 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 2003 Act (see ss 16-24).

⁴⁸ Paras 1.14-1.17.

⁴⁹ 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;..."

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.⁵⁰ 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.⁵¹ Generally in this Discussion Paper we will use the more common, and more easily understood, term 'victim'. However, where the point in issue is whether or not a crime has been committed against a person, we will use the more technical term 'complainer'.

Structure of the Discussion Paper and outline of our proposals

1.33 In Part 2 we consider the general principles which provide the framework for reform of the law of sexual offences. One of the key general principles is the protection of sexual autonomy. This principle is further examined in Part 3 where we consider whether sexual autonomy can best be understood in terms of a person's consent or in some other way. In Part 4 we make proposals for reform of the law on rape and other types of sexual assault. Part 5 deals with offences which fall within the protection principle and considers offences involving children, persons with mental disorder, and abuse of trust. In Part 6, we consider various types of sexual offences which fall within the heading of public morality. Part 7 examines issues in the law of evidence concerning proof of sexual offences. Part 8 contains a list of our proposals and questions.

Legislative competence

1.34 The proposals in this Discussion Paper relate to criminal law and evidence. With a few exceptions, which do not concern the matters in this Discussion Paper, these areas of law are not reserved to the United Kingdom Parliament.⁵² We consider that our proposals would therefore be capable of being implemented by legislation of the Scottish Parliament.

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.⁵³ In Part 2 of this Paper we examine the provisions of the Convention which are relevant to the law on sexual offences.⁵⁴ We have also considered the competence of the Scottish Parliament in respect of Community law.⁵⁵ In our view

⁵⁰ Criminal Justice (Scotland) Act 2003, s 14(2).

⁵¹ *Ibid*, s 18(1).

⁵² Scotland Act 1998, s 126(5); Sch 5.

⁵³ Scotland Act 1998, ss 29(2)(d), 126(1); Human Rights Act 1998, s 1(1).

⁵⁴ See para 2.10.

⁵⁵ Scotland Act 1998, ss 29(2)(d), 126(9).

enactment of the proposals made in this Discussion Paper would be compatible with Convention rights and with Community law.

Part 2 Guiding Principles

Reforming the law on sexual offences

2.1 In this Part we formulate certain principles which we have identified as appropriate sources of guidance for the task of reforming the law on sexual offences. We do not see this discussion 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.¹ 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.²

2.2 *Clarity of the law.* One important goal for any law reform project is to make the law clear.³ 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 and libidinous conduct. Rather, we favour classifying sexual offences according to the specific type of wrong which the prohibited act does to the victim.

2.3 *Respect for sexual autonomy.* 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

¹ 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).

² 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.

³ 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)).

the conduct is made criminal. But these instances are truly exceptional and must be based on clear and convincing reasons.

2.4 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.⁴

2.5 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.

2.6 *Protective principle.* 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 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 5.

2.7 *Distinctions based on sexual orientation.* 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.

⁴ 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.

2.8 *Other types of legal and social intervention.* 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.

2.9 *Guiding principles for the law of evidence.* The principles we have mentioned so far are appropriate ones when considering reform of the substantive law on sexual offences, that is, the definition of the offences themselves and defences to them. Different considerations apply in respect of reforming the law of evidence. The basic principle is that an accused person has the right to a fair trial. This core right is dealt with in detail in the European Convention on Human Rights, and we consider it under that heading.

2.10 *European Convention on Human Rights.* Finally, we would draw attention to the provisions of the European Convention on Human Rights. As we noted in Part 1 the Convention provisions play a crucial role in the issue of legislative competence.⁵ The Scots law on sexual offences has already been amended to ensure compliance with the Convention.⁶ But the Convention is also of importance as a statement of the basic values of the law on sexual offences.⁷ In that context there are various principles which the Convention sets out.

(i) Clarity and certainty of criminal law.⁸ 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:⁹

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

(ii) 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.¹⁰

⁵ Para 1.35.

⁶ 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.

⁷ Setting the Boundaries, paras 1.2.1-1.2.6.

⁸ Article 7.

⁹ *Silver v United Kingdom* (1983) 5 EHRR 347, para 88.

¹⁰ *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

(iii) Prohibition of discrimination based on sexual orientation.¹¹ Decisions of the European Court of Human Rights, such as *Sutherland*,¹² 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.¹³

(iv) Rights relating to evidence and procedure. The Convention sets out a number of rights concerning evidence and procedure which are relevant to this project.

(1) An accused person has a right to a fair trial. Article 6(1) of the Convention provides that everyone facing a criminal charge "is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law." The right includes the right to lead relevant evidence and to examine witnesses, as well as procedural rights such as the right to adequate time and facilities for the preparation of his defence.¹⁴

(2) The law has to be compatible with the presumption of innocence. Article 6(2) of the Convention provides that everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law. The right conferred by Article 6(2) is not absolute but any restrictions on it must be in pursuit of a legitimate aim and there must be proportionality between the means employed and the aims sought to be achieved. In particular, the law may place the burden of proving a defence on the accused provided that these requirements (pursuit of a legitimate aim and proportionality) are met.

(3) There should be equality of arms between the accused and prosecutors. Accused persons must have a reasonable opportunity to present their case, including the leading of relevant evidence, under conditions which do not place them at a disadvantage against the prosecution.¹⁵

(4) The law should protect complainers and other witnesses, including protection of their dignity and privacy. A balance has to be found between fairness to the accused and the human rights of witnesses, including complainers appearing as witnesses.¹⁶

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.

¹¹ Article 8 (right to respect for private life).

¹² *Sutherland v United Kingdom* (App No 25186/94, 1 July 1997) at 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).

¹³ *SL v Austria* (2003) 37 EHRR 39.

¹⁴ European Convention on Human Rights, Art 6(3)(b).

¹⁵ Article 6(3) ECHR.

¹⁶ In *Doorson v The Netherlands* (1996) 22 EHRR 330 the Court explained that Article 6 did not specifically require the interests of witnesses to be taken into consideration, but added that "their life, liberty or security of person may be at stake, as may interests coming generally within the ambit of Article 8 of the Convention. Such interests of witnesses and victims are in principle protected by other, substantive provisions of the Convention, which imply that Contracting States should organise their criminal proceedings in such a way that those interests are not unjustifiably imperilled. Against this background, principles of fair trial also require that in appropriate cases the interests of the defence are balanced against those of witnesses and victims called upon to testify." (Para 70.)

However, any measures restricting the rights of the defence must be strictly necessary and a less restrictive measure should be employed where it will suffice.¹⁷

¹⁷ *Van Mechelen and Others v Netherlands* (1998) 25 EHRR 647, paras 58-60.

Part 3 Sexual autonomy and consent

Sexual autonomy and the criminal law

3.1 In Part 2 we argued that important principles of the law relating to sexual offences were promoting and protecting sexual autonomy. It may be supposed that at a general level these principles are widely accepted. We also argued that the abstract idea of sexual autonomy can be understood in terms of a person's consent to sexual activity. However it does not necessarily follow from accepting sexual autonomy and consent as guiding principles for law reform that the same terms should be used in the formulation of legal provisions on sexual offences. 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 examine the arguments for and against adopting a consent model in the Scots law on sexual offences.

Consent and sexual offences

3.2 The law on sexual offences in many jurisdictions 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. In these situations 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. However, in one area of sexual offences consent has traditionally played a central role, namely in respect of 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)*,¹ 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.² As a result of that decision, rape is now defined as sexual intercourse with a woman without her consent.³

¹ 2002 SLT 466.

² 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)). "Sexual offences" are defined in s 288C of the 1995 Act but this list seems to include offences for which consent does not act as a defence. Later we consider whether it is better to treat consent as part of the offence or of a defence. See para 3.28.

³ A further consequence of the decision is to make redundant the separate crime of clandestine injury to women.

3.3 A further aspect of defining rape in this way relates to mens rea. As the actus reus of rape involves sexual intercourse without the consent of the woman, for the accused to be 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.

3.4 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*,⁴ a jury in a trial involving a charge of indecent assault had asked for guidance on the meaning of consent.⁵ 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:⁶

"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."

3.5 Note should also be made of the approach taken in the Draft Criminal Code. The Code defines a number of sexual offences in terms of acts done without the consent of the victim. Consent is defined in section 111 of the Code in the following way:

"(1) For the purposes of any Part of this Act any consent given by a person is to be disregarded if at the time when the consent was given—

(a) the person giving the consent was, by reason of his or her young age or mental disorder, unable to understand what was being consented to or to withhold consent;

(b) the consent was induced by force or fear or was otherwise not freely given; or

(c) the consent was induced by fraud as to the nature of what was being consented to or the identity of the person doing what was consented to. ...

(3) For the purposes of Part 3 of this Act (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."

3.6 We consider that this definition of consent is an improvement on the present law in that it provides guidance on certain situations where consent is to be disregarded. However,

⁴ 1996 SCCR 696.

⁵ The idea of consent in the law of indecent assault is the same as that in the law of rape.

⁶ *Marr v HM Advocate* 1996 SCCR 696 at 699.

the definition is only negative in effect. It does not state what consent is; nor does it illustrate situations where consent is not present. In other words the Code follows the common law approach of not giving consent a special meaning in the context of sexual offences.

3.7 To sum up the current position on consent in the Scots law on rape and indecent assault: the law adopts what may be referred to as a 'thin' version of consent, that is it provides no guidance as to what the term means. Later we consider other versions of consent which provide more detail on how to understand the idea in the context of sexual offences.⁷ But we consider first the prior issue whether consent is the appropriate concept to use in defining sexual offences, or at least the category of offences of sexual assault.

Problems with consent as part of the law of sexual assaults

3.8 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 defined.⁸ 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 actions 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 actions of the victim rather than those of the accused.

We consider these points in turn.

3.9 (i) *Determining consent.* 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

⁷ Paras 3.30-3.44.

⁸ Useful brief statements can be found in V Tadros, "No Consent: A Historical Critique of the *Actus Reus* of Rape" (1999) 3 Edin LR 317, 326-332; V Tadros, "Rape Without Consent" (2006) Oxford Journal of Legal Studies, forthcoming.

parties have a long-standing relationship and regularly engage in a particular type of sexual activity.

3.10 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.

3.11 However, 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.

3.12 (ii) *Ambiguity of consent.* 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

⁹ D N Husak and G C Thomas III, "Date Rape, Social Convention, and Reasonable Mistake" (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 D 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 verified that this experience was not unique, the author began to consider several related, researchable issues."

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.

3.13 (iii) *Abuse of issues of consent.* 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, a jury might use the same sort of reasoning in deciding the crucial question of did the victim consent or did she not. 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.

3.14 (iv) *Stereotypes of women's sexuality.* Allied to this scope for abuse is the fact that consent models 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's having sex with her.

3.15 (v) *Focus on the victim.* 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 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

¹¹ Temkin, pp 8-11.

3.16 We do not propose to give a detailed analysis or assessment of these criticisms of the consent model. Rather our approach is to accept 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. There are two possible responses. The first is to abandon consent as an element of sexual offences and to replace it with something else; the second is to refine the idea of consent to make it a more satisfactory and workable concept in this context. Earlier we referred to 'thin' models of consent, that is where consent is not defined but is understood in its common everyday, sense. Even if these criticisms have force against the approach to consent in the thin sense, it does not follow that they are equally valid against the richer, more detailed models of consent, which we consider later.

Alternative models of sexual offences

3.17 We consider, first, possible alternatives to consent. There are two broad types of alternative to using consent in relation to sexual offences, especially sexual assault. The first seeks to explain sexual assault in terms of a different key element. The second attempts to restructure the way in which the law sets out offences of sexual assault.

3.18 (i) *Overcoming the will of the victim.* The most obvious alternative to consent as a defining element in rape and other sexual assaults is that these offences are committed when there is sexual intercourse or other contact against the will of the victim. Indeed this was the approach taken by Scots law from Hume (and earlier) until the decision in the *Lord Advocate's Reference (No 1 of 2001)*.¹² Difficulties did exist with the law prior to that case, especially the narrow manner in which 'against the will' of the victim was read as requiring the use or threat of force. However, it is possible to give a wider meaning to the idea of against the will. Dr Victor Tadros has suggested a definition of the actus reus of rape on these lines:¹³

"[T]he actus reus of rape will be complete where the accused has sexual intercourse with the victim and either (a) the accused has overcome the victim's will; or (b) the victim did not have a fair opportunity to exercise her will."

It is important to note that this definition is limited to the actus reus of the offence. It does not deal with the separate issue of what, if any, defences are open to an accused who is charged with such an offence. Can such an accused contend that the victim consented to sexual intercourse? If he can, then the same issues of what counts as consent will continue to arise as under a law in which consent is part of the definition of the actus reus. But if he cannot, major difficulties ensue. The most direct way to counter a charge of rape on the proposed definition is to say that as the woman gave her consent there was no overcoming of her will. How is an accused to present his defence when on his version of events the woman consented to sex? It is not sufficient to say that the accused can assert that the victim had sex 'willingly' as this term becomes simply a synonym for consent and would attract the same problems of definition or meaning.

3.19 (ii) *Redefining rape and other sexual assaults.* A different approach seeks to avoid the problems of defining rape and other sexual assaults by reference to the absence of the

¹² 2002 SLT 466.

¹³ (1999) 3 Edin LR 317, 336-337.

consent or the will of the victim, either as part of the offence or as a defence. This 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 the whole range of circumstances in which rape (and other sexual assaults) can be committed. What unites the resulting definitions is that they all identify ways in which a victim's sexual autonomy is infringed but without the implications that each infringement is of the same type.

3.20 In a more recent paper,¹⁴ Dr Victor Tadros uses the Sexual Offences Act 2003 as an example of the difficulties in giving more meaning to the idea of consent in the law of rape. The 2003 Act has three related provisions about consent:

"74 For the purposes of this Part, a person consents if he agrees by choice, and has the freedom and capacity to make that choice.

75 (1) If in proceedings for an offence to which this section applies it is proved –

- (a) that the defendant did the relevant act,
- (b) that any of the circumstances specified in subsection (2) existed, and
- (c) that the defendant knew that those circumstances existed,

the complainant is to be taken not to have consented to the relevant act unless sufficient evidence is adduced to raise an issue as to whether he consented, and the defendant is to be taken not to have reasonably believed that the complainant consented unless sufficient evidence is adduced to raise an issue as to whether he reasonably believed it.

(2) The circumstances are that –

- (a) any person was, at the time of the relevant act or immediately before it began, using violence against the complainant or causing the complainant to fear that immediate violence would be used against him;
- (b) any person was, at the time of the relevant act or immediately before it began, causing the complainant to fear that violence was being used, or that immediate violence would be used, against another person;
- (c) the complainant was, and the defendant was not, unlawfully detained at the time of the relevant act;
- (d) the complainant was asleep or otherwise unconscious at the time of the relevant act;
- (e) because of the complainant's physical disability, the complainant would not have been able at the time of the relevant act to communicate to the defendant whether the complainant consented;

¹⁴ V Tadros, "Rape Without Consent" (2006) Oxford Journal of Legal Studies, forthcoming.

(f) any person had administered to 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.

(3) In subsection (2)(a) and (b), the reference to the time immediately before the relevant act began is, in the case of an act which is one of a continuous series of sexual activities, a reference to the time immediately before the first sexual activity began.

76 (1) If in proceedings for an offence to which this section applies it is proved that the defendant did the relevant act and that any of the circumstances specified in subsection (2) existed, it is to be conclusively presumed –

(a) that the complainant did not consent to the relevant act, and

(b) that the defendant did not believe that the complainant consented to the relevant act.

(2) The circumstances are that –

(a) the defendant intentionally deceived the complainant as to the nature or purpose of the relevant act;

(b) the defendant intentionally induced the complainant to consent to the relevant act by impersonating a person known personally to the complainant."

3.21 As can be seen, section 74 states a broad definition of consent. This is followed by section 75, which sets out six sets of facts, each of which if proved gives rise to a rebuttable presumption that the victim did not consent. Section 76 then adds two other sets of fact but if either of them is proved the lack of consent is conclusively presumed. Tadros argues that it is a mistake to call the provisions in sections 75 and 76 presumptions. They are not evidence of lack of consent but are rather circumstances which *constitute* rape. What the law should provide are comprehensive and detailed definitions of all the circumstances in which rape can be committed, for example where violence or threats have been used against the victim, where the victim was asleep or drugged, and so on. One example of a definition of rape on this approach is the following:¹⁵

"the defendant has raped the complainant if he penetrates her whilst she a) has become intoxicated to the extent that substantially interferes with her decision-making processes; and b) that intoxication occurred without her knowledge or as a consequence of force, threats of force or she was otherwise intimidated into becoming intoxicated; and c) he is aware of the circumstances surrounding her intoxication or was reckless as to those circumstances having occurred."

3.22 On this approach the idea of consent adds nothing to what is contained in the definition of the offence and is redundant. However, as noted in connection with Scots law prior to the decision in *Lord Advocate's Reference (No 1 of 2001)*, the definitional approach does not totally remove consent if consent is allowed to act as a defence. For this reason

¹⁵ Ibid.

the definitional approach argues that, in addition to general defences available for all or most offences, the law should also define specific defences for this charge. In relation to the example of rape given above, the following defence is suggested:¹⁶

"it is a defence to a charge of rape contrary to this section that the defendant was a) explicitly invited by the complainant to have intercourse with the complainant whilst she was in a state of intoxication prior to her becoming intoxicated; or b) was in an ongoing sexual relationship with the complainant such that intercourse in such circumstances was to be expected."

3.23 We are not convinced that this approach provides a satisfactory way of reforming the law on sexual assaults. The idea of consent is used to give expression to protection of sexual autonomy. It is undoubtedly true that there are difficulties in applying the concept of consent in this area of the law but we have strong reservations whether the definitional model provides a better alternative to consent models. There are three major problems with the proposed model which seeks to avoid using consent.

3.24 The first is that if it is not possible to consider whether the parties consented, some other basis is required for identifying when sexual autonomy is infringed. If the rationale of the law of rape is that it protects sexual autonomy, then how is one to determine all of the circumstances in which autonomy is infringed? In Tadros' view all of the definitions of rape are instances of infringement of sexual autonomy. But he also argues that they do not necessarily share any other characteristic, and instead he seems to rely on some intuitive basis for recognising such instances.

3.25 The second is that any list of definitions must be a closed list, that is the list must contain all of the examples in question. Definitions on the list are disparate, with nothing uniting them apart from each being in some way an infringement of sexual autonomy. Unless a set of defining circumstances appears on the statutory list the activity in question does not count as rape. Any omitted set of circumstances could only be added to the list once it was recognised as a form of rape, and for ECHR reasons any amendment to the list would have no retrospective effect. As the items on the list are disparate, it would not be possible to add to the list a provision to the effect of 'or any similar set of circumstances'. They do, of course, share the characteristic of being examples of infringement of sexual autonomy. But a provision which stated that rape was also 'any other infringement of sexual autonomy' would be to introduce into the law a concept even more likely to lack shared understanding than that of consent.¹⁷

3.26 The third problem with the definitional approach is that it would result in an extremely complex and lengthy set of statutory provisions. On the model of the 2003 Act rape would be defined in eight different ways, each with its own set of defences for that type of rape. But as the general rationale for adopting this approach is to avoid the problems associated with consent, then a similar approach would have to apply to every sexual offence for which consent is currently part of the offence or a defence. If consent is unsatisfactory for the law of rape, it is equally unsatisfactory for the law of indecent assault, and any other offence of which it is part. Each of these offences would have to be re-cast to set out all of its

¹⁶ Ibid.

¹⁷ Furthermore such a provision would clash with the requirements of clarity and certainty of the law. See paras 2.2 and 2.10.

constituent elements and all of the defences special to that offence. In our view the outcome would be an extremely unwieldy set of provisions.

3.27 In general terms we do 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. Furthermore we are of 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.

3.28 Earlier we 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. In our view 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 fails to express what is wrong about the conduct in question.¹⁸ We therefore favour treating the absence of consent as part of the definition of these offences,¹⁹ rather than the presence of consent as a defence to them. It must be stressed that we are not suggesting that consent is to be understood in the same sense in which it is used in the present law. On the contrary, we favour a richer and more detailed model of consent in the formulation of the rules and definitions of sexual assaults.²⁰

3.29 We propose that:

1. **A constituent element of offences of sexual assault should be the lack of consent by the victim.**
2. **If, contrary to our proposal, consent is to be removed as a defining element of sexual offences, we would welcome responses to the following questions:**
 - (a) **Should offences of sexual assault be defined in terms of actings against the will of the victim?**
 - (b) **Should offences of sexual assault be defined by specifying all of the circumstances in which they can be committed rather than by reference to lack of consent (or actings against the will) of the victim?**

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

3.30 For the reasons already set out, we do not propose to take an approach which removes consent from the law on sexual offences. Moreover given the criticism of consent noted earlier,²¹ we see no merit in the option of continuing to leave consent undefined. Rather, we believe that a refined model of consent can deal with the problems which those criticisms identified.

3.31 The difficulty with the current version of consent is that it presents a model of sexual activity in which one party (usually, but not always, a woman) does not play an active role.

¹⁸ For discussion see K Campbell, "Offence and Defence" in I H Dennis (ed), *Criminal Law and Justice* (1987), 73.

¹⁹ This is currently the law on rape since the decision in *Lord Advocate's Reference (No 1 of 2001)* 2002 SLT 466.

²⁰ Paras 3.30–3.44.

²¹ Paras 3.8–3.16.

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.

3.32 The model of consent which we propose may be termed an 'active' (or positive) type as opposed to the passive model which the law currently uses. On an active understanding of consent to sexual conduct the basic principle is that all participants in sexual activity should respect each other's sexual autonomy and all are 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.

3.33 We consider 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. Furthermore if there are unacceptable social conventions or understandings about consent in a sexual context, then the law can expressly state that certain factual situations do not by themselves count as the giving of consent.

3.34 We note that a similar approach was taken by the Home Office Review Group, who made the following observations:²²

"It is vital that the law is as clear as possible about what consent means. The law sets 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 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."

²² Setting the Boundaries, paras 2.10.1; 2.10.3 respectively.

3.35 As indicated earlier, we do not consider that consent as part of the definition of offences of sexual assault should remain undefined. Moreover we take the view that definitions of consent in the law of sexual offences in certain other jurisdictions provide examples of this model of consent. The jurisdictions include England and Wales, Canada, California and New South Wales.²³ 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 consent cannot be established or presumed.

3.36 In our view, adopting this approach to consent 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.²⁴ One was that there would be difficulty in determining whether consent had been given in the absence of a person expressly using 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. One way of interpreting this interaction as involving the giving, or the withholding, of consent, is by appealing to social conventions. As noted earlier, some (but not necessarily all) conventions may be inappropriate ones to use (for example, where a woman wearing revealing clothing is interpreted as indicating her willingness to have sex). But the proposed model can avoid using these unappealing conventions by expressly ruling them out as interpretative guides. The model can say that certain situations are not in themselves to be taken as the giving of consent; or that other situations are indicators that no consent is given. Another advantage of the model is that it moves the focus away from the victim, and concentrates instead on 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.

3.37 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.²⁵ Whether or not 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.

3.38 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.

3.39 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

²³ See Appendix A (definitions of consent).

²⁴ Paras 3.8-3.16.

²⁵ Later we consider in more detail the objection that the definition would make the law too complicated to apply (para 3.40).

intercourse as a result of threats 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 giving guidance 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:²⁶

"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 society about the bounds of acceptable behaviour."

3.40 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. 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. Indeed in some jurisdictions there are statutory jury directions on how to apply this model of consent.²⁷

3.41 For example the directions in Victoria include the following:²⁸

"(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 is normally enough to show that the act took place without that person's free agreement;

²⁶ *Setting the Boundaries*, para 2.10.7. The Home Office Review Group appear 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.

²⁷ *Setting the Boundaries*, paras 2.11.1-2.11.6.

²⁸ 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).)

(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."

3.42 These jury directions were assessed by an evaluation project on behalf of the Department of Justice of Victoria, which found that they were well received.²⁹ The Home Office Review Group also suggested that jury directions on the meaning of consent should be placed in statute, on the basis that doing so would make the issues to be considered at rape trials both clear and accessible to the public. In the event the 2003 Act contained no such directions and we do not propose that they should be included in any statute reforming the law of sexual offences in Scotland. The point, however, is that in jurisdictions which follow this model of consent there do not seem to be practical problems about applying it.

3.43 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 an 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.³⁰ The report noted:³¹

"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

²⁹ Department of Justice, Victoria, Rape Law Reform Evaluation Project, *The Crimes (Rape) Act 1991: An Evaluation Report*, (Report No 2, (1997)). It was noted that some judges would give all the directions even in cases where only one or some were relevant.

³⁰ *Ibid.*

³¹ *Ibid*, Executive Summary, p 71.

otherwise have been considered to have a reasonable chance of gaining a conviction."

3.44 We take the view that the law on sexual assault should contain a definition of the central element of consent on the lines we have described. We propose 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 examples or indicators where consent does not exist.**

General definition of consent

3.45 The first element of the consent model which we propose should be adopted for Scots law on sexual offences is a general definition of the term. Examples of general definitions of consent used in other legal systems include the following:

- (i) England and Wales:³² "For the purposes of this Part, a person consents if he agrees by choice, and has the freedom and capacity to make that choice."
- (ii) California:³³ "'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."
- (iii) Canada:³⁴ "'consent' means . . . the voluntary agreement of the complainant to engage in the sexual activity in question."
- (iv) Victoria:³⁵ "'consent' means free agreement."

3.46 In an earlier paper the Law Commission for England and Wales suggested a broad definition of consent on the following lines:³⁶

"(1) 'consent' should be defined as a subsisting, free and genuine agreement to the act in question; but

(2) the definition should make it clear that such agreement may be (a) express or implied, and (b) evidenced by words or conduct, whether present or past."

³² Sexual Offences Act 2003, s 74.

³³ Penal Code, s 261.6.

³⁴ Criminal Code, s 273.1.

³⁵ Crimes Act 1958, s 36.

³⁶ Law Commission, *Consent in Sex Offences, A Report to the Home Office Sex Offences Review* (2000), para 2.12.

In addition the Commission proposed a general requirement of capacity:³⁷

"for purposes of any non-consensual sexual offence, a valid consent may be given only by a person who has capacity to give it."

3.47 In *Setting the Boundaries* the Home Office Review Group declined to follow the Law Commission's approach on the ground that it was too complex and introduced unnecessary semi-contractual complications into consent. We agree with this criticism. In the present context 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. However, in the present context it would be inappropriate to prohibit the withdrawal of consent to sexual activity. The Review Group itself proposed a definition similar to that used in some Australian jurisdictions, namely 'free agreement'.

3.48 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. The Home Office Review Group identified the central issues as follows:³⁸

"In this context the core element is that there is an agreement between two people to engage in sex. People have devised a complex set of messages to convey agreement and the lack of it – agreement is not necessarily verbal, but it must be understood by both parties. Each must respect the right of the other to say 'no' – and mean it."

In our view there are two contrasting ways of achieving this outcome. One is a short definition which states the core elements. We consider that the best formulation of this method is that used in the Australian states mentioned earlier, namely that consent means 'free agreement'. This approach has the advantage of simplicity. However, by itself,³⁹ it may provide little information. A contrasting approach is to use a slightly more complex definition which expressly sets out the matter of co-operative agreement which the positive mode of consent adopts. An example is that used in the Californian Penal Code, quoted earlier.⁴⁰ We are inclined to adopt the shorter definition but we would welcome views on the following questions:

4. **Should consent as a constituent element of sexual assaults be defined as:**
 - (a) **'free agreement'; or**
 - (b) **'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'?**

³⁷ Ibid, para 3.3.

³⁸ *Setting the Boundaries*, paras 2.10.4. This passage refers to interaction between two people but the same principle applies where more than two people are involved.

³⁹ It should be remembered that the general definition is to be followed by statutory examples of non consent. See paras 3.49-3.59.

⁴⁰ In Proposal 4 we follow the Californian example but have omitted the words 'or transaction', which might suggest that consent in relation to sexual offences is similar to 'consensus in idem' in the law of contract. See para 3.47.

5. If neither of these definitions is satisfactory, how should consent be defined in general terms?

Statutory examples or indicators

3.49 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'⁴¹ 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.⁴² The 2003 Act also sets out six situations which, if established, give rise to a rebuttable presumption that the victim did not consent.⁴³ These 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 the victim to be stupefied or overpowered.

3.50 Further indicators of lack of consent from other legal systems include the following situations:

- (i) Mistaken belief by the victim that the sexual intercourse had a medical or hygienic purpose;⁴⁴
- (ii) the accused induced the victim to engage in the activity by abusing a position of trust, power or authority;⁴⁵
- (iii) where the victim, having consented to engage in sexual activity, expresses (by words or conduct) a lack of agreement to continue to engage in the activity.⁴⁶

3.51 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

⁴¹ 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."

⁴² 2003 Act, s 76.

⁴³ Section 75.

⁴⁴ Crimes Act 1900, s 61R (2) (a1) (New South Wales).

⁴⁵ Canadian Criminal Code, s 273.1 (2)(c).

⁴⁶ Ibid s 273.1(2)(e).

relationship; and the victim's suggestion or request that the accused uses a condom or other birth control device. Furthermore, in Victoria one of the statutory jury directions is that:⁴⁷

"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."

3.52 A further possible situation concerns what may be termed limited or specific consent.⁴⁸ 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, penetrative intercourse). Accordingly the law should not permit a type of implied 'escalation' of consent. 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.⁴⁹

3.53 We take the view that Scots law should follow the approach taken in these legal systems of adding to a general definition of consent a list of situations which indicate that consent is not present. It must be emphasised that the list is intended to be illustrative rather than exhaustive. Furthermore, the existence of a list of indicators does not affect questions of proof. The onus will remain on the Crown to establish lack of consent for those crimes where that is an element of the offence. It is true that where the Crown can establish the factual situation of one of the statutory indicators, then they can be said to have discharged that burden of proof in relation to the absence of consent. But any resulting burden of proof falling on an accused is an evidential rather than a legal burden.⁵⁰ However, we do not favour stating the indicators as evidential presumptions. We consider 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 illustrations of the key element of the offence itself and should be read that way.

3.54 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

⁴⁷ Crimes Act 1958, s 37(1) (Victoria). The Victorian Law Reform Commission report on sexual offences recommended that the words in brackets should be amended to "at the time that act occurred is evidence" (recommendation 169).

⁴⁸ For discussion see paras 3.60-3.61.

⁴⁹ 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 2002) and *Commonwealth v Fionda* 599 NE 2d 635 (Mass App Ct 1992) 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 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."

⁵⁰ See para 5.66, fn 73 for an explanation of the terms 'evidential burden' and 'legal burden'.

temporary lack of capacity at the relevant time, for example, where the victim was asleep or unconscious.

3.55 However 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 5 when we consider the protective principle.

3.56 One particular area in which the absence or presence of consent is problematic is where the victim is intoxicated. The issue of the lack of consent is relatively straightforward where the victim is so intoxicated that she becomes unconscious or where the accused, unknown to the victim, plies her with drink or drugs. Matters are less clear where the victim has voluntarily taken drink or drugs. At some stage a person will become so intoxicated that he or she will lose the capacity to give meaningful consent to sexual activity. But there are degrees of intoxication. There may be an earlier stage in intoxication where a person loses his or her inhibitions and does 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. 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.

3.57 A point which has to be stressed is that the question is not simply did a drunk victim consent to sexual activity in a general or abstract sense but rather did the victim give consent *as defined by the law*. In other words, consent is to be understood according to its general definition.⁵¹ For example, in English law the question is whether a victim, because of an intoxicated state, did not agree by choice or lacked the capacity or freedom to make that choice.⁵² Professor Temkin makes a similar point about a recommendation of the Home Office Review Group that one of the statutory examples of absence of consent is where a person was too affected by alcohol or drugs to give 'free agreement':⁵³

"Under the [Group's] proposals, consent will automatically be vitiated whenever the victim is proved to have been insensible or so drunk that she lacked the capacity to consent. However, the issue in each case must be whether the victim freely agreed or whether, as a result of her intoxication, she did not freely agree. It must be open to the prosecution to demonstrate that, although not necessarily incapable, she did not freely agree to sexual intercourse on the occasion in question."

3.58 We would stress that the list of situations which we suggest below is not meant to be the final word either in terms of what factual situations should be included or in the way each situation is drafted. We would welcome comment not only on the situations we have

⁵¹ See paras 3.45-3.48.

⁵² Sexual Offences Act 2003, s 74: "For the purposes of this Part, a person consents if he agrees by choice, and has the freedom and capacity to make that choice."

⁵³ Temkin, p 103. This particular recommendation was not enacted in the 2003 Act.

mentioned as indicators of lack of consent but also on what other situations should be included on the list.

3.59 Accordingly we propose that:

6. **A non-exhaustive statutory list of factual situations which indicate that a person has not consented to sexual activity should include the following:**
 - (a) **where at the time of the act the person was subject to force or violence or the threat of force or violence against him or her;**
 - (b) **where at the time of the act the person was subject to force or violence or the threat of force or violence against another person;**
 - (c) **where the person was unconscious or asleep;**
 - (d) **where the person had taken or been given alcohol or other substances and as a result lacked the capacity to consent;**
 - (e) **where the person was deceived or mistaken about the nature of the activity;**
 - (f) **where the person was deceived into thinking that the other person was someone known to him or her;**
 - (g) **where the person was unlawfully detained;**
 - (h) **where expression of consent was made by someone other than the person.**
7. **Are there any other factual situations which should be included on this list?**

Limited or specific consent

3.60 These situations cover most of the standard cases where the existence of consent is problematic. A further particular problem arises when consent is given to sexual activity but is 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 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 engages in penetrative oral sex does not mean that she consents to penetrative vaginal sex. In other words, the law should make it clear that there is no implied escalation to consenting to different types of sexual activity. It may well be that there are social conventions whereby for example, a woman going back to a man's flat, or kissing a man, are signs that the woman is consenting to full intercourse. Earlier 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 there must remain doubts

whether consent has 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.

3.61 We propose that:

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

Withdrawal of consent

3.62 A further situation is where a person gives consent to a sexual act and then withdraws consent either before or during the act.⁵⁴ 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.⁵⁵ There is already some 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.⁵⁶ We agree with the principle of this approach and we are of the view that it should also represent Scots law. However we wish to make clear that consent to a sexual act cannot be withdrawn after the act is completed. In this situation the other party to the act has no way of adapting his or her behaviour to withdrawal of consent. We propose that:

- 9. A person who has consented to a sexual act may at any time 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.**

The positive consent model and previous sexual history

3.63 At this point we would draw attention to a possible implication of the positive consent model. This model of consent emphasises the interaction between the parties in determining whether there has been consent to a sexual act. But this emphasis may mean that more attention has to be given to the parties' previous interactions and more generally to their previous sexual history and behaviour. For example, some persons who are in a long-term relationship may rarely, if ever, expressly talk about having sex or about engaging in a particular sort of sexual act. For them to engage in a sexual act would not necessarily involve lack of consent, as their patterns of sexual activity could be traced back to times when consent had been given to that type of act and repeated without any indication being given of non-consent. But there would always have to be some time in the relationship when

⁵⁴ 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 4.

⁵⁵ In the well-known case of *Tyson v Trigg* 50 F.3d 436, 448 (7th Cr 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."

⁵⁶ *Kaitamaki v R* [1985] AC 147 (PC) (New Zealand).

consent was positively given. For example, where a relationship is an abusive one and a man has previously had sex with a woman who submitted because of threats of violence, future acts of sex would not be consenting even if violence was not explicitly threatened, provided that in the circumstances it is clear that the man would resort to violence on the later occasion.

3.64 It might be thought a weakness in the model that it seems to incorporate a need to look at the parties' sexual history. But there are several points which qualify this view. Under the positive consent model, the question always is what did *both* parties⁵⁷ do to establish consent to a sexual act? Moreover, it must be borne in mind that resort to the parties' past is necessary only if they have had a sexual history with each other. The model rules out the inference that because a woman has in the past consented to have sex with a man, she therefore has consented to have sex with someone else, either at the same time or on a later occasion. Furthermore, looking back to the parties' relationship arises only in the situation where there has now been no direct expression of consent or of lack of consent. Where a woman now says 'no', the past relationship of the parties becomes irrelevant. In addition, the need to resort to the parties' history requires proof that at some stage in the past the woman did consent to that form of sexual act and that her subsequent actings are consistent with continued implied consent to it. In the absence of these features no consent has been given to the particular act currently in issue.⁵⁸

Illustrations of the consent model

3.65 In order to help understanding of the consent model which we are proposing, we present various factual scenarios which we analyse to show how the model would work. For the sake of convenience we present these examples in the terms of the current law of rape, which is defined as a man having sexual intercourse (vaginal penetration) with a woman without her consent. We examine the exact scope of the offence of rape in Part 4. Furthermore these examples concentrate on the absence or presence of consent, that is the actus reus of the offence. We do not consider here the question of mens rea, that is the issue of the man's knowledge (or lack of knowledge) of the woman's consent.⁵⁹

3.66 We consider that these illustrative examples are useful ways of explaining and testing the consent model which we have recommended. As we noted earlier, the current law does not define consent except in the sense that it is to be given its 'normal' meaning.⁶⁰ We are of the view that an important advantage of the proposed model of consent, in contrast to the existing law, is that it provides some help to anyone who is assessing the situations set out in the illustrations below. In considering these illustrative examples, it is important to remember that the proposed model contains two elements: a general definition and a list of indicators. Each of these parts has to be considered when assessing the situations in question.

⁵⁷ Or if more than two people are involved, what did they all do?

⁵⁸ We consider the law on sexual history evidence at paras 7.40-7.50.

⁵⁹ The issue of knowledge of the accused that the victim did not consent is discussed at paras 4.35-4.48.

⁶⁰ Para 3.4.

Persons asleep

(1) A man finds a woman asleep on a bed. They are complete strangers. Without waking her, he has sexual intercourse with her.

Analysis: This case is governed by one of the statutory indicators. The woman has not consented. The fact that they are strangers precludes any consideration of previous interaction.

(2) As above but the parties have a relationship with each other and occasionally have had sexual intercourse with each other whilst awake.

Analysis: On the first level of analysis this case is also governed by one of the statutory indicators. The woman has not consented. However the possibility exists that the parties have discussed having sex while the woman was asleep and that she has given her consent to this.

(3) As above, but the parties cohabit and frequently have sexual intercourse with each other (including whilst the woman is asleep).

Analysis: This gives rise to the same outcome as (ii) but in this case there is a stronger possibility of showing that at some time in the past the woman has consented to this form of sexual intercourse.

Intoxicated persons

(4) A man plies a woman (a stranger) with drink. She becomes very drunk and the man has sexual intercourse with her.

Analysis: This case may be governed by one of the statutory indicators, if the woman is so drunk as to lack capacity to give free agreement to sex, in which case she has not consented. The fact that the parties are strangers precludes any consideration of previous interaction.

(5) A man is with a woman who is clearly very drunk. He suggests that she should go back to his place and have sex. They have sexual intercourse.

Analysis: The woman's intoxication may be so extreme that she lacks capacity to make a free agreement to have sex. According to one of the indicators she would not have consented. However, the parties may have discussed having sex at a stage before the woman got very drunk but much would depend on the nature of the discussion. If the parties did not have this discussion then no consent is present.

(6) A man and a woman, both strangers, get very drunk at a party. They wake up the next morning and it is evident that they have had sexual intercourse with each other.

Analysis: This case is more problematic in that there is no element of one party inducing or taking advantage of the other's intoxication. Much depends on the degree of intoxication. Alcohol is generally understood as a disinhibitor, and people must accept that their behaviour when drunk may be different from that when sober.

Mistake and Deception

(7) A man (falsely) tells a woman that he is a famous footballer and is very rich. He tells her that if she has sex with him he will start to date her. They have sexual intercourse with each other.

Analysis: None of the statutory indicators applies in this case. The deception did not go to the nature of the sexual act or to the identity of the man as someone known to the woman. The assertions made by the man were not central to the woman making an agreement to have intercourse. They did not prevent her from exercising free agreement.

(8) A man meets a woman who is under the impression that he is a former acquaintance with whom she is happy to resume a relationship. They have sexual intercourse.

Analysis: This case is governed by one of the statutory indicators. In this case the identity of the man is crucial to the woman's agreement to having sex. The woman has not consented to having sex with this particular man.

Threats

(9) A man goes to the house of a former girlfriend with whom he had a sexually abusive relationship. He says he wants to have sex but makes no (express) threat of violence. She is afraid that if she refuses, he will become violent. They have sexual intercourse.

Analysis: This case is governed by one of the statutory indicators. The previous history of abuse indicates the threat of violence if she does not have sex with him. The woman has therefore not consented.

(10) 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.

Analysis: This case is not clear-cut. It is not governed by any of the statutory indicators. Much will depend on the extent to which the threat of unemployment will deprive the woman of any options in choosing not to have sex.

(11) As above, except that the man tells the woman that if she has sex with him he will give her a promoted post.

Analysis: None of the statutory indicators applies to this case. The man's inducements are not a threat but an offer. They are not essentially exploitative and they do not prevent the woman from exercising free agreement to have sex.

*Conditional consent to intercourse*⁶¹

(12) A woman consents to sexual intercourse with a man on the condition that he uses a condom. He agrees but then proceeds to have intercourse without a condom.

⁶¹ These examples are taken from Note, (2004) 117 Harvard Law Review 2341, 2360.

Analysis: The woman's consent is only to a particular form of protected sex. She has not consented to having unprotected sex.

(13) A woman consents to sexual intercourse. During intercourse, her partner becomes 'rough', and she indicates that she does not consent to this type of sexual intercourse.

Analysis: The woman has not consented to 'rough' intercourse. The consent given to intercourse does not imply intercourse with force, which would require specific consent. Further she had indicated her lack of consent to rough intercourse and any continued intercourse is without her consent.

3.67 We would stress that our aim in setting out and analysing these factual situations is to provide a way of showing how the proposed model of consent might work in practice. Our discussion of them is not meant to be exhaustive of all the issues but as illustrative of the possible advantages which that model may bring to the law. We would welcome the views of consultees both on the factual situations themselves and on our analysis of them.

10. Comment is invited on the illustrative examples of the consent model set out at paragraph 3.66.

Part 4 Sexual assaults

Introduction

4.1 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 current Scots law there are two types of sexual assault, namely rape and indecent assault. Both offences share the characteristic that for the offence to be committed the victim did not consent. Where they differ is in respect of the physical acts which constitute the assault on the victim. 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.¹ 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.²

4.2 Sexual assault of any type is a clear infringement of the victim's sexual autonomy, and it is beyond dispute that all forms of sexual assault should attract criminal liability. In Part 3 we proposed that the lack of the consent of the victim should be a defining element of all types of sexual assault. In this Part we are concerned with the separate questions of whether and how the law should distinguish between different kinds of sexual assault. We have identified three options for dealing with these issues.

4.3 (1) The first is to have no separate category of sexual assaults but to subsume this part of the law into the general criminal law on assault. (2) A second option is to have a separate category of sexual assault but not to further divide sexual assaults into different offences. (3) A third approach, which is taken by the present law, is to have different types of sexual assault. We examine each option in turn.

Sexual assaults as part of the general law of assault

4.4 There are various arguments for abandoning a separate category of sexual assault and for treating these offences as part of the more general law of assaults. The first is that many instances of rape and indecent assault involve violence, a factor which may often be lost sight of by classifying these offences as separate from other types of assault. 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 Scots law of assault tends not to draw rigid distinctions between different categories but instead allows for

¹ "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).

² See, for example, *Stewart v Thain* 1981 JC 13, at 17: "Each case must be considered in the light of the whole circumstances relevant to it."

various circumstances which are recognised as aggravating an assault.³ 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.

4.5 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, we have adopted as one of the guiding principles for reform of the law on sexual offences the principle that the law should promote and protect sexual autonomy. 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.⁴

4.6 For these reasons, and especially on the basis that violation of sexual autonomy is a specific form of wrong suffered by the victim, we consider that there should be a general category of sexual offence which has assault at its core. We propose that:

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

Undifferentiated sexual assaults

4.7 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 our view, the law on sexual assaults should reflect these differences in the wrong done to the victim. We propose that:

³ 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.

⁴ 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 123).

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

Distinguishing types of sexual assault

4.8 The third option, which we favour, distinguishes different types of sexual assault in terms of more specific wrongs done to the victim. The question then is how to identify the different types of wrong involved in sexual assaults. The current law uses a distinction between rape and indecent assault but, as noted, rape is defined narrowly as penile penetration of the vagina. The effect is that a wide spectrum of ways of infringing a person's sexual autonomy are grouped within the one offence of indecent assault (for example, forced penile penetration of a person's mouth, penetration of a victim's vagina or anus with an object, rubbing a person's breasts, or uninvited kissing).

4.9 One way is to make a distinction between penetrative and non-penetrative assault. This is the approach taken in the 2003 Act in England and Wales and was also proposed in the Draft Criminal Code. The underlying rationale of this approach 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 attack on that person. Not everyone would agree. A counter-argument is that to equate sex with penetration is to adopt a one-sided view of sexuality and suggest that penetrative sex is 'normal' whereas other forms are not. We find it difficult to assess the merits of this view in the present context, for what we are arguing is that non-consenting penetrative sex is a particular form of sexual wrong which the law should recognise as such. The proposed classification of sexual assaults, of which penetrative assaults form one general type, is not intended to be a strict gradating or hierarchical schema. Thus we are not saying that, for example, all rapes are more serious than all non-penile penetrative assaults which in turn are always more serious than non-penetrative sexual assaults. Often this will be the case but, depending on the circumstances, not always. Still less are we saying that because rape is a serious offence, a sexual assault by contrast is trivial. The point is not that one type of assault is always worse than another; but rather that different forms of wrong are involved in each type. We propose that:

13. The law on sexual assaults should distinguish assaults involving penetration of the victim's body from assaults not involving penetration.

4.10 We now consider two distinct but related issues concerning penetrative sexual assaults. One is whether there should be a further distinction made between assaults involving penetration with a penis and assaults by penetration with something else (either another part of the body or an object). The other issue is whether the law should continue to use the term 'rape' to denote a form of sexual assault, and if so, what form of assault.

4.11 Arguments in favour of making this further distinction are mainly based on the idea that as the penis is a sexual organ, penetration with a penis represents a quite different form of wrong from other forms of penetration. At one level the assault is itself sexual in nature because the attack involves the victim's vagina, anus or mouth. But an added dimension to the sexual nature of the attack is present when the penetration is made with the sexual

organ of another person, which for practical purposes means the penis. Arguments against this further distinction between penile and other forms of penetration deny that there is any major difference between the type of wrong suffered by a victim who has been subject to any form of sexual penetration. Furthermore, the proposed distinction reinforces the idea mentioned earlier, that penile penetration is the paradigm, normal form of sex, a view which should be questioned. Another point against the distinction is that it breaches the principle of gender neutrality, as on one interpretation at least, the offence can only be committed by a man, or more accurately a person who has a penis.⁵

4.12 It is worth noting that both English law in the 2003 Act and the Draft Criminal Code for Scotland adopt a distinction between different types of penetrative sexual assaults. Section 1 of the 2003 Act defines rape as penetration with the penis, whereas section 2 defines assault by penetration as a form of assault with a part of the body or anything else.⁶ The Draft Code proposes two separate offences: one is rape which consists of 'sexual intercourse', defined as penetration by a penis; the other offence is sexual penetration which is defined as penetration with anything other than the penis.

4.13 A further point in considering the merits of this distinction is a separate issue, namely whether the law should continue to use the term rape to refer to a certain type of sexual assault. In some legal systems, such as Canada and New South Wales, the word rape is not used in the legislation on sexual crimes.⁷ A main argument in support of this approach is that the term rape is seen as stigmatic as far as concerns victims of the crime.⁸ A further point is that it also stigmatises persons accused of rape and as a result juries might not be prepared to attach the label of rapist to an accused in cases which do not fit into a stereotypical image of rape as involving violent assault between persons who were strangers to each other. However, there is now little support for abandoning the term rape. It is considered that, by not using the term, the seriousness of the offence became downgraded. Moreover its stigmatic effects have important functions in labelling a particular form of wrongdoing. Temkin quotes the views of the Law Reform Commission of Victoria, who wrote that 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."⁹

4.14 These arguments on using or abandoning the term rape focus on the symbolic value of the term. A different argument concerns the types of activity to which the term rape should apply. The Home Office Review Group did not consider the issue of whether English law should abandon the term rape but it did not favour extending rape to include all forms of sexual penetration. It felt that:¹⁰

⁵ But see below at para 4.22 where we consider whether a woman can commit rape where that offence is defined as penetration with a penis.

⁶ As s 2 does not exclude penetration by a penis, there is an overlap between ss 1 and 2.

⁷ Temkin, pp 177-178.

⁸ See Law Reform Commission of Canada, Report on *Sexual Offences* (LRCC No 10 (1978)), p 12: "The Commission has come to the conclusion that the very use of the word 'rape' attaches a profound moral stigma to the victim and expresses an essentially irrational folklore about them." (Quoted by Temkin, p 177.)

⁹ Law Reform Commission of Victoria, Discussion Paper on *Rape and Allied Offences: Substantive Aspects* (LRCV No 2 (1986)), p 51. (Quoted by Temkin, p 178.)

¹⁰ Setting the Boundaries, para 2.8.4.

"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."

4.15 Similarly, the Comment on section 61 (Rape) of the Draft Criminal Code explains that:

"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. The Act does not, however, ignore the very real harm involved in other forms of such behaviour, but prefers to separate these out from the crime of rape. Thus section 62 provides for an offence of 'sexual penetration'. This deals with sexual penetration by any instrument other than the penis."

4.16 We favour the approach which distinguishes between penetration by the penis and other forms of penetration, mainly for the reason that each involves a different form of wrong to the victim. In general terms we also favour retention of the term rape, which we consider has an important role in expressing social disapproval of a certain sort of sexual wrong. And for the reasons set out in *Setting the Boundaries* and in the Draft Criminal Code, we favour defining rape in relation to penile penetration. We propose that:

- 14. Scots law should retain the term rape as referring to a specific sort of offence of sexual assault.**
- 15. Rape should be defined in terms of penetration of the victim by the penis of another person.**
- 16. Penetration of the victim by anything other than the penis of another person should be a separate type of sexual assault.**

Scope of rape and other sexual assaults

4.17 Applying these distinctions gives rise to a three-fold set of offences within the general category of sexual assault: rape (which involves penile penetration); an offence of penetration by anything other than a penis; and a residual category of sexual assault. We now consider the scope and the names of these offences.

4.18 *Rape*. Under the existing law, rape is defined as penetration of a vagina by a penis 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,¹¹ and the definition was expanded by the Sexual Offences Act 2003. In English law the actings which constitute rape are defined as follows:¹²

"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."

4.19 A similar but not identical approach was taken in the Draft Criminal Code where rape is defined in two interlinking provisions.¹³ The first is that rape involves sexual intercourse which is defined as "penetration of the genitalia, anus or mouth by the penis" and rape is itself defined in the following way:

"A person who –

has sexual intercourse with another person without the consent of that person...

is guilty of the offence of rape."

4.20 We agree with the policy underlying these provisions and are of the view that the offence of rape in Scots law should be widened to include penile penetration of the victim's vagina, anus, or mouth. Accordingly we propose that:

17. 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.

4.21 Two aspects of this proposed definition of rape call for comment. 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,¹⁴ anus or mouth can be a victim of rape. 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 may arise in respect of surgically constructed or reconstructed parts of the body. The 2003 Act in English law contains a provision that references to a part of a body "include references to a part surgically constructed (in particular, through gender reassignment surgery)."¹⁵ We suggest that a similar provision should be made for Scots law.

4.22 A second issue concerns the possibility of rape being committed by a woman (or more accurately a person without a penis). The proposed definition, as with the 2003 Act, restricts the commission of rape to a person who has a penis. By contrast, the Draft Criminal Code allows for the possibility that a woman can commit the offence of rape by

¹¹ Criminal Justice and Public Order Act 1994, s 142.

¹² 2003 Act, s 1(1).

¹³ Sections 60 and 61.

¹⁴ The 2003 Act refers to vagina rather than genitalia, which is the term used in the Draft Criminal Code but the effect is the same as s 79(9) of the 2003 Act which provides that the term vagina includes vulva.

¹⁵ 2003 Act, s 79(3).

causing the penetration of her own vagina, anus or mouth by another person's penis. We do not favour this approach. In this situation, although there is intercourse obtained without consent, the victim's body has not 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. Later we propose that there should be a separate offence to cover all situations where the victim, although not subject to sexual penetration, is forced to carry out a sexual act, and this offence would cover the situation of coerced penetration of the accused.¹⁶

4.23 *Sexual penetration.* For the reasons set out earlier we favour the introduction of a specific offence involving penetration by something other than a penis. This type of conduct is analogous to rape (except that it does not involve penile penetration) and is to be differentiated from forms of touching by the type of violation of sexual integrity which penetration involves. A possible difficulty is how to limit the offence to one of a sexual nature. The Draft Criminal Code proposes an offence of 'sexual penetration', which it defines as penetration of the genitalia or anus by anything other than a penis. Unlike the offence of rape, penetration of the victim's mouth is not covered by the offence of sexual penetration. English law takes a similar approach. Section 2 of the 2003 Act created the offence of 'assault by penetration', which is restricted to penetration of a person's vagina or anus. Moreover, it is a requirement that the penetration is 'sexual' in nature, a term which is defined in the Act.¹⁷

4.24 Two issues arise for consideration. The first is the name of the offence; the second is whether there is any need to define the term sexual for purposes of this section. As regards the name of the offence, we do not favour the name used in the Draft Criminal Code. The merit of the expression 'sexual penetration' is that it highlights the sexual element of the offence but the expression does not contain any indication that the conduct is criminal in nature, that is to say it does not distinguish between consensual and non-consensual penetration. This factor is absent from the name used in English law, assault by penetration, but this name does not highlight the sexual element of the offence (in contrast to that used in the Draft Criminal Code). In our view adding the word sexual to the name of the offence would not make the name too unwieldy and we favour calling the offence 'sexual assault by penetration'.

4.25 The provisions in both the Draft Criminal Code and the 2003 Act restrict the offence to penetration of the victim's genitalia (or vagina in English law) and anus but the Code, unlike the 2003 Act, does not see any need for further defining the sexual nature of the penetration.¹⁸ We agree with the approach taken in the Draft Code. But in any case, we propose below that the definition of the third type of sexual assault should include a definition of the word sexual and if there are doubts about whether there can be non-sexual penetration of the genitals or anus then that definition can also be applied to sexual assault by penetration. We propose that:

¹⁶ Paras 4.49-4.51.

¹⁷ 2003 Act, s 78.

¹⁸ It should be noted that the Draft Criminal Code (s 60(2)) contains a general provision excluding criminal liability for sexual penetration which was done reasonably and in good faith for medical reasons. We consider this issue at paras 4.53.

18. **There should be an offence of sexual assault by penetration.**
19. **Sexual assault by penetration should be defined as the penetration of a person's genitalia or anus by anything other than a penis without that person's consent.**

4.26 *Other sexual assaults.* A third type of sexual assault is a residual category of sexual contact or touching which does not fall within the scope of rape or sexual assault by penetration. There is no obvious name for this offence. It could be referred to simply as sexual assault but adopting this name would mean that this particular type of offence shares the same name as the more general category which also includes rape and sexual assault by penetration.¹⁹ However, in English law the offence is known as 'sexual assault'. The Draft Criminal Code refers to a similarly defined offence as 'sexual molestation' but we are not sure that the word 'molestation' is commonly understood as identifying the type of wrong which the offence is concerned with, namely infringement of a person's sexual autonomy by unwanted touching of his body. In some legal systems the offence is known as sexual touching,²⁰ but in our view the name 'sexual assault' is more readily understood and best captures both elements of the offence.

4.27 Whatever name is given to the offence, the offence is still one of 'sexual' assault and the question then arises of how to mark out the sexual nature of the offence. Unlike the case of rape (and possibly also sexual assault by penetration), it would not be possible to capture the sexual nature of the offence solely in terms of specifying the conduct it covers. Some types of contact or touching would be sexual in nature but many others would not. This issue arises with the present law in respect of the element of indecency in the crime of indecent assault. However the courts proceed on a general assumption that whether an assault is indecent is a matter of facts and circumstances but that there has to be a sexual element to the assault.²¹

4.28 One difficulty in setting out a definition is locating the perspective from which to judge an activity as sexual. There are 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.

4.29 The variety of approaches is illustrated in statutory provisions which set out definitions of the expression 'sexual activity'. The Sexual Offences (Amendment) Act 2000, which creates an offence of sexual activity involving abuse of trust, provides the following definition:²²

"In this section, 'sexual activity'—

¹⁹ This is a feature of the present law in which the crime of rape also falls within the general heading of indecent assault.

²⁰ For example, Canada and Maine.

²¹ Gane, p 58.

²² Section 3(5).

(a) does not include any activity which a reasonable person would regard as sexual only with knowledge of the intentions, motives or feelings of the parties; but

(b) subject to that, means any activity which such a person would regard as sexual in all the circumstances."

4.30 More recently, a different approach was taken in section 19 of the Protection of Children and Prevention of Sexual Offences (Scotland) Act 2005, which states that sexual activity means an "activity that a reasonable person would, in all the circumstances, consider to be sexual."²³

4.31 A further contrasting approach is that in the Draft Criminal Code. Section 60 of the Code uses a set of connected definitions for the expressions sexual activity, sexual intercourse and sexual penetration which avoid having to define the term sexual. However part of the definition of sexual contact uses the phrase "touching in a sexual manner", which is itself defined as:

"touching which is intended by the person doing the touching to be sexual or which is perceived, on reasonable grounds, by the person touched as being sexual."

4.32 The 2003 Act in England and Wales uses the following definition of sexual:²⁴

"For the purposes of this part (except section 71), penetration, touching or any other activity is sexual if a reasonable person would consider that—

(a) whatever its circumstances or any person's purpose in relation to it, it is because of its nature sexual, or

(b) because of its nature it may be sexual and because of its circumstances or the purpose of any person in relation to it (or both) it is sexual."

4.33 We consider that some of these definitions are too complex to apply in distinguishing forms of assault. For present purposes, we prefer the more straightforward definition used in the 2005 Act, the reasonable person standard. 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) would 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 offender notification procedure.²⁵

²³ A similar definition is used for determining whether for the purposes of making a risk of sexual harm order a communication or an image is sexual (s 3). A different formulation is used for the corresponding provisions in English law. Section 124 of the 2003 Act defines sexual activity for these purposes as an activity etc "that a reasonable person would, in all the circumstances but regardless of any person's purpose, consider to be sexual."

²⁴ Section 78. This definition has been criticised: see J R Spencer, "The Sexual Offences Act 2003: (2) Child and Family Offences" [2004] Crim LR 347, 348.

²⁵ 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, 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.)

4.34 We propose that:

20. **There should be an offence which consists of one person touching, or having contact with, another person in a sexual manner without that person's consent.**
21. **The term 'sexual' means what a reasonable person would consider to be sexual.**
22. **Should the name of the offence be**
 - (a) **sexual assault;**
 - (b) **sexual touching;**
 - (c) **sexual assault by touching;**
 - (d) **sexual molestation; or**
 - (e) **something else?**

Mens rea

4.35 So far we have considered the constituent actings (actus reus) of the various offences which fall within the general heading of sexual assault. A key part of all three types of sexual assault which we propose (rape, sexual penetration, sexual assault) is that the victim does not consent to the sexual activity in question. The question which now requires to be considered is what should be the appropriate state of mind (mens rea) of the accused in respect of these offences.

4.36 Under the present law the mens rea of rape and indecent assault is that the accused knew that the victim was not consenting or was reckless as to whether or not she consented. Stated at this level, the mens rea requirements are correct in principle and relatively uncontroversial. However, a more complex issue arises in the situation where at the time of the offence the accused mistakenly believed that the victim was consenting. In *Jamieson v HM Advocate*,²⁶ the High Court of Justiciary held that in this situation the accused lacked the mens rea for the offence of rape, even where there were no reasonable grounds for his mistaken belief. In other words, provided the accused had, subjectively speaking, an honest belief that the woman was consenting, then he lacked mens rea even if that belief was not one based on reasonable grounds.

4.37 The doctrine of 'honest belief' has been highly controversial in every jurisdiction which has adopted it, and there are a number of well-known arguments for and against the doctrine.

²⁶ 1994 JC 88. Most commentators treat the rule as firmly established by this decision but 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.

4.38 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 level of educational development, 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. A further point is that the test of honest, though unreasonable, belief is used in other areas of the criminal law, for example in the law on self-defence.²⁷

4.39 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.²⁸ There is also an argument that where in its criminal law a State adopts a purely subjective rather than an objective test for belief in consent, it may be acting in way which is incompatible with the requirements of Article 3 of the ECHR.²⁹

4.40 We would draw attention to three further features of the test. The first is that it can arise only in a very restricted range of circumstances. There are two elements to this point. In the first place the defence is relevant only where the accused accepts that the victim did not in fact give consent at the time of the offence. If the dispute is whether there was or was not consent, there is no scope for the honest but unreasonable belief defence, and in most cases the dispute between victim and accused is on the presence or absence of consent. Furthermore an accused running the honest belief defence faces a practical difficulty about credibility. Where the accused can give no reasonable basis for his mistaken belief, the jury will be less inclined to find that he actually held that belief.

4.41 A second aspect of the defence relates to the imbalance in the risks between adopting a subjective or an objective test. Professor Gane explains this point as follows:³⁰

"There is a critical difference between the position of the victim and that of the accused. If in deciding whether or not to have intercourse with a woman a man is alerted to the possibility that she may not consent, he suffers no harm if he is required to pause and find out whether she does or not. On the other hand, if the man may proceed to have intercourse with a woman regardless of her wishes, on the basis of an unreasonable belief in consent, the woman does suffer harm, harm which she cannot avoid since the law allows the man to override her wishes."

²⁷ This is certainly the law in England and Wales and arguably also in Scotland. For discussion, see F Leverick, "Is English self-defence law incompatible with Article 2 of the ECHR?" [2002] Crim LR 347.

²⁸ Stair Memorial Encyclopaedia *Reissue* Criminal Law, para 95.

²⁹ F Leverick, "Is English self-defence law incompatible with Article 2 of the ECHR?" [2002] Crim LR 347 at p 361.

³⁰ Gane, p 45.

4.42 A third point is that the honest belief test developed when the element of consent in sexual assault was undefined. The result is that an accused can argue that the facts that he believed happened amounted to the presence of 'consent', even if those facts would not constitute consent on any objective understanding. In other words, the lack of reasonable grounds applies not only to the basis for the accused's belief about consent but also to what consent means. However, were our proposals on consent set out in Part 3 to be adopted then any honest belief would have to be in relation to consent as defined in that model. For example, if the law were to adopt a general definition of consent as 'free agreement', the defence would be that the accused honestly believed that the victim had given her free agreement to intercourse, and not that she had given consent in the abstract or in some undefined way. The effect is that the applicability of such a defence would be narrowed from that available under the existing law.

4.43 There are three options for dealing with the honest belief defence. The first is to leave the law as it stands, namely that in a case of sexual assault in the general sense, where an accused honestly believed that the victim consented, he lacks mens rea of the sexual assault, even though there are no reasonable grounds for that belief. The test would be modified to the extent that the nature of the consent would be that set out in the proposed definition discussed in Part 3 above.

4.44 The second option is to remove all traces of subjective belief from the mens rea of sexual assault. This is the approach taken in the Draft Criminal Code, where the formulation of the mens rea is that the accused knew that, or was reckless as to whether, the other person consented. The idea of recklessness is used throughout the Code in an objective sense,³¹ including recklessness as to consent in offences of sexual assault. However, problems do exist about using the 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.

4.45 A third option is to retain the honest belief standard but to qualify it. For example, it is already the law that where the accused believes the woman was consenting because of his own intoxication, the defence is not open to him.³² A further limitation to the honest belief defence is illustrated by English law. The Home Office Review Group suggested that the defence should not be available where the accused did not take all reasonable steps in the circumstances to ascertain whether the victim was consenting. This proposal was followed but with modifications in the 2003 Act. Section 1 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

³¹ "A person is reckless as to a circumstance, or as to a possible result of an act, if the person is, or ought to be, aware of an obvious and serious risk that the circumstance exists, or that the result will follow, but nonetheless acts where no reasonable person would do so." (Draft Criminal Code, s 10(b).)

³² *Brennan v HM Advocate* 1977 JC 38.

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." ³³

4.46 We find the arguments between the different options to be finely balanced. We would not support the view that the law on the honest belief defence should remain exactly as it is, that is in relation to an undefined concept of consent. However, if our proposals on the definition of consent were to be implemented then retaining the existing test as it currently applies would not in any event be an option.

4.47 We propose that:

- 23. For an accused person to be guilty of an offence of sexual assault (rape, sexual assault by penetration, sexual assault) the accused, at the time of the assault, must have known the victim was not consenting or was reckless as to whether or not the victim consented.**

4.48 We also welcome views on the following question:

- 24. Should the test for the accused's belief that the victim was consenting be:**
- (a) the subjective test that he honestly held that belief;**
 - (b) the objective test that he held the belief and that there were reasonable grounds for doing so; or**
 - (c) the test that he held the belief but subject to the qualification that the belief must be reasonable having regard to all the circumstances (including steps taken by the accused to ascertain whether the victim did consent)?**

Coercing sexual conduct

4.49 We consider next a situation which though, not necessarily involving sexual contact as such, deals with conduct which is broadly similar. In cases of sexual assault the victim has 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.

4.50 It is not clear how the current law deals with coerced sexual conduct,³⁴ but in our view there should be an offence which specifically covers this situation. A similar proposal was made by the Home Office Review Group,³⁵ which was implemented in the 2003 Act.³⁶ In

³³ Similar definitions are given for assault by penetration (s 2) and sexual assault (s 3).

³⁴ But it is clearly the law that it is not rape for a woman to force a man to have sex with her (Gordon, vol II, p 508).

³⁵ Setting the Boundaries, paras 2.20.1-2.20.4.

English law the offence applies to the situation where the offender causes the victim to engage in sexual activity with the offender himself. This particular situation would also be a form of sexual assault, as there would be contact between the two parties but we consider that the type of wrong which such contact involves is better captured under the specific offence which we now propose. Thus it would also deal with what would loosely be called 'female rape', that is where a woman compels a man to have penetrative intercourse with her without his consent.

4.51 We propose that:

25. It should be an offence for a person to compel or coerce another person to engage in any sexual activity without that person's consent.

4.52 For the purposes of this offence the definition of 'sexual' should be the same as that considered earlier in respect of sexual assaults. Furthermore, the same rule on honest belief in consent should apply to this offence as it applies in cases of sexual assaults. In Part 5 we consider the situation where the person being coerced into sexual activity is a child.³⁷

Medical exemption

4.53 Many forms of medical intervention involve the (non-penile) penetration and touching of a person's genitalia or other parts of the body. It would be absurd that acts carried out for sound medical reasons could attract criminal liability. The Draft Criminal Code contains the following provision excluding medical interventions from the ambit of the sexual offences: "Nothing other than sexual intercourse is within subsection (1) if it was done reasonably and in good faith for medical reasons."³⁸ We are of the view that a similar rule should apply to the types of sexual assault which we have proposed. It should be emphasised that we are dealing here only with absence of criminal liability. We are not concerned with the question of any delictual liability which might follow as a consequence of medical intervention done without a person's consent. We propose that:

26. The offence of sexual assault (including sexual assault by penetration) does not apply to any act done reasonably and in good faith for medical reasons.

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

³⁷ Para 5.53.

³⁸ Section 60(2).

Part 5 Offences based on a protective principle

Introduction

5.1 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 or authority. 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 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 a person who suffers from a mental disorder to engage in a sexual act with that 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

5.2 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 3, 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. Furthermore, in Part 2 we identified another guiding principle for reform of sexual offences, namely that where sexual activity is genuinely consensual, then it should not be criminalised 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.

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.

⁵ Para 2.3.

5.3 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.

5.4 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.

5.5 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 12 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 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.

5.6 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 that no child under the age of (for example) 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.

5.7 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.

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

5.9 A second type of wrong involves persons 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 making criminal 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.

5.10 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

5.11 We are inclined to accept the arguments in support of the retention of offences based on the protective principle, which we see as complementary to the consent model we have recommended. Moreover, if sexual offences based on the protective principle were to be abolished, then the offences which apply to persons such as children or those with a mental disorder would be limited to the general offences which we recommend elsewhere in this Discussion Paper.⁸ Following this approach would also mean the abolition of the considerable number of existing provisions which are based on the protective principle.⁹

5.12 However, in order to gauge wider reaction, we pose the following question:

27. In addition to the general consent model proposed in Part 3, should there continue to be special provisions relating to sexual activity involving children, persons with mental disorder, and persons otherwise open to sexual exploitation?

5.13 For the purposes of the remainder of this Part of the Discussion Paper, we are assuming that at least certain offences should be based on the protective principle.

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

⁷ 1995 Act, s 5(3), (5).

⁸ See Parts 4 and 6.

⁹ See the examples given at para 5.1 above. These examples are Criminal Law (Consolidation) (Scotland) Act 1995, s 5(1) (sexual intercourse with a girl below the age of 13); s 5(3) (sexual intercourse with a girl below the age of 16); Mental Health (Care and Treatment) (Scotland) Act 2003, s 313 (sexual acts with a person suffering from a mental disorder); Sexual Offences (Amendment) Act 2000, s 3 (sexual intercourse with a person over whom the accused holds a position of trust). See also the provisions mentioned at para 5.17.

A. Children and young persons

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

5.15 *Common law.* 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.¹⁰

5.16 In addition, there is a special common law offence, known as lewd, indecent and 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,¹¹ but it is not clear whether it applies to conduct with consenting children who are close to the age of puberty.¹² Some confusion was caused by the former practice of charging certain types of lewd conduct as 'shameless indecency'. The High Court of Justiciary has now held that there is no such offence in Scots law and that these types of conduct, if criminal at all, should be regarded as forms of lewd, indecent and libidinous behaviour.¹³

5.17 *Statutory offences.* 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 13.¹⁴ It seems that 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 over the age of 13 and under the age of 16.¹⁵ 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.¹⁶
- (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 16.¹⁷ The defences mentioned in (2) above do not apply.

¹⁰ 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.

¹¹ 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 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).

¹² See Gordon, vol II, p 530.

¹³ *Webster v Dominick* 2005 JC 65. See further at paras 5.73-5.74 and 6.31-6.32.

¹⁴ Criminal Law (Consolidation) Scotland Act 1995, s 5(1).

¹⁵ 1995 Act, s 5(3).

¹⁶ 1995 Act, s 5(5).

¹⁷ Criminal Law (Consolidation) Scotland Act 1995, s 6.

- (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 16.¹⁸ 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.¹⁹ 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.²⁰ 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.

5.18 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.²¹
- (2) The common law offence of lewd, indecent and 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.

5.19 In general terms we seek 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.

¹⁸ 1995 Act, s 13(5) (as amended by the Sexual Offences (Amendment) Act 2000, s 1(3)).

¹⁹ 1995 Act, s 1.

²⁰ 1995 Act, s 2.

²¹ This practice could only be charged as a form of lewd, indecent and libidinous conduct. It is not an offence in itself for a woman to have (consensual) sexual intercourse with a boy aged 14 or older.

Gender neutrality

5.20 In Part 2 we mentioned, as a guiding principle for reform, the goal that the law on sexual offences should not involve distinctions based on sexual orientation or types of sexual practice or on gender.²² 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. We propose that:

- 28. 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'

5.21 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.

5.22 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. 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."²³ 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 defence' age) and consensual sexual activity involving children who may be vulnerable to exploitation (the upper age, or the age of consent). We consider, first, offences which apply in respect of what we call young children, that is children at the lower of these two levels of age.

Offences involving sexual activity with young children

5.23 In Part 4 of this Discussion Paper we made proposals for the introduction of three types of offences involving sexual assault (rape, sexual assault by penetration, and non-penetrative sexual assault). We also proposed that there should be an offence of coercing sexual conduct. Part of the definition of each of these offences is that the activity in question

²² Para 2.7.

²³ Setting the Boundaries, para 3.3.6.

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).²⁴ A number of related issues need to be considered:

5.24 *What age?* 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

5.25 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 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

5.26 *The role of consent.* 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.

²⁴ 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 reasonable belief in marriage between the accused and the child. See paras 5.63-5.72.

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).

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).

5.27 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 13.²⁹ 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.³⁰

5.28 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 12.³¹

5.29 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).

5.30 *Defences.* Earlier we stated that current offences involving young children are offences of 'strict' liability, and that such offences are sometimes (though not entirely accurately) referred to as 'no defence' offences. 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 (guilty mind) in respect of all elements of the offence.³² 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. The same is probably true of the offence in Scots law of having sexual intercourse with a girl under 13. It should be noted, however, that there is a presumption

²⁹ For example, ss 5-8.

³⁰ 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."

³¹ See note to s 5(1) of the 1995 Act in *Current Law Statutes Annotated*, which cites *Jas Burtney* (1822) Alison, I, 214; *C v HM Advocate* 1987 SCCR 104.

³² Accordingly strict liability offences are not to be equated with 'no defence' offences. 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.

that mens rea is required as to the central elements of a statutory offence.³³ Moreover, the imposition of strict liability has been challenged in England in respect of other offences involving child victims.³⁴ 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 12 (or 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.³⁵

5.31 We examine later the defences which may be appropriate in respect of offences involving children under 16 (and 18). We have already mentioned one, namely mistake as to age. Another defence is marriage or reasonable belief in marriage. Under Scots domestic law a person cannot marry if he or she is below the age of 16,³⁶ but Scots law may recognise foreign marriages where the parties are below this age.³⁷ 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 marriage³⁸ 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 any case, we take the view that as regards offences involving young children (that is, below 12 or 13), there should not be a defence of marriage.³⁹ The policy reason for adopting strict liability for these offences is so strong as to exclude this 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.⁴⁰ We examine later the circumstances in which Scots law may recognise a foreign civil partnership.⁴¹ 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.

³³ 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."

³⁴ *B 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.

³⁵ See paras 5.64-5.66.

³⁶ 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)).

³⁷ A E Anton (with P R Beaumont), *Private International Law* (2nd edn, 1990), pp 436-439.

³⁸ *Henry Watson* (1885) 5 Couper 696; *Abinet v Fleck* (1894) 2 SLT 30; *R v Chapman* [1959] 1 QB 100.

³⁹ 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).

⁴⁰ It should be borne in mind that in general Scots criminal law does not apply to acts committed outside of Scotland.

⁴¹ Paras 5.69-5.70.

5.32 Problems may arise where the person engaging in sexual activity with a young child is himself or herself a child. If it were a strict liability offence to have sexual activity with a child below the age of 12, then where both parties were children under that age, each would be guilty of the offence. A solution to this problem would exist if that age were set at the same age as that of criminal responsibility. 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.⁴² We consider later issues involved with the criminal responsibility of children under the age of 16.⁴³

5.33 We now draw these various issues together. We consider that the law on sexual offences should continue to provide that sexual activity with young children is criminal. Currently, the law uses two different ages in this context, namely 12 and 13, which may lead to confusion. We consider that it would be better if there were only one age for these types of offence but we have not yet identified what that age should be. The age of 12 is used in other areas of the law as indicating that children below that age have very limited legal capacity and are in need of protection. It is also the age which we propose should be the threshold for criminal responsibility. On the other hand, 13 is the age used in one existing statutory offence in Scots law and is also used in a wide range of offences in English law. Fixing the age at 12 would mean lowering the range of protection given to 12 year-old children, who would be better protected under English law than under Scots law. However, we must emphasise in the strongest possible terms that we are not fixing 12 (or 13) as the age of consent. Rather the issue is what should be the age for the application of the special strict liability offences. Even if the age of 12 were to be fixed for this purpose, 12 year-old children would still be protected by the offences which prohibit non-consensual sexual activity and by the protective offences, which we consider later, applicable to children under 16 (and in some case under 18).

5.34 The next issue is whether the offences should be special instances of the 'no consent' offences (that is rape, penetrative assault, sexual assault and coercing sexual activity) or should be additional to those offences.⁴⁴ On the first approach the law in effect deems that children below the age in question lack capacity to consent. On the second approach the offences applicable to young children apply where there is no issue of the child not consenting to the sexual activity. We see merits in both approaches and at this stage we are undecided as to which to adopt.

5.35 Finally, we support the idea that these offences should involve strict liability. Persons contemplating having sex with young children act at their peril.

5.36 Accordingly, we set out the following proposals and questions:

29. There should be special provisions in applying the law on sexual assaults and coercing sexual activity to young children below a defined age.

30. Should that age be 12 or 13?

⁴² 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).)

⁴³ Paras 5.45-5.47.

⁴⁴ Paras 5.26-5.29.

31. **Should these offences provide that children below that age lack capacity to consent to sexual activity? Or should they apply in addition to offences in which lack of consent is a defining element?**
32. **There should be no defence to these offences that the accused believed that the child was of, or older than, the age in question or that the accused was married to, or in a civil partnership with, the child.**

Offences involving children under 16

5.37 We now consider offences involving sexual activity with children who are below 16 years of age but are older than 12 (or 13) (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 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 children between 12 (or 13) and 16 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.⁴⁵

5.38 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.

5.39 *The wrongfulness of (consenting) sex with children.* 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.⁴⁶ 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

⁴⁵ See 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.

⁴⁶ Para 2.6.

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."⁴⁷ Placing protection of children in general sexual offences applying to victims of any age tends to hide this statement of principle.

5.40 Nonetheless, it might be argued that children on reaching their 12th (or 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 12 (or 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.⁴⁸ 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).

5.41 We do not agree with this approach but would welcome the views of consultees on it. We take the view that the provisions on consent and on abuse of trust do not by themselves provide adequate protection for children aged 12 to 16. The consent model which we propose in Part 3 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.

5.42 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.

5.43 We also think that lowering the age of consent to 12 or 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.⁴⁹ Furthermore, there would be cross-border anomalies. Sixteen is the age of consent which applies in the rest of the UK.⁵⁰ A man in England wanting to have sex with

⁴⁷ Setting the Boundaries, para 3.6.1.

⁴⁸ 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 5.45-5.47.

⁴⁹ Other examples are the regulation of child prostitution and child pornography for children; health strategies in relation to sex education and teenage pregnancies.

⁵⁰ 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

a 13-year-old boy there would escape criminal liability by the simple step of crossing the border.

5.44 We remain of the view that there are good reasons of principle for retaining protective offences in respect of children aged 12 or older.

5.45 *Prosecuting sexual activity between consenting (older) children.* There are thought to be problems in applying sexual offences relating to consensual sexual activity with young children to cases where the participants are themselves children.⁵¹ 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 2003:⁵²

"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."

5.46 Nor might it be a proper response to say that very few cases of consenting sex between children will involve prosecution in the criminal courts. If conduct is not to be prosecuted then it ought not to be made criminal at all. It is contrary to the rule of law to enact a criminal offence and then to provide that the offence should be rarely, if ever, prosecuted. However, the points about not prosecuting children for sexual offences involving other children prove too much if they are used as an argument against having any provisions on sexual activity with older children. All that these points might show is that the offences should not apply to children as offenders in the same way as they apply to adult offenders. For example, the offences could be restricted to persons over the age of 18, or could apply to child offenders in a different way. In English law there is a wide-ranging offence of engaging in sexual activity with a child under 16 but the offence can be committed only by a person aged 18 or over.⁵³ There is also a separate offence, subject to lesser penalties, for a person under 18 engaging in that form of conduct,⁵⁴ but the existence of this second offence is by no means a necessary consequence of the first.

5.47 Furthermore, the argument about not prosecuting children fails to take account 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

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.

⁵¹ 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.

⁵² J R Spencer, "The Sexual Offences Act 2003: (2) Child and Family Offences" [2004] Crim L Rev 347, at 354.

⁵³ Sexual Offences Act 2003, s 9.

⁵⁴ *Ibid*, s 13.

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 criminal courts.⁵⁵ In Scots law, it is (virtually) true, in respect of all types of offence, that children under 16 will not be prosecuted. Yet, it can hardly be said that the rules on criminal responsibility subvert the rule of law in Scotland. We return to the topic of the age of criminal responsibility when we consider the issue of defences to offences dealing with sexual activity with older children. For immediate purposes, however, we take the view that offences which criminalise consenting sexual activity with children under 16 (and over 12 (or 13)) have a distinct purpose which is absent from the offences prohibiting non-consensual sexual activity. We also take the view that problems with the application of such offences to children themselves are not good reasons against the existence of such offences in respect of older persons. Accordingly we propose that:

33. There should continue to be offences which prohibit a person engaging in sexual conduct with a child who is older than 12 (or 13) where such conduct involves the consent of the child.

5.48 *What should the age of the child be?* We regard it as fairly well settled that if these offences are to exist, the cut-off age of the child should be 16. We examine later the special instances of sexual activity involving abuse of positions of trust and authority where there may be arguments for a higher age. Sixteen is the age in many legal rules for fixing legal capacity of a child.⁵⁶ In particular, the children's hearings system deals only with children under 16⁵⁷ and, as noted earlier, children under 16 are subject to special rules about criminal prosecution. We propose that:

34. The offences referred to in proposal 33 should apply in respect of children under the age of 16.

5.49 We now consider the issue of the types of activity which these offences should cover and the application of the offences to persons who are themselves under the age of 16. These issues are to some extent connected. An important general point about these offences is that it should not be a defence that the child consented to the sexual activity. Indeed the rationale of the offences is to protect children who do consent.

5.50 For the purpose of discussing the first issue we deal solely with the situation where the person participating in a sexual act with a child under 16 is himself older than 16. The existing law on sexual activities involving children under 16 prohibits sexual intercourse and

⁵⁵ 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 and libidinous conduct 5, and for 'other indecency' 8.

⁵⁶ Age of Legal Capacity (Scotland) Act 1991, s 1 (capacity to enter into legal transactions); Marriage (Scotland) Act 1977, s 1 (capacity to marry).

⁵⁷ This rule is subject to various exceptions which allow children over 16 to be subject to children's hearings (see Children (Scotland) Act 1995, s 93(2)(b) (definition of child); Criminal Procedure (Scotland) Act 1995, s 49 (power of courts to remit persons up to 17 years and 6 months to children's hearings)).

lewd, indecent, and libidinous conduct in respect of girls under 16 and sodomy and acts of gross indecency in respect of boys.⁵⁸ We find these provisions to be unsatisfactory. The provisions in relation to girls are not equivalent to those applying to boys. Instances of lewd, indecent and libidinous conduct will not necessarily match acts of gross indecency. In any case, these expressions are too vague and do not achieve the aims of making the law clear. Nor is it clear what forms of sexual activity short of sexual intercourse are lewd, indecent and libidinous in nature and likewise what forms of conduct short of sodomy constitute acts of gross indecency. The law protecting children under 16 should apply equally to boys and girls.

5.51 In Part 4 we proposed various offences which should apply where one of the parties does not consent. The question then is which of these offences should apply as part of the protective principle to children under 16 where there is no issue of lack of consent on the part of the child. We consider that penetrative sexual acts should fall within the range of offences. More problematic are the other types of offence we mentioned in Part 4, namely non-penetrative sexual contact and compelling sexual activity.⁵⁹

5.52 We have proposed that there should be an offence which consists of one person touching another in a sexual manner (not involving penetration) without that person's consent. It is not so clear what is wrong about this sort of conduct where the other person does consent. On one view applying these provisions to consenting behaviour would criminalise a mother kissing her 13 year-old son, or a father stroking his 14 year-old daughter's hair. However this objection fails to focus on a crucial element of the conduct in question, namely that it is 'sexual' in nature. Even in non-consent cases involving adults, touching which was not sexual in nature would not come within the scope of the proposed offence (though it might constitute ordinary assault). Similarly for the protective offence of contact with a child under 16, touching would amount to that crime only where it was sexual in nature. In this context we would use the same test for determining sexual, which we proposed earlier, namely what a reasonable person would consider to be sexual. However, problems might still arise where the contact is sexual in nature but of a relatively minor nature, for example, a 17 year-old kissing his 15 year-old girlfriend. In this situation, the man would not fall within the provisions on age of criminal responsibility and he could not escape prosecution on that basis. We see the force of this point and would welcome the views of consultees on whether the protective offences for under-16s should include non-penetrative sexual activity.

5.53 We have also proposed that there should be an offence where one person compels another to engage in a sexual act without that other person's consent. Examples of the prohibited conduct would be where the perpetrator compels the victim to masturbate himself or touch the perpetrator's genitals. However, there is an oddity about the notion of someone being compelled to do something with his consent. At the same time, we take the view that the protective principle should apply where 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 regard this as mainly a matter of statutory drafting. We also note that there is an offence in English law of 'causing or inciting' a child to engage in sexual activity.

⁵⁸ Criminal Law (Consolidation) (Scotland) Act 1995, ss 5, 6, and 13(5).

⁵⁹ It should be borne in mind that unlike the strict liability offences in respect of children under 12 or 13, there should be defences to the offences on sexual activity with children under 16. See paras 5.63-5.72.

5.54 We propose that:

- 35. It should be an offence for a person to penetrate (with a penis or with any part of the body or with any object) a child under the age of 16 (but older than 12 (or 13)).**
- 36. Should it be an offence for a person to touch in a sexual manner a child under the age of 16 (but older than 12 (or 13))?**
- 37. It should be an offence for a person to cause or to incite a child under the age of 16 (but older than 12 (or 13)) to engage in sexual conduct.**

5.55 We now consider the application of the offences referred to in proposals 35 to 37 to children. The problem here is that if these offences apply to children who engage in the prohibited acts with other children, the effect is to criminalise consenting behaviour between children which may be far from objectionable and which is commonly practised. Professor J R Spencer points out that examples of this type of conduct include mouth to mouth kissing or minor acts of sexual exploration between 14 and 15 year-olds; two boys giving themselves a sexual thrill by looking at a dirty book; and 'rude games' between children. He also refers to empirical studies about sexual behaviour:⁶⁰

"In 1994 a widely-respected study reported that the average age of young people's first sexual experiences (kissing, cuddling, petting, etc) then stood at 14 for women and 13 for men. This also showed that 18.7 per cent of women and 27.6 per cent of men had full intercourse before they were 16 – figures which a follow-up study shows now stand at 24.8 per cent and 30.7 per cent."

5.56 One possible solution is to exempt persons under the age of 16 from any liability under these provisions. The difficulty with this response is that it fails to deal with cases where sexual conduct between under 16 year-olds is truly exploitative, which may occur where there is a disparity in age (for example, a boy aged just under 16 having sexual intercourse with a girl just over 13). Moreover the existing position in Scots law is that, in effect, children under 16 are not prosecuted for any types of offence (including sexual offences), except in exceptional circumstances.

5.57 In our project on the age of criminal responsibility, we drew attention to section 42 of the Criminal Procedure (Scotland) Act 1995, which places restrictions on the prosecution of children under 16.⁶¹ This provision followed on from a recommendation of the Kilbrandon Committee on Children and Young Persons, whose work led to the introduction of the system of children's hearings. As that system has developed since its introduction in 1971 the effect has been that almost all children under 16 who commit crimes are dealt with in the hearings system and not in the criminal courts. The Kilbrandon Committee had rejected the idea that no child under 16 should ever be prosecuted, as there would still be cases in which it would be appropriate for children to be prosecuted in the criminal courts. However, the Committee envisaged that such cases would be few in number and would occur where there

⁶⁰ J R Spencer, "The Sexual Offences Act 2003: (2) Child and Family Offences" [2004] Crim L Rev 347 at 354, referring to K Wellings et al, *Sexual Behaviour in Britain: The National Survey of Sexual Attitudes and Lifestyles* (1994), p 40.

⁶¹ "No child under the age of 16 years shall be prosecuted for any offence except on the instructions of the Lord Advocate, or at his instance" (Criminal Procedure (Scotland) Act, s 42(1)).

was a major issue of public interest. In our Discussion Paper we also examined the issue whether there should be a complete exemption of children under 16 from criminal prosecution. We concluded:⁶²

"Overall in our view the consistent pattern of infrequent resort to prosecuting children under 16 indicates a proportionate response in Scots law to dealing with young offenders. We believe that current law and practice strikes a proper balance between the welfare approach which applies to the vast majority of offenders under 16 and the very rare cases where the public interest requires prosecution of under-16s in the criminal courts."

5.58 On consultation, there was support for our view that it should remain competent for children under 16 to be prosecuted but this was to some extent subject to a concern that the rule should be absolute in respect of young children. In the event we accepted this point and recommended that children under 12 should be immune from criminal prosecution. For children above 12 and under 16, we recommended that prosecution should remain competent but subject to various safeguards to ensure that prosecution is used only in rare case where public interest requires it.⁶³

5.59 For the present project, we take the view that the current rules on the age of criminal responsibility of children under 16 should continue to apply. In other words, there should be no universal prohibition on prosecuting children under 16 in respect of the offences we are considering but we anticipate that most cases of consenting sex between under 16s would not result in a criminal prosecution. However such cases would lead to referrals to a children's hearings where it was thought that a compulsory measure of supervision was necessary in respect of the child (which would not always be the case). It should be noted that, unlike a conviction, a finding or admission for purposes of referral to a hearing that a child has committed any sex offence does not trigger the notification requirements for the so-called sex offenders register.⁶⁴ It may therefore be of value to retain a residual power to prosecute children even for the 'consenting' offences where there were aspects of exploitation and where the notification procedures were thought to be appropriate for that child.

5.60 We also note that the Draft Criminal Code proposed a specific offence of 'sexual intercourse between minors' but the comment on that provision suggested that such offences should be rarely prosecuted and pointed to disposal within the children's hearings system.⁶⁵ However, we see little point in creating a specific offence which would be applied only in very rare cases.

5.61 Our preferred approach is not to exempt children under 16, as offenders, from the scope of the offences referred to in proposals 35 to 37. Rather these cases should be integrated into the general system on the prosecution of children under 16. The advantage of proceeding in this way is that the practical effect would be that criminality would not be attached to consenting sexual activity between under 16 years 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,

⁶² Discussion Paper on *Age of Criminal Responsibility* (Scot Law Com No 115 (2001)), para 3.12.

⁶³ Report on *Age of Criminal Responsibility* (Scot Law Com No 185 (2002)), paras 3.6-3.20.

⁶⁴ Sexual Offences Act 2003, s 80.

⁶⁵ Section 66.

further, children under 16 who engaged in sexual activity could, where appropriate, be referred to a children's hearing.

5.62 We propose that:

- 38. The offences mentioned in proposals 35, 36 and 37 should apply to children under 16 who commit those offences against children under that age, subject to the application of the existing provisions on the prosecution of children under 16.**

5.63 *Defences.* On any view, offences involving consensual sexual activity with children under 16 are less serious than offences relating to sex with children under 12 (or 13). Earlier we proposed that there should be no specific defences in relation to offences involving children in the lower age group.⁶⁶ However, we consider that the arguments for strict liability 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.

5.64 (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 We consider that the form of this defence, sometimes referred to as the 'young man's defence', is unprincipled, and can be explained only in terms of a political compromise in the enactment of a previous version of the defence.⁷¹ We suggest later that the accused should bear a legal burden of establishing this defence. Any question of the accused's own age may have a bearing on his credibility but should not be a formal restriction of raising the defence.

5.65 We take a similar view of the fact that the accused may have raised the defence on a previous occasion, that is the issue goes 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 see some merit in allowing the Crown to continue to lead such evidence, not to disallow the defence, but to test the accused's

⁶⁶ Para 5.36, proposal 32.

⁶⁷ 1995 Act, ss 5(3) and 5(5), as it applies to girls (but not boys).

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.

credibility. However, the admissibility of this evidence would be subject to the question of prejudice which the accused might suffer from such disclosure.

5.66 We also consider that the onus of proving this defence should lie on the accused as a legal, and not simply an evidential, burden.⁷³ 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 consider that these factors would ensure the compatibility of the legal burden of proof with the ECHR.⁷⁴

5.67 We set out the following proposals and question:

- 39. There should be a defence to an offence relating to sexual activity with a child under 16 (but older than 12 (or 13)) that the accused believed on reasonable grounds that the child was 16 or older.**
- 40. The legal burden of establishing this defence should lie with the accused.**
- 41. Should the Crown be allowed to lead evidence that the accused had previously been charged with a like offence?**

5.68 (ii) *Marriage; civil partnerships*. The offence of having sex with a girl under 16 applies only in respect of 'unlawful' sexual intercourse.⁷⁵ This term has been interpreted as meaning intercourse outside of marriage.⁷⁶ 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.⁷⁷ No equivalent or analogous defence exists in relation to homosexual activity with a boy under 16. The English 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,⁷⁸ and in these cases the defence has been subsequently extended to include civil partnership.⁷⁹

5.69 In our view it is appropriate to remove criminal liability for consensual sexual conduct between spouses, at least where neither is a young child.⁸⁰ The current law also allows for a defence that the accused reasonably believed that he was married to the child, and we

⁷³ 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 there must be enough evidence on a particular issue to entitle the court to treat the issue as one that it must consider. It will 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.

⁷⁴ *Sheldrake v DPP; Attorney-General's Reference (No 4 of 2002)* [2005] 1 AC 264.

⁷⁵ Criminal Law (Consolidation) (Scotland) Act 1995, s 5(3).

⁷⁶ *Henry Watson* (1885) 5 Couper 696; *Abinet v Fleck* (1894) 2 SLT 30; *R v Chapman* [1959] 1 QB 100.

⁷⁷ 1995 Act, s 5(5)(a).

⁷⁸ Sexual Offences Act 2003, ss 28-29.

⁷⁹ Civil Partnership Act 2004, Sch 27, paras 173-175.

⁸⁰ 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.)

consider that the defence should remain. 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.⁸¹ 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 16.⁸²

5.70 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.⁸³ But we consider 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 children under 16 (but older than 12 (or 13)).

5.71 Who should bear the burden of proof in relation to these defences? As the defences are based on events occurring outside Scotland there may 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 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.

5.72 We propose that:

- 42. There should be a defence to an offence relating to sexual activity with a child under 16 (but older than 12 (or 13)) that the accused and the child were married or in a civil partnership or similar or analogous relationship recognised as valid under Scots law.**
- 43. It should also be a defence to such an offence that the accused believed on reasonable grounds that he was married to the child or that he and the child were in a civil partnership or similar or analogous relationship recognised as valid under Scots law.**
- 44. The accused should bear an evidential, but not a legal, burden of establishing these defences.**

Offences concerning indecent conduct

5.73 The offence of lewd, indecent and libidinous practices 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).

⁸¹ Civil Partnership Act 2004, Part 3.

⁸² 2004 Act, s 217.

⁸³ See K Norrie, "Reproductive technology, transsexualism and homosexuality: new problems for international private law" (1994) 43 ICLQ 757.

In the case of girls, but not boys, statute has extended the scope of the offence to the age of 16.⁸⁴ The nature of the offence of lewd, indecent and 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*⁸⁵ the High Court of Justiciary held that no such offence existed. The Court pointed out that certain types of shamelessly indecent conduct which were aimed at specific victims should be treated as types of lewd, indecent and libidinous conduct. The Court noted:⁸⁶

"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 Adv 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."

5.74 There are several problems with the offence of lewd, indecent and 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.

5.75 In our view a preferable approach would be to replace a broad offence of indecent behaviour towards children with more specific offences.⁸⁷ Many of the instances of lewd, indecent and libidinous behaviour would be covered by other proposals which we make in this Discussion Paper. Examples are sexual assault; indecent exposure; sexual touching with children under 16; sexual activity with a child in breach of trust. Other types would be included in more general offences applicable to adults and children (for example, nuisance phone calls;⁸⁸ harassment;⁸⁹ displaying obscene materials in a public place;⁹⁰ and child pornography offences⁹¹). There are, however, two particular types of activity which do not obviously fall within the scope of any offence (either existing or proposed by us) but which we consider should be made criminal. These are where a person for purposes of sexual gratification (i) engages in sexual activity in the presence of a child or (ii) causes a child to watch a sexual act (which may be in the form of a photograph or image). These offences exist in English law, which draws a distinction between victims under the age of 13 (which involves strict liability) and children between 13 and 16 (where there is a defence of

⁸⁴ There is a statutory offence of homosexual gross indecency in respect of boys under 16 (1995 Act, s 13).

⁸⁵ 2005 JC 65.

⁸⁶ Para 49.

⁸⁷ We later propose that the statutory offence of gross indecency between males should be abolished (see paras 6.2-6.9).

⁸⁸ Communications Act 2003, s 127.

⁸⁹ Protection from Harassment Act 1997, s 8.

⁹⁰ Civic Government (Scotland) Act 1982, s 51(1).

⁹¹ *Ibid*, ss 52 and 52A.

reasonable mistake as to age).⁹² In our view, a similar approach should be taken in Scots law.

5.76 We propose that:

- 45. The crime of lewd, indecent and libidinous practices and behaviour towards children should be abolished.**
- 46. It should be an offence for a person, for purposes of sexual gratification, to engage in sexual activity in the presence of a child.**
- 47. It should be an offence for a person, for purposes of sexual gratification, to cause a child to watch a sexual act.**
- 48. It should be a defence to an offence mentioned in proposals 46 and 47, where the child is older than 12 (or 13) and below 16,**
 - (a) that the accused believed on reasonable grounds that the child was 16 or older or**
 - (b) that the accused and the child were married or in a civil partnership or similar or analogous relationship recognised as valid under Scots law or the accused believed on reasonable grounds that he was married to the child or was in such a relationship.**

Immunity for counselling

5.77 An issue which attracted some attention during the passage of the Sexual Offences Act 2003 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 of⁹³

- (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.

5.78 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

⁹² Sexual Offences Act 2003, ss 11 and 12.

⁹³ *Ibid*, s 73.

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.⁹⁴

5.79 We consider that a similar defence should apply in Scots law but we see no reason why it should not extend to offences involving sexual activity with young persons aged 16 or over. We propose that:

- 49. 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.**

B. Persons with mental disorder

5.80 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.⁹⁵

5.81 In Scotland, these issues were most recently explored in the comprehensive review of the law on mental disorder by the Millan Committee,⁹⁶ and the subsequent Mental Health (Care and Treatment) (Scotland) Act 2003.⁹⁷ The 2003 Act creates two offences in respect of sexual activity involving persons with a mental disorder.⁹⁸ 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.

5.82 It may be noted that a person with a mental disorder may have sexual relations provided the circumstances do not fall within the scope of these offences.

5.83 These provisions have only recently been brought into force and they followed detailed consideration of the issues by a committee with expertise in issues of mental health. There may be a case for not proposing further legislative change, at least until experience has been gained of how the provisions of the 2003 Act have operated in practice. However, 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

⁹⁴ Card, *op cit*, p 17.

⁹⁵ "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.

⁹⁶ *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).

⁹⁷ The Act came into force in October 2005.

⁹⁸ 'Mental disorder' is defined in the Mental Health (Care and Treatment) (Scotland) Act 2003 as "any (a) mental illness (b) personality disorder or (c) learning disability, however caused or manifested" (s 328).

Committee noted the problems which were encountered when the existing general law covering sexual offences was applied in cases where a person has a mental disorder:⁹⁹

"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."

5.84 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.¹⁰⁰

5.85 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:¹⁰¹

"(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."

5.86 The second is a statutory test of being incapable of consenting to a sexual act by reason of mental disorder:¹⁰²

"(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

⁹⁹ Report of the Millan Committee, paras 21.22-21.25.

¹⁰⁰ "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.)

¹⁰¹ 2003 Act, s 311(3).

¹⁰² Section 311(4).

(c) communicate any such decision."

5.87 The issue which arises is whether there would be any need for the provisions of section 311 of the 2003 Act if our proposals on sexual offences involving lack of consent were to be implemented. It is our view that everything which those measures state is included in our more general proposals. However, although the substantive effect is the same, the drafting of the consent provisions in the 2003 Act might prove to be different from a provision which gives effect to our own proposals on a consent model. 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. We therefore propose that:

50. Assuming our proposals in Part 4 (offences involving lack of consent) were implemented, section 311 of the Mental Health (Care and Treatment) (Scotland) Act 2003 should be repealed.

5.88 It should be noted that the section 311 offence is not based on a protective principle but is rather a specific application of the principle that non-consensual sex should be criminalised. The other offence enacted in the 2003 Act, under section 313, is based less on a protective principle than on the idea that certain types of sexual activity with a person with a mental disorder may involve a breach of trust or authority. We consider that situation below.¹⁰³

5.89 Accordingly, there is a gap in the protection of persons with a mental disorder, namely in the situation where sexual activity is consensual but is exploitative in a way that does not involve a breach of trust or authority. The Draft Criminal Code recommended repeal of the provisions of the 2003 Act, mainly on the basis that the statutory offences tended to duplicate offences which apply generally to non-consensual sexual activity.¹⁰⁴ The Code itself 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 or authority over that person. The second is defined as follows:¹⁰⁵

"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."

5.90 We can see an advantage of having a specific offence which protects persons with a mental disorder from exploitation but we are concerned whether such an offence can 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

¹⁰³ Paras 5.93-5.100.

¹⁰⁴ Draft Criminal Code (commentary on s 69).

¹⁰⁵ Section 69(1)(b).

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.

5.91 The approach of English law is that offences in respect of persons with a mental disorder parallel the protective offences relating to children over 13.¹⁰⁶ 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.

5.92 We have not reached a concluded view on this issue. On the basis that persons with a mental disorder are in any case within the scope of offences involving lack of consent and of offences based on abuse of trust and authority (which we consider next), we pose the following question:

51. Should there 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?

C. Persons in positions of authority and trust

5.93 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.

5.94 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 member of the same household as the child and is in a position of trust or authority in relation to that child.¹⁰⁷ 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. The Scottish Law Commission noted that other statutes had used the first of these expressions,¹⁰⁸ and suggested that the use of this phrase in those Acts had not caused any difficulty. They added:¹⁰⁹

"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."

¹⁰⁶ Sexual Offences Act 2003, ss 9-12 and ss 30-33.

¹⁰⁷ Section 3 of the 1995 Act is derived from section 2C of the Sexual Offences (Scotland) Act 1976, which was based on the recommendations of the Scottish Law Commission. See Report on *The Law of Incest in Scotland* (Scot Law Com No 69 (1981)), para 4.36.

¹⁰⁸ Social Work (Scotland) 1968, s 32(2)(d),(e) (now Children (Scotland) Act 1995, s 52(2)(e)-(f)). See *McGregor v Haswell* 1983 SLT 626 where the expression is defined as: "a group of persons, held together by a particular kind of tie who normally live together ... akin to a family unit" and *A v Kennedy* 1993 SCLR 107 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).

¹⁰⁹ Report on *The Law of Incest in Scotland* (Scot Law Com No 69 (1981)), para 4.33.

5.95 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.

5.96 Secondly, section 3 of the Sexual Offences (Amendment) Act 2000 created an offence for a person of 18 or over to have sexual intercourse¹¹⁰ 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:¹¹¹

- (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.

5.97 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.

5.98 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.¹¹² The Act does not use the expression abuse of trust or authority 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.

5.99 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 Discussion Paper. 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

¹¹⁰ Under this provision sexual intercourse includes both vaginal and anal intercourse.

¹¹¹ The Scottish Ministers have power by order to add further situations to this list (s 4(1) and s 7(2)).

¹¹² The type of carers are 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.

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.¹¹³ 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."¹¹⁴ 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 or authority over the victim. The existence of the trust relationship renders highly problematic any consent which the vulnerable person may give to sexual activity. But over and above the issue of the validity of consent, a person who holds a position of trust over another is acting inconsistently with the duties imposed by that position if he engages in sexual activity with that person. 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.¹¹⁵

5.100 Accordingly, we propose that:

52. There should continue to be offences prohibiting sexual activity between persons one of whom holds a position of trust and authority over the other.

5.101 *Abuse of trust in family settings.* We now consider the types of situation where this type of offence should apply. 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 our view there is scope for expanding this provision to cover sexual abuse within any type of family unit. It will be recalled that we have already proposed that sexual activity where there is no consent by the victim should in itself be subject to specific provisions,¹¹⁶ as should cases where one of the participants is under the age of 16.¹¹⁷ But there is scope for protection of vulnerable members of a family unit who do not fall within the range of these offences.¹¹⁸

5.102 The key elements of the proposed offence are that the parties share the same household, that there was at the relevant time a position of trust between them, and that the sexual activity, which was consensual in nature, occurred as a breach of trust. Another way

¹¹³ 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.

¹¹⁴ Scot Law Com No 69 (1981), para 4.31.

¹¹⁵ 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).

¹¹⁶ Para 3.29.

¹¹⁷ Para 5.48.

¹¹⁸ 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 5.73) there is now no such offence.

of making this last point is to say that the victim's consent was obtained by a breach of trust. In its 1981 Report this Commission stated that these elements (membership of the same household, a position of trust, and breach of trust) are essentially factual matters, and they are not defined in section 3 of the 1995 Act.¹¹⁹ We are not aware of any problems in practice caused by the lack of definition of these terms in the Act. We consider that the idea of people sharing the same household is sufficiently clear and that no statutory definition is required. However, there may be advantages in setting out some non-exhaustive examples of situations where a position of trust can be said to exist. A position of trust could be defined, for example, in terms of anyone who has or exercises parental responsibilities and rights as set out in the Children (Scotland) Act 1995. Under that Act, a person has various responsibilities and rights in relation to a child where he or she is the child's genetic father or mother.¹²⁰ Although a parent cannot abdicate these responsibilities or rights to anyone else he may arrange for them to be fulfilled or exercised by someone else on his behalf. One disadvantage of defining relationship of trust in this way is that it would not allow for expansion of the offence where the child is 16 or older.¹²¹ However in some situations, for example where a child continued to live with her parents after the age of 16, the court might be prepared infer that a position of trust continued to exist although there were no longer any parental responsibilities and rights. Furthermore, it would not allow for a position of trust where the relationship between the parties was not genetic, for example with step relationships. However, a position of trust would arise where a step-parent treated a child as a member of his family. Overall, we consider that it would be helpful to include the existence of parental responsibilities and rights, and acceptance of a child into a family, as non-exhaustive factors in establishing a relationship of trust in a family setting.

5.103 The section 3 offence as it currently exists could be extended in other ways. At present, it prohibits only (heterosexual) sexual intercourse between the parties, but not other types of sexual activity based on breach of trust. In our view, the offence should extend to all types of sexual conduct, both heterosexual and homosexual. Furthermore, the current offence applies only where the victim is a child under the age of 16. It might be thought that the offence need not be restricted in this way on the basis that sex obtained by a breach of trust is a wrong whatever the age of the victim. On this approach, the age of the parties would be relevant, not as limiting the scope of the offence, but as part of the factual scenario in deciding whether, in any particular case, there was a position of trust between the parties and whether there was a breach of trust. In determining these questions the court or jury would look at all the relevant facts, including the age of the parties and the nature of their relationship within the family unit.

5.104 Section 3 of the 1995 Act provides for three defences. One of them is a mistake as to the victim's age. This defence would not be necessary if the offence were not limited to victims under a defined age (though mistake as to the other party's age might be relevant to determining the existence of a position of trust). A second defence is that the accused did not consent to the sexual intercourse with the person under 16. Again we doubt whether this

¹¹⁹ 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.)

¹²⁰ Children (Scotland) Act 1995, ss 1, 2, 15. The definition of parent is subject to Part IV of the Adoption (Scotland) Act 1978 and ss 27 to 30 of the Human Fertilisation and Embryology Act 1990.

¹²¹ With one exception, the parental rights and responsibilities set out in the Children (Scotland) Act 1995 apply where the child is under 16 (ss 1(2); 2(7)).

defence is required. The fact that the accused did not consent to sexual activity with the person over whom he holds a position of trust is evidence which suggests that the activity did not involve a breach of trust. But this is a matter of evidence, governed by the usual rules about relevancy, and not a specific defence.

5.105 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. There is a point to a marriage defence where the offence is based on some defining line, such as where one of the parties is under 16 or where the parties would be within the prohibited degrees of relationship under Scots law. In these situations the marriage defence would be confined to foreign marriages and reflect the need to recognise that other legal systems may draw these lines differently. But matters are different where the wrong involves an abuse of a relationship of trust and the marriage may be either Scottish or non-Scottish. The law has moved on from the position that on marriage a wife is deemed to consent to sexual activity with her husband. It is also worth noting that the Commission in recommending the introduction of a breach of trust offence did not examine the marriage defence specifically in relation to that offence but appears to deal with marriage solely as a defence to incest.¹²² There is much to be said for the view that the fact that the parties were married to each other should not act as a complete defence to offences relating to breach of trust but that this fact would be relevant in determining the factual questions whether a relationship of trust existed between the parties and whether sexual activity occurred as a consequence of breach of trust. In the majority of situations involving marriage, or other relationships such as a civil partnership, all or at least some of the factual issues would not exist.

5.106 We set out the following proposals and questions:

- 53. It should be an offence for a person to engage in sexual activity with another person under 16 where**
 - (a) the parties live in the same household;**
 - (b) there was a relationship of trust between the parties; and**
 - (c) the sexual activity occurred as a result of breach of trust.**

- 54. 'A relationship of trust' should be defined as including (but not limited to) the situation where**
 - (a) a person has or exercises parental responsibilities and rights in respect of the other person; or**
 - (b) a person has treated the other person as a member of his family.**

- 55. Should the offence also apply where the person over whom the position of trust is held is 16 or older? If so, should there be any limit on the age of that person?**

¹²² Report on *The Law of Incest in Scotland* (Scot Law Com No 69 (1981)), para 4.44.

56. Should it be a defence that the parties were married to each other at the time of the sexual activity?

5.107 *Breach of trust in other settings.* We now consider breach of trust offences which do not involve persons living in the same family unit. These cases are different in that they involve relationships of trust and authority in which one person holds a specific role, such as a carer or teacher, which necessarily brings with it a position of trust. They also allow, more easily than in a family setting, the person to abandon that role if he wishes to have sexual contact with the other person. Examples of this type of offence, noted earlier, are contained in section 3 of the Sexual Offences (Amendment) Act 2000 and section 313 of the Mental Health (Care and Treatment) (Scotland) Act 2003.

5.108 We accept the general principles of these offences but have 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. It is a defence that there was a reasonable belief that the victim was older than 18. In the context of positions of trust within family units, we have already questioned whether there should be a cut-off age for the offence. The same issue arises in the context of a breach of trust in other relationships. The intention of the 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. On the other hand, the situations in the 2000 Act are different in kind from a family setting where there is less scope for a vulnerable person to quit the relationship. On balance, we are inclined to the view that the offence should be restricted to protection of vulnerable young persons but we welcome comments on whether it should be extended to protect persons older than 18 or to persons of any age.

5.109 Another point about the 2000 Act which has attracted comment is the way in which a position of trust has been defined.¹²³ By listing only four specific positions, the Act can be criticised as being both too detailed yet also far from comprehensive. A different, and in our view a preferable, approach is taken 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). 'Position of trust' between two persons is defined as including, but not restricted to, cases where:¹²⁴

"(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."

¹²³ J R Spencer, "The Sexual Offences Act 2003: (2) Child and Family Offences" [2004] Crim LR 347 at 355.

¹²⁴ Section 112(2).

5.110 The provisions in both the 2000 and the 2003 Act provide for a defence that the parties were married to, or in a civil partnership with, each other. Earlier we expressed doubts whether in the context of abuse of trust in a family unit there should be this type of defence. In that situation the relationship between the parties is a crucial issue in determining whether there is a position of trust and also whether the sexual activity occurred as a consequence of the breach of trust. However, in the present context, the existence of a position of trust is defined by the specific role which one party has in relation to the other. Furthermore, the existence of the breach of trust is constituted by the sexual activity between the parties. In these circumstances, it seems clear that where marriage or civil partnership between the parties co-exists with this type of position of trust between them, sexual activity cannot be held to constitute a breach of trust.

5.111 In relation to sexual activity by a person in a position of trust with someone with a mental disorder, it is currently a defence that the person did not know, on reasonable grounds, that the other person was mentally disordered.¹²⁵ 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.¹²⁶ 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."¹²⁷ We see the force of this point.

5.112 We set out the following proposals and questions:

- 57. It should be an offence for a person 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 or was mentally disordered; and**
 - (c) the sexual activity occurred as a result of breach of trust.**
- 58. Position of trust should be defined as including, but not restricted to cases, where**
- (a) one person is the teacher, instructor or religious adviser of the other person;**
 - (b) one person provides care services to the other person professionally or on behalf of a voluntary organisation;**
 - (c) one person is actively engaged in the management of, works in, or is contracted to provide services to**

¹²⁵ Mental Health (Care and Treatment) (Scotland) Act 2003, s 313 (3)(a)(i).

¹²⁶ Section 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."

¹²⁷ Setting the Boundaries, para 4.8.17.

- (i) a hospital where the other person is being given treatment; or
 - (ii) an establishment where the other person lives.
- 59. Should the age mentioned in proposal 57 be an age other than 18? Should the offence apply in respect of a person of any age?
- 60. It should be a defence that the person holding the position of trust did not know, on reasonable grounds, that the other person was below 18 (or the age in question) or was mentally disordered.
- 61. It should be a defence that the parties were married to, or in a civil partnership with, each other at the time of the sexual activity.
- 62. It should be a defence to the offence in relation to a person with a mental disorder that a sexual relationship existed between the parties at the time when the relationship of trust between them was constituted.

Part 6 Offences based on public morality

Introduction

6.1 In this Part we consider 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.¹

Homosexual offences

6.2 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 act² 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,³ 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."

6.3 Despite the wording of these provisions, it is generally assumed that the common law offence of sodomy still exists.⁴ 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'

¹ For fuller discussion see para 1.31.

² 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 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" (1980 Act, s 80(6)).

³ 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.

⁴ Gordon, vol II, p 519; Gane, p 123.

as used in section 13 of the 1995 Act will draw on cases decided in relation to the earlier statutory offence.⁵

6.4 It should be noted that both at common law and under statute there have been no offences which specifically make female homosexual conduct criminal.⁶

6.5 We take the 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 the offences considered in Part 4 (rape, penetrative assault, and other sexual assaults). The offences which we have discussed in Part 5 on the protective principle, such as sexual activity with children under 12 (or 13) and with children under 16, of abuse of trust within family units, or sexual activity involving a position of trust, all apply to homosexual sexual activity.

6.6 We also consider that it is wrong in principle that offences should be based on sexual orientation rather than on forms of wrong.⁷ We therefore propose 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 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, should be repealed in relation to specifically homosexual conduct but should be re-stated as part of wider offences which apply also to heterosexual conduct.

6.7 There are other aspects of the offences in section 13 which we consider should no longer be retained. The existing provisions on homosexual acts extend the offences to acts not committed in private. Furthermore, an act is not committed in private if done "in a lavatory to which the public have, or are permitted to have, access whether on payment or otherwise." As far as we can discover, there is no such restriction on other lawful sexual acts, either in relation to heterosexual activity or other forms of homosexual acts. In our view what is wrong about sexual activity in a public place, including public lavatories, is that the conduct is an affront to public decency, and such acts should be punished as a form of indecent conduct, not as an illegal sexual act.

6.8 Furthermore, there are time limits for the prosecution of certain types of homosexual offence.⁸ No such limits are placed on the prosecution of equivalent offences involving heterosexual conduct,⁹ and we see no reason why any time limits should be introduced in respect of the offences, which we propose in the Parts 4 and 5, which apply alike to homosexual and heterosexual activity.

6.9 Subject to our comments on offences relating to procuring and trading in prostitution, we propose:

⁵ *R v Hunt* [1950] 2 All ER 291; *R v Preece* [1977] QB 370.

⁶ Some types of female homosexual conduct might constitute the offence of lewd, indecent and libidinous behaviour where one of the participants was under the age of 16.

⁷ Para 2.7.

⁸ Section 13(11) imposes a time limit for prosecution of 12 months from the date of the offence in respect of the commission of homosexual offences, procuring such offences and living off the earnings of a male prostitute.

⁹ A time limit of one year on the prosecution of a person for having sexual intercourse with a girl over 13 and under 16 was removed by the Protection of Children and Prevention of Sexual Offences (Scotland) Act 2005, s 15.

- 63. Any existing common law offence relating to homosexual conduct should be abolished.**
- 64. Section 13 of the Criminal Law (Consolidation) (Scotland) Act 1995 should be repealed.**

Incest

6.10 The crime of incest is currently contained in section 1 of the Criminal Law (Consolidation) (Scotland) Act 1995.¹⁰ The offence consists of sexual intercourse, that is intercourse involving penile-vaginal penetration, between a male person and a female person who are related to each other within specified degrees of relationship.¹¹ It is a defence to a charge under section 1 that the accused (i) did not know, on reasonable grounds, that the other party was within the degree of relationship; (ii) did not consent to the sexual intercourse; (iii) was a spouse of the other person under a foreign marriage.

6.11 In any consideration about incest as a crime, the exact scope of the offence should be borne in mind. Incest is restricted to penile-vaginal penetration. Any other form of sexual contact between close family members, for example other types of penetration or any other sexual act, whether heterosexual or homosexual, does not constitute incest. Furthermore, incest overlaps with many other sexual offences. Sexual assaults which involve the lack of consent by the victim, such as rape and our proposed offences of penetrative assault and sexual assault, apply where the parties are related to each other. So also do offences based on the protective principle such as those prohibiting sexual activity with children under 12 (or 13) and under 16. We have also proposed a wide offence of sexual acts involving abuse of trust within family units.¹² That offence would not be restricted to sexual intercourse nor would it be confined to activity between close relatives but would apply to people who share the same household. In short, the only type of activity which incest prohibits which is not already subject to criminal sanction (under the existing law or under our current proposals) is sexual intercourse between consenting adults who are of different gender and within the prohibited degrees of relationship.

6.12 The question which calls for consideration is whether incest should be retained as a separate offence. We are aware that any debate on whether there should be a specific offence of incest is likely to involve strongly held views and possible misunderstanding of the

¹⁰ Section 1 is a consolidation version of section 2A of the Sexual Offences (Scotland) Act 1976, as inserted by the Incest and Related Offences (Scotland) Act 1986. Prior to the 1986 Act the law of incest was based on the Incest Act 1567 which incorporated into Scots criminal law chapter 18 of the Book of Leviticus, in the version of the text of the Geneva Bible of 1562 (*HM Advocate v RM* 1969 JC 52).

¹¹ For a male person the prohibition applies to his mother, daughter, grandmother, grand-daughter, sister, aunt, niece, great grandmother, great grand-daughter, adoptive mother, former adoptive mother, adoptive daughter, and former adoptive daughter. For a female person the prohibition applies to her father, son, grandfather, grandson, brother, uncle, nephew, great grandfather, great grandson, adoptive father, former adoptive father, adopted son, and former adoptive son.

There is a similar, though separate offence, in relation to sexual intercourse between a step-parent and a step child (1995 Act, s 2). This is an offence 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. It is a defence that the accused did not know that the other person was a stepchild, 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.

¹² Paras 5.101-5.106.

issues involved.¹³ We must emphasise strongly that the question is not concerned with non-consenting sexual activity between family members and is certainly not concerned with sexual contact between parents and (non-adult) children. These activities are wrong. They are, and should be, subject to direct and clear prohibition by the criminal law.

6.13 At this stage we are not making any specific proposals in relation to this issue. Rather, we will set out the arguments both for and against an offence of incest in order to gauge respondents' reactions. The particular point of focus, as with any crime, is what are good reasons for making incest an offence.

6.14 The question of whether incest should be retained as a criminal offence was addressed by this Commission in an earlier project on the law of incest.¹⁴ In its Report the Commission identified five arguments for retaining incest as a crime. One of these it regarded as inappropriate. This was the argument from religious doctrine.¹⁵

6.15 The other arguments were as follows:¹⁶

- (a) the protection of members of the family, especially children, from psychological harm, molestation and injury;
- (b) the maintenance of the solidarity of the family and the strengthening of its fabric;
- (c) the recognition of the repugnance felt by significant numbers of the community and their strong opposition to the idea of sexual intercourse between certain closely related persons;
- (d) the reduction of the risk of the birth of children with defects of a genetic origin.

6.16 We have identified two further arguments. These are:

- (e) problems of the validity of consent, especially where there has previously been sexual abuse of a child;

¹³ The experience of the consultation on the Australian Model Criminal Code is instructive. A discussion paper on a model criminal code was prepared by the Model Criminal Code Officers Committee of the Standing Committee of the Attorneys-General of Australia. The discussion paper contained a recommendation that consenting sexual intercourse between adult relatives should no longer be criminal. In its Report the Committee noted: "This recommendation was greeted with a great deal of opposition. Unfortunately, much of that reaction was based upon a misconception. In particular, many members of the community believed that the Committee was recommending that it should be lawful for an adult parent to have sexual contact with his or her child who is under the age of consent. Of course, the committee recommended nothing of the sort. The discussion paper sought to make clear that sexual contact by adults with children (whether there existed between them a relationship of consanguinity or not) must be prohibited and harshly penalised." (Model Criminal Code Report (1999), p 193.)

¹⁴ Report on *The Law of Incest in Scotland* (Scot Law Com No 69 (1981)).

¹⁵ "In our Memorandum we stated that 'Historically, the law of incest in Scotland derives from the dominant religious views in Scotland in the immediate post-Reformation period. However, our society now includes persons of various religious beliefs and of no religious belief. Punishment in these circumstances must be justified in terms of society's present ends.' We also referred to the criticisms which have been made of the existing law and the need for reform. With one exception, all the individuals and organisations commenting on the Memorandum agreed that the law of incest was in need of immediate reform and that the 18th chapter of Leviticus should no longer be the basis for contemporary legislation." (Scot Law Com No 69 (1981), para 3.1).

¹⁶ Scot Law Com No 69 (1981), paras 3.9-3.24. The Commission noted that no other reasons were advanced during consultation.

- (f) labelling the specific wrong of sexual abuse within a family.

We consider each argument in turn.

6.17 *Protection of members of the family.* It is clear that where there is sexual activity between family members then harm will be done not only to participants but also other members. In particular, children should not be exposed to the risk of sexual abuse within a family. Leaving this conduct to be regulated by other offences does not distinguish between the stranger who molests children and the person who has abused his authority or breached familial trust.

6.18 A counter view is that this ground is a justification not for incest but for offences based on breach of trust within a family setting. The need to protect members of a family from sexual abuse applies not only to sexual intercourse involving close relatives but to any type of sexual contact involving anyone living in a family unit who may be harmed by another person who breaches a position of trust within the family setting. It may be noted that the Commission in its 1981 Report recommended that there should be an offence, separate from that of incest, of intercourse with a child under 16 by a person sharing the same household and in a position of trust or authority in relation to the child.¹⁷

6.19 *Maintenance of family solidarity.* A second ground for retaining incest as a separate crime is that the harm which it causes to family members can lead to a breakdown of trust within the family and, as such, incest should be seen as attacking the solidarity of the family. Incest may in many cases result in disruptive rivalries within a family and its prohibition will help to protect the fabric of the family. In its 1981 Report, the Commission noted that it had not received any comments which contradicted this view.

6.20 However, there may be doubts as to the exact force of this argument. Many things may threaten the maintenance of family solidarity, not just one form of (heterosexual) sexual intercourse between relatives. Many forms of sexual activity between people living together but who are not within the prohibited degrees of relationship can have this effect. It might be thought that what threatens family solidarity is the abuse of familial trust, in which case this argument adds nothing to the first. Furthermore, in practice family solidarity is broken more frequently by other sexual practices than consenting sexual intercourse between adult relatives. In particular, the activity which is most likely to break up families is adultery.¹⁸

6.21 *Feelings of repugnance towards sexual intercourse between close relatives.* We consider that this argument is best stated by quoting what the Commission said in its 1981 Report:¹⁹

"In our Memorandum we expressed the belief that significant numbers of the community opposed the idea of sexual intercourse between persons who were closely related. This belief has been confirmed by the overwhelming support we received for our proposal that incest be retained as a separate crime. Some commentators, in expressing their opposition to incestuous sexual relationships,

¹⁷ This recommendation was given effect in the Incest and Related Offences (Scotland) Act 1986 and now appears as section 3 of the Criminal Law (Consolidation) (Scotland) Act 1995. For our current proposals for offences dealing with abuse of trust within family units, see paras 5.101-5.106.

¹⁸ It should be borne in mind that when the Incest Act 1567 was enacted adultery was a criminal offence in Scots law.

¹⁹ Scot Law Com No 69 (1981), para 3.17.

referred to a taboo against incest which was variously described as ancient and universally prevalent, as representing public opinion, as a basic feeling that certain relationships are not fitting and as rendering sexual activity within the family unthinkable. Others referred to a basic public abhorrence of and repugnance to incest. As one commentator put it, 'The purpose of making incest a specific crime is to declare that society regards it with a high degree of revulsion and disgust.' Another suggested that, 'Until it can be shown more clearly that past abhorrence of incest is unjustified, it would seem inopportune to abandon what has traditionally, at least in Scotland, been regarded as an invaluable, if not critical, social regulator.' We have noted that in England and Wales the Criminal Law Revision Committee 'favour the continued use of the term "incest", considering that it will serve to mark the strong disapproval of such conduct generally felt in the community.' Support for this latter view was contained in a number of comments we received, which opposed the abolition of incest on moral or religious grounds. One commentator, in rejecting the argument that the criminal law should not be used to enforce moral standards said that 'part of the function of the criminal law must be to promote and maintain generally accepted standards of behaviour, thereby reflecting the public interest in preserving an ordered and stable society.' To this it may be added that the prohibition of incest by the criminal law is not merely an attempt to impose a certain view of private morality, but is concerned with the protection of the family and its weaker members and thus of society as a whole."

6.22 The counter consideration to this view is to query the point which the argument is attempting to make. If it is empirically the case that there are strongly held views about incest,²⁰ it is important to find out what reasons are given for those views. For example, the fact that many people believe that incest is wrong because it threatens family solidarity is not in itself a separate ground for criminalising incest. It simply adds weight to the argument about family solidarity. If strongly held views are based on a reason not identified here, then that reason should be expressed in order to assess its strengths and weaknesses. If the argument is that account should be taken of strongly held views which are based on no reason at all, then it is difficult to see what point is being made.

6.23 *The genetic effect of incest.* This argument for criminalising incest is that intercourse between certain related persons should be prohibited because the offspring of such persons are more liable to exhibit physical and mental abnormalities. The scientific evidence for the genetic effect was set out in detail in the Commission's Consultative Memorandum, where the Commission stated that the argument, which it called the argument from inbreeding, was of fundamental importance and was rightly used to justify the prohibition of incest.²¹ In its subsequent Report, the Commission accepted that this argument could not be given priority but argued that the criminal law should intervene to prevent the potentially tragic effects of avoidable genetic defects on the individuals concerned, namely the child and the parents. A particular strength of the argument from genetic effects is that it provides a reason why incest is concerned with only male-female intercourse and why only certain family relationships are or should be within the prohibited degrees.

6.24 Counter arguments against the genetic effects of incest are that it removes the wrong of incest away from the sexual intercourse between the parties to any resulting birth of a

²⁰ The Commission in its 1981 Report did not claim that the views which it quoted were representative of society generally but rather that they reflected the views of those persons who responded to its Consultative Memorandum.

²¹ Scot Law Com Memorandum No 44 (1980), para 3.1.

child with a physical or mental disorder. As such, the offence becomes a so-called 'result' crime, that is liability should attach only if the wrongful outcome occurs.²² Some people may find it offensive to say that because a child has developed a genetic physical or mental disorder, therefore its parents should be subject to criminal prosecution and punishment. It may also be noted that other bodies which have considered incest as an offence have tended to ignore the argument from genetic effects, even when favouring making incest a crime. For example, the Home Office Review Group argued:²³

"We thought that the eugenic argument was not significant in considering whether or not there should be an offence of or similar to incest. Our policy was to ensure that the law provided protection for the family and in particular for children within the family. We thought it was important that the law should provide not only a tool to tackle an acknowledged social problem but that it should clearly define the need for adults to protect children in their care. The family unit is central to a healthy society and the protection of children in the family is vital for us all."

6.25 *Consent and continuation of familial abuse beyond childhood.* A further argument in favour of a specific offence of incest challenges the idea that incest between adults is truly consenting. Incest often begins when a child is below the age of consent but continues when the child reaches that age. As Jennifer Temkin puts the point: "abuse does not cease to be abuse the moment the victim reaches a prescribed age. Many women will find it impossible to extricate themselves from such relationships."²⁴ The Commission had itself pointed out that it was an open question whether in a family setting one could usefully talk in terms of a child consenting to sexual intercourse with a parent.²⁵ Under the present law section 3 of the Criminal Law (Consolidation) (Scotland) Act 1995 Act deals with the situation where (psychological) coercion and manipulation within a family setting may be used to obtain 'consent' to intercourse (for example, exploitation of a child's financial dependency). But such coercion and manipulation will not necessarily come to an end when a child reaches 16.

6.26 Counter arguments on this point are to the effect that this is a ground for an offence which penalises abuse of trust and authority within any family setting, even where the victim is older than 16. If the mischief is to protect the person whose consent is open to question, it should be done other than by a crime of incest, which attaches criminal liability to all of the participants.²⁶

²² This point was recognised by the Commission in its 1982 Report: "the genetic argument does not relate to the actual act of intercourse, but to its possible consequences namely, the risk of conception, the risk that a live birth will follow, and the risk that the child may be deformed or defective." (Para 3.19).

²³ *Setting the Boundaries*, para 5.1.9. It had earlier made the point that "It is often assumed that the offence of incest is a protection for the potential offspring of such a union, to prevent inbreeding (the eugenics argument). However there is little evidence for this being used as the rationale for the law in the past. Research into closely related communities such as the Amish of North America (who have a high proportion of 'first cousin' marriages) reveals that they do run a greatly increased risk for a variety of diseases when compared to other populations. However it is doubtful whether these risks would justify a criminal offence. Marriage between unrelated persons who carry genetic markers for various hereditary diseases such as Huntington's Chorea or Sickle Cell Anaemia is not proscribed, nor should it be. It is treading a dangerous path to base the criminal law solely on any form of eugenic argument." (para 5.1.6.)

²⁴ J Temkin, "Do We Need the Crime of Incest?" 1991 *Current Legal Problems* 185 at p 187.

²⁵ *Scot Law Com No 69* (1981), para 3.12.

²⁶ J R Spencer, "The Sexual Offences Act 2003: (2) Child and Family Offences" [2004] *Crim LR* 347 at pp 357-358

6.27 *Proper labelling of the wrong.* A final argument in support of an offence of incest is that where wrongful sexual activity occurs between members of a family, the offence should expressly bring out that key element. Including such activity within a broader offence which applies equally in non-family situations fails to highlight the wrong involved. A sexual offence committed by one member of a family on another is not simply an aggravating element of a more general offence. It is a separate wrong and should be recognised as such.

6.28 However, it might be thought that this point does not argue for the specific offence of incest but rather for separate offences where wrongful sexual activity takes place within a family. This type of separate offence already exists in the current law (as in section 3 of the 1995 Act) and we have proposed a more general offence of abuse of trust within a family unit.²⁷ Moreover, this argument may lead to the mislabelling of sexual wrongs. Where, for example, a man has intercourse with his 10 year-old daughter, describing this conduct as incest (an offence which can be committed where all the participants are consenting) fails to bring out the most crucial aspect of the wrongdoing, namely that a young child has been raped.

6.29 As stated earlier, we have not at this stage arrived at any concluded view on the offence of incest but we would welcome reactions both on the general question about retaining incest as an offence and on the various arguments which we have identified as having a bearing on that issue.

6.30 We pose the following questions:

65. In addition to offences based on lack of consent by the victim and offences based on the protective principle, should there continue to be a separate offence of incest? If so, why?

Public indecency

6.31 Prior to the decision of the High Court of Justiciary in *Webster v Dominick*,²⁸ 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.²⁹

6.32 Prior to *Webster v Dominick* various types of sexual conduct had been treated as shamelessly indecent and therefore criminal. One was (consenting) sexual conduct

²⁷ Paras 5.101-5.106.

²⁸ 2005 JC 65.

²⁹ 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.

between family members which did not fall within the scope of the law on incest.³⁰ In Part 5 we propose that this type of conduct should fall within a wider provision of an offence of sexual activity involving abuse of trust within a family unit.³¹ In *Webster* 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 other offence, including lewd, indecent and libidinous conduct. We have also proposed a number of offences to replace that offence.³²

6.33 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.³³ We note that the Home Office Review Group identified research which indicated that indecent exposure aimed at specific victims is not a minor nuisance or experienced as trivial in nature. The Group stated that:³⁴

"We were impressed by the evidence of research among 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."

6.34 The Group's recommendation that there should be a new offence of indecent exposure was given effect in the Sexual Offences Act 2003.³⁵ We consider that there should be a similar offence in Scots law. Accordingly we propose that:

66. It should be an offence for a person to expose his or her genitals with the intent of causing alarm or distress to someone else.

Sado-masochistic practices

6.35 In Part 2 we stated as one of our guiding principles the idea that sexual practices involving consent should not, unless there are weighty overriding reasons, be subject to legal sanction.³⁶ 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*

³⁰ See for example, *R v HM Advocate* 1988 SLT 623 (sexual activity, short of intercourse, between man and his 16 year-old daughter); *HM Advocate v K* 1994 SCCR 499 (sexual intercourse between man and his foster daughter who was over the age of 16).

³¹ Paras 5.101-5.106.

³² Para 5.76.

³³ Gordon, vol II, p 532.

³⁴ Setting the Boundaries, para 8.2.3.

³⁵ Section 66(1): "A person commits an offence if (a) he intentionally exposes his genitals and (b) he intends that someone will see them and be caused alarm or distress."

³⁶ Paras 2.3-2.5.

HM Advocate,³⁷ 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,³⁸ but may be to lesser types of assault.³⁹

6.36 Our current terms of reference are not concerned with the role of consent in relation to the general law of assault but we do consider that conduct done for purposes of sexual gratification does fall within the scope of this project. The issue was not considered by the Home Office Review Group. The Draft Criminal Code does not expressly deal with consent to assaults done for purposes of sexual gratification. Instead it has a provision in relation to assault generally that consent is a defence but consent is to be disregarded if it was to "a socially unacceptable activity likely to cause serious injury or risk of serious injury."⁴⁰ The commentary to this provision states that it is designed to allow consent to be given to minor injuries (such as having ears pierced) but not to serious injury caused by socially unacceptable means. The commentary expressly mentions sado-masochistic practices as an example of what is socially unacceptable in this context.

6.37 Most analysis of sado-masochistic practices is made in the context of the general crime of assault rather than as a sexual offence. This approach has the consequence that 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. We take the view 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.⁴¹ We stress that the situation we are considering is where there is genuine consent given by all the parties to the specific activities in question. Nor are we concerned with conduct which is intended to cause death. The main issue is whether, as the Draft Criminal Code suggests, the consensual infliction of non-minor injuries done for a sexual purpose must always be deemed to be socially unacceptable. We seek to discover views on this topic. Accordingly, we set out the following proposal and question for consideration:

67. 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.

³⁷ 1975 JC 30 at 33.

³⁸ *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).

³⁹ 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.

⁴⁰ Draft Criminal Code, s 111(2).

⁴¹ The characterisation of sado-masochistic practices as sexual rather than violent in nature is discussed in L Bibbings and P Alldridge, "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.

68. Should it be an assault where the activity referred to in proposal 67 results in, or is likely to result in, serious injury?

Bestiality and necrophilia

6.38 There is currently an offence of bestiality, which consists of "unnatural carnal connection with a beast."⁴² Although the position is not entirely clear, it may be that in Scots law only a man, but not a woman, can commit this crime.⁴³ It has to be queried whether there is any need for such an offence. It appears to be prosecuted very rarely.⁴⁴ Moreover, bestiality is not one of the offences conviction for which triggers the notification procedures of the so-called sex offenders register.⁴⁵

6.39 In some circumstances this type of conduct might constitute an offence of public indecency or cruelty towards animals.⁴⁶ It has been suggested to us that the major social mischief in this context is the situation where one person coerces another into having sexual contact with an animal. In this situation, the wrong is the act of coercion, and we have made proposals for an offence to deal with this activity.⁴⁷

6.40 However, both the Sexual Offences Act 2003 and the Draft Criminal Code have specific provisions in relation to sexual contact with animals.⁴⁸ The commentary to the Code states that the justification for criminalising sexual activity with animals "is partly the revulsion caused to most members of the public and partly the element of abuse of power over the animal." However, we are not convinced that there is any need for a specific offence such as the existing offence of bestiality. This type of conduct should be regarded as a form of public indecency and as a form of cruelty to animals. We propose that:

69. Sexual activity with an animal should attract criminal liability only where it is a form of public indecency or of cruelty to animals.

6.41 It is not entirely clear what offence is committed where a person has sexual contact with a dead body.⁴⁹ No specific offence of this type was included in the Draft Criminal Code but the Code does have a provision on unlawful interference with human remains,⁵⁰ which would apply to any form of sexual contact with a dead body. We agree with this approach, which views sexual contact with a dead body as a form of offensive conduct.

⁴² *Jas McGiven* (1845) 2 Broun 444; Hume, I, 469.

⁴³ Gordon, vol II, p 521.

⁴⁴ During the period from 1994 to 2004 proceedings were taken against one person for bestiality (Scottish Executive Justice Department Analytical Services Division, Recorded Crime Statistics).

⁴⁵ Sexual Offences Act 2003, Sch 3.

⁴⁶ Under the Protection of Animals (Scotland) Act 1912.

⁴⁷ Paras 4.49-4.51.

⁴⁸ Sexual Offences Act 2003, s 69 (where the offence is defined as penile penetration of a live animal. 'Animal' is not defined); Draft Criminal Code, s 109 (here the offence is that of engaging in sexual activity with an animal. 'Animal' is defined as excluding a human being). Section 109 is not part of the Code's provisions on sexual offences but is in the Part dealing with offences involving animals.

⁴⁹ In English law it is an offence for a person to sexually penetrate a corpse (Sexual Offences Act 2003, s 70).

⁵⁰ 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."

6.42 We propose that:

- 70. Consideration should be given to the creation of an offence of unlawful interference with human remains.**

Part 7 Evidence

Introduction

7.1 In this Part we consider aspects of the evidential requirements for proving rape and other sexual offences. It is not within the scope of this project to examine the law of evidence as it applies to all crimes. Rather our concern is with rules of evidence which are specific to sexual offences or which have a special significance in proving these offences. There are two main topics which we consider: (1) corroboration and sexual offences; (2) sexual history evidence. Later we refer to further possible reforms of the general law of evidence which would be of significance in relation to sexual offences but which, in our view, should not be restricted to those offences.

Corroboration and sexual offences

7.2 It may be a useful preliminary step to our discussion of more specific issues to consider how corroboration operates as a general requirement of the Scots law of evidence and, in particular, how it applies to cases of rape and other sexual offences.

7.3 It has for long been a fundamental principle of Scots criminal law that no person can be convicted of an offence on the unsupported evidence of one witness alone, no matter how credible and reliable that witness might appear. Evidence relating to the crucial or essential facts of a crime (the *facta probanda*) must come from at least two independent sources. Thus, the testimony of one witness has to be supported and confirmed by evidence from a different source. This is known as corroboration.¹ It should be noted that each of the sources of evidence need not in itself be incriminative, that is that it leads to the necessary inference that the accused is guilty. If one source of evidence is incriminative, it may be corroborated by separate evidence which is consistent with the guilt of the accused.

7.4 In the context of the prosecution of sexual offences the need for corroboration has given rise to concern. The reason is that in many cases the complainer will often be the only person - apart from the accused - who can give direct eyewitness evidence of what occurred. But corroboration does not require that the complainer's account be confirmed by direct eyewitness evidence from another independent source. The other evidence can, and almost inevitably will, be circumstantial. But provided the evidence is consistent with the complainer's direct evidence, it is capable of corroborating that evidence.²

"It is not necessary that circumstantial evidence should of itself incriminate the accused or that it should be unequivocally referable to the essential element of the charge which is to be established. What matters is whether it is capable of providing

¹ The corroboration required to prove most crimes in Scotland should not be confused with the special corroboration warning in common law jurisdictions. In some legal systems a warning had to be given to the jury in sexual offence cases about the danger of convicting the accused on the testimony of a single witness. Most common law systems have abandoned this requirement.

² *Fox v HM Advocate* 1998 JC 94 at 109 (Lord Justice General Rodger).

support or confirmation in regard to the factum probandum of which direct evidence has been given."

7.5 While corroboration is required in relation to all sexual offences, it is convenient to discuss the issues in relation to rape. This is because the crime of rape graphically illustrates the difficulties which are perceived to exist in the current law and is the context in which there have been demands for reform.

7.6 In a trial for rape the Crown must prove beyond reasonable doubt that the accused is guilty. To do so there must be corroborative evidence that the accused had sexual intercourse with the complainant without her consent (the actus reus) and that the accused knew that the complainant was not consenting or was recklessly indifferent as to whether she was consenting or not (the mens rea). The mens rea of the accused has to be inferred from the facts of the case. Corroboration of the accused's mens rea is shorthand for corroboration of the evidence of the facts from which his mens rea can be inferred. These points are best explained by considering some hypothetical examples.

7.7 (1) The complainant, C, alleges that she was raped by the accused, A, around 10 pm having invited A back to her room in a student residence for coffee. C maintains that A threatened to kill her and forced her to have sex with him. C's friend D who lives in the residence gives evidence that she saw A leave C's room at 10.15 pm: this corroborates C's evidence that A was in her room. A medical examination performed at 11.30 pm confirms that sexual intercourse had taken place earlier in the evening: this is consistent with C's testimony that sexual intercourse took place with A that evening. E, who has the room next door to C, testifies that she heard C screaming at 10.10 pm, and that C was extremely distressed when she came to E's room at 10.20 pm. This corroborates C's evidence that she was the victim of force and that she did not consent to intercourse with D. The fact that C's clothes are torn further corroborates C's evidence that A used force to have sex with her. There is therefore enough evidence to corroborate the facta probanda which constitute the actus reus of the crime. The corroborative evidence that A used force - C's screaming, her distress and the torn clothing - is also sufficient to lead to the inference that A must have known that C was not consenting to the sexual intercourse, that is it indirectly provides corroborative evidence that A had the mens rea for the rape of C.

In this example, there is considerable circumstantial evidence to corroborate C's direct evidence that she was raped by A. But although the requirements of corroboration are met, this does not mean that A would necessarily be convicted. For example, the jury may not believe C and D's evidence that it was A who was in the room at the time of the alleged offence. Consequently, the jury might return a verdict of not guilty.

7.8 (2) C alleges that she was raped by A around 10 pm having invited A back to her room in a student residence for coffee. No-one else saw A at the locus. A medical examination several days after the alleged incident cannot confirm that sexual intercourse took place that evening. There is no evidence that C screamed or was distressed or her clothing was torn. *As a matter of law*, the prosecution will not succeed because the Crown has no evidence from independent sources to corroborate C's evidence that A had sexual intercourse without her consent and knew that she did not consent.

In this example, there is no evidence to corroborate C's direct evidence that she was raped by A. Apart from C's statement, there is no evidence at all to connect A with the alleged

crime. A might not be prosecuted or, if prosecuted, would not be convicted. This would be so even if C is a credible witness and the police believe her allegations against A because of A's previous convictions for sexual assault.³ Yet this appears to be the inevitable result of the requirement of corroboration which Scots law has long regarded as essential in order to protect the innocent from wrongful conviction.

7.9 (3) C alleges that she was raped by A around 10 pm, having invited A back to her room in a student residence for coffee. A accepts that he was there and had sexual intercourse with her. Evidence of A's admission therefore corroborates C's evidence that A had sexual intercourse with her. But A maintains that C agreed to have sexual intercourse. Here there is corroboration of the first two elements which constitute the actus reus of rape, namely that A had sexual intercourse with C. But there still must be corroborative evidence that C did not consent and that A knew she was not consenting. If C alleges that she was the victim of force, then that will be corroborated if there is medical evidence of assault, for example bruising, or evidence that the complainer was distressed during or immediately after the alleged crime. If there is corroborated evidence of violence, that will also amount to corroborated evidence from which it can be inferred that the accused knew that the complainer did not consent. In the absence of violence, C's absence of consent can be corroborated by evidence of a third party, for example, E who has the room next door, that he heard C screaming or that C had come to his room in a distressed state shortly after A left. But in the absence of such evidence, once again the prosecution should not proceed as two key elements cannot be corroborated, namely that C did not consent and that A knew that she did not consent. Thus if the *only* evidence on absence of consent is C's allegation that she did not do so, the Crown might not proceed against the accused.⁴ It is for this reason that it can be difficult to obtain convictions in so-called 'date rape' cases.

7.10 There are two particular doctrines of corroboration which in practice are significant in respect of sexual offences. The first is corroboration by distress. According to this doctrine evidence of a third party that the complainer was distressed shortly after the alleged assault can in itself corroborate her evidence of absence of consent and possibly also the accused's mens rea. The second is known, after the name of one of the leading cases, as the *Moorov* doctrine.⁵ Applying this doctrine it may be possible to corroborate the complainer's testimony by way of evidence that the accused is alleged to have committed the same offence against someone else in similar circumstances on other occasions. However, before we consider these doctrines we wish to deal with an issue of principle in relation to corroboration and sexual offences.

Is corroboration necessary?

7.11 The principle that no person can be convicted of a crime on the unsupported evidence of one person alone has been a hallmark of Scots criminal law for centuries. And it has long been recognised that a person who has committed a crime may escape prosecution and conviction because there is no corroborative evidence of the facta probanda of the offence with which he is charged. Hume wrote that:⁶

³ Previous convictions for similar offences cannot, of course, corroborate evidence in relation to the offence with which the accused is currently charged. See further paras 7.53-7.54.

⁴ See for example, *McNairn v HM Advocate* 2005 SLT 1071.

⁵ *Moorov v HM Advocate* 1930 JC 68.

⁶ Hume, II, 383.

"No matter how trivial the offence and how high soever the credit and character of the witness, still our law is averse to rely on his single word, in any inquiry which may affect the person, liberty, or fame of his neighbour; and rather than run the risk of such an error, a risk which does not hold when there is concurrence of testimonies, it is willing that the guilty should escape."

7.12 Along with the presumption of innocence and the need to prove guilt beyond reasonable doubt, the requirement of corroboration is considered an important bulwark against wrongful interference with the liberty of the individual. As Lord Justice General Rodger stated in *Smith v Lees*:⁷ "The safeguard against wrongful conviction which the requirement of corroboration affords is needed as much today as it ever was." Moreover, Article 6 of the European Convention on Human Rights provides that an accused person is entitled to a fair trial. In the context of the Scottish system of adversarial criminal procedure where in solemn cases conviction is by a bare majority jury verdict, there is no doubt that the requirement of corroboration is a factor which tilts the balance towards ensuring that the accused is given a fair trial.

7.13 However, there is little doubt that the removal of the need for corroboration would not in itself lead to a breach of Article 6. Other legal systems do not require corroboration: but other safeguards against wrongful conviction are built in, for example the need for a unanimous, or almost unanimous, verdict of guilty.⁸

7.14 The question then is whether corroboration should be abolished for sexual offences. It must be stressed that this approach does not advocate removing the requirement of corroboration from the law of criminal evidence. The proposal is specific to sexual offences, or at least certain types of sexual offences. In many crimes evidence may be obtained not only from the complainer but also from other eyewitnesses and from physical evidence. For example, an assault will usually involve cuts or bruises on the complainer's body or clothes, evidence of which can corroborate his account of the attack. But matters are different in respect of sexual offences. Sexual activity usually takes place out of sight of other people, and in cases of sexual assault, normally there will be no parties present apart from the complainer and the accused. Of course where an accused denies that sexual intercourse took place at all, then there might well be physical evidence (presence of the accused's DNA, marks on the complainer's body or clothes) to support her evidence that there was intercourse. But if the accused's version of events is that there was consensual sex between him and the complainer, then often there may well be no other supporting evidence for the complainer's version of events that she did not consent to sex with the accused. Where the parties are agreed that sexual activity occurred then any physical evidence, such as signs that the complainer had recently had sexual intercourse, cannot corroborate what is in dispute, namely that the complainer had not given her consent.

7.15 We now present arguments for and against removing the corroboration requirement for sexual offences, or at least certain types of sexual offence.

7.16 *Arguments in support of removing corroboration.* We noted in Part 1 that sexual offences are already defined for various purposes, and it would not be difficult to demarcate a range of sexual offences to which corroboration would no longer apply. As mentioned

⁷ 1997 JC 73 at 76.

⁸ For example, England and Wales, Juries Act 1974, s 17. See also para 7.24.

above corroboration may be especially problematic in those cases of sexual assault where the issue is the presence or absence of the complainer's consent rather than the fact that sexual activity had taken place. In this situation, in the absence of eyewitnesses as to what the complainer said and did, there cannot be any corroborating evidence.

7.17 It was already noted that the requirement of corroboration has the effect that an accused must be acquitted in any case where there is only one source of proof against him (for example the complainer) even where that evidence is highly credible and points clearly to the guilt of the accused. This outcome may be acceptable in respect of offences where normally there would have been other sources of evidence but in a particular case no such additional evidence was available. Matters are different in cases, such as these types of sexual assault, where the only likely evidence against an accused is the testimony of the complainer. In this situation, the acquittal of the accused may seem harsher. Even if the complainer's evidence is wholly believed and it points, beyond all reasonable doubt, to the guilt of the accused, the accused would be acquitted for lack of corroborative evidence, even though no such evidence existed.

7.18 There are several other factors which lend support to an argument to abolish the requirement of corroboration in relation to sexual offences, or at least sexual assaults. One is that corroboration has already been removed by statute for certain types of offence. Macphail notes that abolition tends to apply to cases "in which, by the nature of the offence, there is liable to be a paucity of evidence such as offences against the game and freshwater fisheries laws, and those in which the requirement of corroboration involves an extravagant use of resources, particularly police resources."⁹ There are various examples of statutory exceptions to the requirement for corroboration.¹⁰

7.19 Furthermore, the civil law provides a precedent for the removal of corroboration from a particular class of case. At common law corroboration was a requirement for both criminal and civil cases. However, section 9 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1968 removed the need for corroboration in respect of actions of damages for personal injuries. One of the rationales for this statutory rule was due to changes in methods of working. Victims of industrial accidents found it increasingly difficult to produce corroborative evidence of how the accident had occurred because they tended to work out of sight of other workers.

7.20 It is also to be noted that any proposal to remove corroboration from sexual offence cases relates to the sufficiency, not the standard, of evidence. In other words, even if it became the rule that one source of evidence was sufficient to result in a conviction, that evidence could only do so if it proved the accused's guilt beyond reasonable doubt and not on a lower standard (such as the balance of probabilities). The Crown's evidence, even if based on only one source, would always have to establish guilt at this high level of proof. The protection of the accused would not be lessened by the lack of corroborative evidence.

7.21 *Arguments for retaining corroboration for sexual offences.* The main argument for retaining a requirement of corroboration for sexual offences is the need to minimise the

⁹ I D Macphail, *Evidence* (1987), para S23.31.

¹⁰ Game (Scotland) Act 1832, s 1; Poaching Prevention Act 1862, ss 1 and 3; Salmon and Freshwater Fisheries (Consolidation) (Scotland) Act 2003, s 9; Road Traffic Offenders Act 1988, s 21(1) (which applies inter alia to certain offences committed under the Road Traffic Act 1988).

possibility of convicting an innocent person. Although the corroboration rule cannot provide an absolute guarantee that every conviction in the criminal courts is correct, abolishing the requirement would make the risk of wrongful conviction greater. It also has to be remembered that criminal cases differ from civil cases in significant ways. In criminal proceedings the power and resources of the state are brought against an individual who should expect protection against injustice. In civil cases the court adjudicates a contest which is often between two private parties, who are not necessarily of unequal resources. Criminal and civil cases also differ in their outcome. A conviction on any criminal charge is denunciatory and stigmatic. The convicted person is liable to a punishment which may involve the deprivation of his liberty and his property. Furthermore, for sexual offences, a convicted person becomes subject to the notification requirements of the so-called sex offenders register.¹¹ Given these facts, it is proper for the law to make proof of criminal guilt more rigorous than establishing a claim at civil law. Indeed it may well be that the requirement of corroboration is especially of value in the very situation where the only evidence against an accused person is the word of the complainer.

7.22 A major problem about the proposal to remove corroboration is demarcating the range of offences to which the proposal is to apply. There are two points worth noting. The first is the difficulty in providing a precise definition of the offences in question. The proposal seems to be premised on the view that in some, but not all, categories of sexual offence there cannot be any other evidence to support the complainer's version of events. But even in cases where the sole point in dispute is whether the complainer did not consent, the existence of supporting evidence is not in principle impossible (for example, someone else seeing or hearing the parties), even if rare in practice. Secondly, it has to be queried whether sexual offences, or even a narrower range of sexual assaults, are unique in the absence of corroborating evidence. For many offences, there may often be supporting evidence but depending on the circumstances of each case, there may be none. For example, a complainer claims that he handed money over to the accused because the accused had threatened him with violence, although no force was used. In these circumstances, there may be no eyewitnesses and there will be no physical evidence to support the complainer's account of events.

7.23 A related issue is how the law would operate if corroboration were to be abolished only for sexual offences, or a particular category of sexual offences. The effects might seem odd. For example, conviction for a minor assault or breach of the peace would require evidence from two independent sources, while for some of the most serious crimes, such as certain types of rape and indecent assault, only the testimony of one witness would be needed.¹² Whilst corroboration has already been removed for some types of criminal cases, this has tended to occur in relation to offences which are essentially regulatory in nature and for which conviction carries little social stigma. Offences of this type are in marked contrast to sexual offences.

¹¹ Sexual Offences Act 2003, s 80(1).

¹² It is worth noting that although in civil law corroboration was removed initially for only one type of civil action by the 1968 Act, the Civil Evidence (Scotland) Act 1988 (s 1) abolished the need for corroboration in all civil actions. This provision was based upon a recommendation of the Scottish Law Commission (Report on *Corroboration, Hearsay and Related Matters in Civil Proceedings* (Scot Law Com No 100 (1986)), paras 2.8-2.9). One of the reasons which the Commission gave for its recommendation was that it could find no good reason in principle or on practical grounds for retaining a rule for some civil actions where its earlier abolition for one type of case had not had adverse effects on the administration of civil justice.

7.24 Although it is true that other legal systems do not require corroboration for a criminal conviction, those systems provide other safeguards for accused persons. For example, in England and Wales a jury cannot return a verdict of guilty unless at least 10 members of a jury of 12 agree that verdict, whereas in Scotland a conviction can be based on 8 jurors out of a jury of 15 people finding for the accused's guilt.¹³ Changing the rules of corroboration might then require further changes to other parts of the criminal justice system, such as the rules on jury verdicts. If the rules of sexual offences were changed such that corroboration was abolished but the jury system was also changed so that, for example, a conviction required 10 out of 15 jurors deciding for guilty, would establishing guilt in sexual offence cases be any easier than under the present law?

7.25 At this stage we are inclined to the view that there should continue to be a requirement of corroboration for proof of guilt in sexual offences. We discuss below two areas where the current rules may be misunderstood or which could be subject to reform.¹⁴ But we have doubts about the total abolition of corroboration even in the specific context of sexual offences. However, we have not reached a concluded view on this issue, and we would welcome the views of consultees.

7.26 Accordingly we ask the following questions:

71. Should the requirement of corroboration be removed for proof of sexual offences? If so, for which offences?

Corroboration by distress

7.27 Although the doctrine of corroboration by distress may apply in other parts of the criminal law of evidence, in practice it has particular significance in relation to proof of sexual offences. As already mentioned, in a prosecution for rape, the Crown must prove beyond reasonable doubt (i) that the accused had sexual intercourse with the complainant 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 facta probanda which constitute 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.¹⁵ 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.

7.28 As noted earlier, while corroborative evidence must emanate from a source which is independent of the complainant, that other evidence is often evidence *about* the complainant. For example, medical evidence that the complainant had suffered bruising may be consistent with, and can therefore corroborate, her evidence that she was assaulted by the accused. Similarly, if a third party saw that the complainant was distressed when having sexual intercourse with the accused, that evidence would corroborate the complainant's evidence

¹³ It is accepted that this consideration does not apply to cases which are not decided by a jury.

¹⁴ Corroboration by distress (paras 7.27-7.34); the *Moorov* doctrine (paras 7.35-7.39).

¹⁵ *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.) The inference is made objectively. There are exceptional circumstances where an accused claims that he genuinely believed that the complainant was consenting although the reasonable objective inference is that she was not: *Jamieson v HM Advocate* 1994 JC 88. In these cases, however, there will usually be no differences between the parties' versions of what took place between them.

that she had not consented to sexual relations with him. The law has gone a step further and it has long been accepted that evidence from a third party that the complainant was distressed shortly after the time of the alleged rape (known as *de recenti* distress) can provide corroboration that the complainant had experienced a distressful event shortly before.¹⁶ However, in itself, the complainant's distress cannot corroborate the identity of the accused or the complainant'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 complainant's *de recenti* distress can be significant. If the complainant'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.¹⁷ In addition, because the accused had resorted to force, evidence of the complainant's *de recenti* distress could corroborate the inference from her evidence that the accused knew that the complainant did not consent. Put another way, where force is alleged, evidence of the complainant's distress *indirectly* corroborates the *mens rea* of the accused.¹⁸

7.29 The difficulty arises when the complainant does not allege that the accused used or threatened force in order to have sexual intercourse with her. Instead she simply maintains that she did not consent to having or continuing to have sexual intercourse with the accused. Here evidence of the complainant'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 complainant'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 complainant was not consenting.¹⁹

7.30 It is thought that as a matter of logic and principle there is no reason why the complainant's *de recenti* distress cannot corroborate the accused's *mens rea*.²⁰ It depends on what the complainant alleges. For example, the complainant may allege that the accused began to have sexual intercourse with her while she was asleep. Evidence of her distress is consistent with the complainant'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. Because 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 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.²¹

¹⁶ *Smith v Lees* 1997 JC 73 at 80 (Lord Justice General Rodger).

¹⁷ *Ibid.*

¹⁸ 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.

¹⁹ *McKearney v HM Advocate* 2004 JC 87 (Lord Justice Clerk Gill at 91). Lord Gill's views are obiter.

²⁰ 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.

²¹ *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 complainant would

7.31 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.

7.32 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.

7.33 The question which calls for consideration is whether reform is needed for this part of the law of evidence. It would be possible to restate the law of corroboration by distress in statutory form. Such re-statement 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, 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.

7.34 Accordingly we ask:

72. Should the law on corroboration by distress be set out in statute?

'Mutual corroboration': the Moorov doctrine

7.35 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 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 C 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 D as well as C, then the *uncorroborated* evidence of D that she was raped by A may corroborate C'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:²²

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 refuted the proposition that evidence of distress could 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.

²² 1930 JC 68 at 73.

"Where an accused is tried on two or more charges alleging similar acts which are so connected in time, character and circumstances as to justify an inference that they are instances of similar conduct systematically pursued by him, the evidence of a single witness in relation to one charge may be corroborated by the evidence of a single witness in relation to another."

7.36 Thus before the doctrine applies C and D 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.

7.37 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.²³

7.38 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.²⁴ 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. We would welcome the views of consultees on whether there should be changes to the existing law on the *Moorov* doctrine but we take the view that if reform is required, it should not be done only in the context of sexual offences.

7.39 Accordingly we present the following proposal and question:

73. The law on mutual corroboration (the *Moorov* doctrine) should not be reformed solely in respect of sexual offences.

Sexual history evidence

7.40 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.²⁵ If the accused claims in defence that the victim 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

²³ For discussion of the use of an accused's previous convictions in later cases see paras 7.53-7.54.

²⁴ See for example *Johnstone v HM Advocate* 2004 SCCR 727 at 732 para 8 (Lord Justice General Cullen).

²⁵ 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 (1993) *Sex Crimes on Trial: The Use of Sexual Evidence in the Scottish Courts* (1993).

consent or her behaviour was such that it may have seemed reasonable to the accused to believe that she consented. This is likely to involve adducing evidence which intrudes upon the complainer's private life.

7.41 It is clear that the law has to give due weight to the interests of the complainer in a sexual offence trial.²⁶ 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 on the inadmissibility of collateral evidence. Accordingly, the Crown cannot adduce evidence of the accused's previous criminal convictions in order to undermine his credibility.²⁷ To do so would be severely prejudicial to the accused and would appear to be a breach of his right to a fair trial under Article 6 of the European Convention on Human Rights.

7.42 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.²⁸

"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."

7.43 After the Criminal Evidence Act 1898,²⁹ 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

²⁶ 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.)

²⁷ 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.

²⁸ *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) Ark 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.

²⁹ The provision is now s 266 of the Criminal Procedure (Scotland) Act 1995.

necessarily involved casting aspersions on the moral character of the complainer.³⁰ 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 seeking redress.

7.44 An attempt to redress the 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 1985.³¹ Evidence of the complainer's sexual history was prohibited.³² But the defence 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
- (iii) it would be contrary to the interests of justice to exclude such evidence.

7.45 However, research established that evidence of a complainer's sexual history continued to be adduced in circumstances which were not justified under the Act.³³ After consultation,³⁴ the sexual evidence provisions of the Criminal Procedure (Scotland) Act 1995 were amended by the Sexual Offences (Procedure and Evidence) (Scotland) Act 2002.³⁵

7.46 The starting point of the new provisions 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.³⁶ 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.

7.47 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:³⁷

³⁰ 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 H M Advocate* 1988 JC 127.

³¹ 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.

³² 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.

³³ 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.

³⁴ Scottish Executive, *Redressing the Balance: Cross-Examination in Rape and Sexual Offences Trials* (2000).

³⁵ Criminal Procedure (Scotland) Act 1995, ss 274-275B. See Appendix B.

³⁶ 1995 Act, s 274 (as amended).

³⁷ 1995 Act, s 275.

- (a) the evidence will relate only to a specific occurrence of sexual or other behaviour which will demonstrate the complainer's character or any condition or predisposition to which she has been subject;
- (b) that the occurrence of behaviour or facts is relevant to establishing whether the accused is guilty of the crime 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.³⁸

7.48 It will be clear that the grounds for the admission of evidence of the complainer's 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. Nevertheless, the courts appear to remain reluctant to refuse to admit evidence if it appears to be pertinent to the accused's defence.³⁹ 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.⁴⁰ 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.⁴¹ These provisions have been held to be compatible with Article 6 of the European Convention of Human Rights.⁴²

7.49 There is no doubt that these provisions are intended to find an appropriate balance between the complainer's right to dignity and privacy and the accused's right to a fair and unbiased trial. The question is whether in practice they have achieved this goal. A study of the operation of these provisions is currently being undertaken on behalf of the Scottish Executive.⁴³ This is unlikely to be available until 2007. Given that the legislation is of recent origin and is being subjected to systematic monitoring, we feel that there is little purpose to be served in considering proposals for the reform of these provisions until the findings of the research project become available.

³⁸ 1995 Act, s 272(2)(b)(i).

³⁹ *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 of Human Rights: *M(M)v HM Advocate* 2005 JC 102.

⁴⁰ Criminal Procedure (Scotland) Act 1995, s 275A.

⁴¹ *HM Advocate v DS* 2005 SCCR 655.

⁴² *Ibid.*

⁴³ A preliminary research study which focuses on the 1995 Act prior to the 2002 amendments has been published: M Burman, L Jamieson and J Nicholson (with F Cartmel), *The Law of Evidence in Sexual Offence Trials: Base Line Study* (Scottish Executive, 2005).

7.50 It is proposed that:

- 74. Further consideration of the law on sexual history evidence should await the completion of the research on the impact of the changes made by the Sexual Offences (Procedure and Evidence) (Scotland) Act 2002.**

Further topics in the law of evidence

7.51 During the period in which we were preparing this Discussion Paper, we received suggestions on two other topics in the law of evidence which we might wish to consider as part of the project. These were similar facts evidence and the use of previous convictions.

7.52 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 offence.⁴⁴ 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.⁴⁵

7.53 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.⁴⁶ 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.⁴⁷ 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

⁴⁴ 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.

⁴⁵ 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.

⁴⁶ Criminal Procedure (Scotland) Act 1995, s 266(4).

⁴⁷ 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.

convictions must be laid before the jury, unless the court considers that disclosure would not be in the interests of justice.⁴⁸

7.54 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, we do not propose 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 doubt 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. It is significant that 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).⁴⁹ 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.⁵⁰ We are 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 conclude that:

- 75. Any consideration of the law relating to evidence of the character of a person accused of a sexual offence should be conducted as part of a wider review of the law of evidence.**

⁴⁸ Criminal Procedure (Scotland) Act 1995, s 275A. See para 7.48.

⁴⁹ 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)).

⁵⁰ Law Commission, Report on *Evidence of Bad Character in Criminal Proceedings* (Law Com No 273 (2001)).

Part 8 List of proposals and questions

Part 3 Sexual autonomy and consent

1. A constituent element of offences of sexual assault should be the lack of consent by the victim.

(paragraph 3.29)
2. If, contrary to our proposal, consent is to be removed as a defining element of sexual offences, we would welcome responses to the following questions:
 - (a) Should offences of sexual assault be defined in terms of actings against the will of the victim?
 - (b) Should offences of sexual assault be defined by specifying all of the circumstances in which they can be committed rather than by reference to lack of consent (or actings against the will) of the victim?

(paragraph 3.29)
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 examples or indicators where consent does not exist.

(paragraph 3.44)
4. Should consent as a constituent element of sexual assaults be defined as:
 - (a) 'free agreement'; or
 - (b) 'positive cooperation 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'?

(paragraph 3.48)
5. If neither of these definitions is satisfactory, how should consent be defined in general terms?

(paragraph 3.48)

6. A non-exhaustive statutory list of factual situations which indicate that a person has not consented to sexual activity should include the following:
- (a) where at the time of the act the person was subject to force or violence or the threat of force or violence against him or her;
 - (b) where at the time of the act the person was subject to force or violence or the threat of force or violence against another person;
 - (c) where the person was unconscious or asleep;
 - (d) where the person had taken or been given alcohol or other substances and as a result lacked the capacity to consent;
 - (e) where the person was deceived or mistaken about the nature of the activity;
 - (f) where the person was deceived into thinking that the other person was someone known to him or her;
 - (g) where the person was unlawfully detained;
 - (h) where expression of consent was made by someone other than the person.

(paragraph 3.59)

7. Are there any other factual situations which should be included on this list?

(paragraph 3.59)

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

(paragraph 3.61)

9. A person who has consented to a sexual act may at any time 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 3.62)

10. Comment is invited on the illustrative examples of the consent model set out at paragraph 3.66.

(paragraph 3.67)

Part 4 Sexual assaults

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

(paragraph 4.6)

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

(paragraph 4.7)
13. The law on sexual assaults should distinguish assaults involving penetration of the victim's body from assaults not involving penetration.

(paragraph 4.9)
14. Scots law should retain the term rape as referring to a specific sort of offence of sexual assault.

(paragraph 4.16)
15. Rape should be defined in terms of penetration of the victim by the penis of another person.

(paragraph 4.16)
16. Penetration of the victim by anything other than the penis of another person should be a separate type of sexual assault.

(paragraph 4.16)
17. 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 4.20)
18. There should be an offence of sexual assault by penetration.

(paragraph 4.25)
19. Sexual assault by penetration should be defined as the penetration of a person's genitalia or anus by anything other than a penis without that person's consent.

(paragraph 4.25)
20. There should be an offence which consists of one person touching, or having contact with, another person in a sexual manner without that person's consent.

(paragraph 4.34)
21. The term 'sexual' means what a reasonable person would consider to be sexual.

(paragraph 4.34)

22. Should the name of the offence be

- (a) sexual assault;
- (b) sexual touching;
- (c) sexual assault by touching;
- (d) sexual molestation; or
- (e) something else?

(paragraph 4.34)

23. For an accused person to be guilty of an offence of sexual assault (rape, sexual assault by penetration, sexual assault) the accused, at the time of the assault, must have known the victim was not consenting or was reckless as to whether or not the victim consented.

(paragraph 4.47)

24. Should the test for the accused's belief that the victim was consenting be:

- (a) the subjective test that he honestly held that belief;
- (b) the objective test that he held the belief and that there were reasonable grounds for doing so; or
- (c) the test that he held the belief but subject to the qualification that the belief must be reasonable having regard to all the circumstances (including steps taken by the accused to ascertain whether the victim did consent)?

(paragraph 4.48)

25. It should be an offence for a person to compel or coerce another person to engage in any sexual activity without that person's consent.

(paragraph 4.51)

26. The offence of sexual assault (including sexual assault by penetration) does not apply to any act done reasonably and in good faith for medical reasons.

(paragraph 4.53)

Part 5 Offences based on a protective principle

27. In addition to the general consent model proposed in Part 3, should there continue to be special provisions relating to sexual activity involving children, persons with mental disorder, and persons otherwise open to sexual exploitation?

(paragraph 5.12)

28. 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 5.20)
29. There should be special provisions in applying the law on sexual assaults and coercing sexual activity to young children below a defined age.
(paragraph 5.36)
30. Should that age be 12 or 13?
(paragraph 5.36)
31. Should these offences provide that children below that age lack capacity to consent to sexual activity? Or should they apply in addition to offences in which lack of consent is a defining element?
(paragraph 5.36)
32. There should be no defence to these offences that the accused believed that the child was of, or older than, the age in question or that the accused was married to, or in a civil partnership with, the child.
(paragraph 5.36)
33. There should continue to be offences which prohibit a person engaging in sexual conduct with a child who is older than 12 (or 13) where such conduct involves the consent of the child.
(paragraph 5.47)
34. The offences referred to in proposal 33 should apply in respect of children under the age of 16.
(paragraph 5.48)
35. It should be an offence for a person to penetrate (with a penis or with any part of the body or with any object) a child under the age of 16 (but older than 12 (or 13)).
(paragraph 5.54)
36. Should it be an offence for a person to touch in a sexual manner a child under the age of 16 (but older than 12 (or 13))?
(paragraph 5.54)

37. It should be an offence for a person to cause or to incite a child under the age of 16 (but older than 12 (or 13)) to engage in sexual conduct.
(paragraph 5.54)
38. The offences mentioned in proposals 35, 36 and 37 should apply to children under 16 who commit those offences against children under that age, subject to the application of the existing provisions on the prosecution of children under 16.
(paragraph 5.62)
39. There should be a defence to an offence relating to sexual activity with a child under 16 (but older than 12 (or 13)) that the accused believed on reasonable grounds that the child was 16 or older.
(paragraph 5.67)
40. The legal burden of establishing this defence should lie with the accused.
(paragraph 5.67)
41. Should the Crown be allowed to lead evidence that the accused had previously been charged with a like offence?
(paragraph 5.67)
42. There should be a defence to an offence relating to sexual activity with a child under 16 (but older than 12 (or 13)) that the accused and the child were married or in a civil partnership or similar or analogous relationship recognised as valid under Scots law.
(paragraph 5.72)
43. It should also be a defence to such an offence that the accused believed on reasonable grounds that he was married to the child or that he and the child were in a civil partnership or similar or analogous relationship recognised as valid under Scots law.
(paragraph 5.72)
44. The accused should bear an evidential, but not a legal, burden of establishing these defences.
(paragraph 5.72)
45. The crime of lewd, indecent and libidinous practices and behaviour towards children should be abolished.
(paragraph 5.76)

46. It should be an offence for a person, for purposes of sexual gratification, to engage in sexual activity in the presence of a child.
- (paragraph 5.76)
47. It should be an offence for a person, for purposes of sexual gratification, to cause a child to watch a sexual act.
- (paragraph 5.76)
48. It should be a defence to an offence mentioned in proposals 46 and 47, where the child is older than 12 (or 13) and below 16,
- (a) that the accused believed on reasonable grounds that the child was 16 or older or
- (b) that the accused and the child were married or in a civil partnership or similar or analogous relationship recognised as valid under Scots law or the accused believed on reasonable grounds that he was married to the child or was in such a relationship.
- (paragraph 5.76)
49. 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.
- (paragraph 5.79)
50. Assuming our proposals in Part 4 (offences involving lack of consent) were implemented, section 311 of the Mental Health (Care and Treatment) (Scotland) Act 2003 should be repealed.
- (paragraph 5.87)
51. Should there 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?
- (paragraph 5.92)
52. There should continue to be offences prohibiting sexual activity between persons one of whom holds a position of trust and authority over the other.
- (paragraph 5.100)
53. It should be an offence for a person to engage in sexual activity with another person under 16 where
- (a) the parties live in the same household;
- (b) there was a relationship of trust between the parties; and

- (c) the sexual activity occurred as a result of breach of trust.
(paragraph 5.106)
54. 'A relationship of trust' should be defined as including (but not limited to) the situation where
- (a) a person has or exercises parental responsibilities and rights in respect of the other person; or
- (b) a person has treated the other person as a member of his family.
(paragraph 5.106)
55. Should the offence also apply where the person over whom the position of trust is held is 16 or older? If so, should there be any limit on the age of that person?
(paragraph 5.106)
56. Should it be a defence that the parties were married to each other at the time of the sexual activity?
(paragraph 5.106)
57. It should be an offence for a person 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 or was mentally disordered; and
- (c) the sexual activity occurred as a result of breach of trust.
(paragraph 5.112)
58. Position of trust should be defined as including, but not restricted to cases, where
- (a) one person is the teacher, instructor or religious adviser of the other person;
- (b) one person provides care services to the other person professionally or on behalf of a voluntary organisation;
- (c) one person is actively engaged in the management of, works in, or is contracted to provide services to
- (i) a hospital where the other person is being given treatment; or
- (ii) an establishment where the other person lives.
(paragraph 5.112)

59. Should the age mentioned in proposal 57 be an age other than 18? Should the offence apply in respect of a person of any age?
- (paragraph 5.112)
60. It should be a defence that the person holding the position of trust did not know, on reasonable grounds, that the other person was below 18 (or the age in question) or was mentally disordered.
- (paragraph 5.112)
61. It should be a defence that the parties were married to, or in a civil partnership with, each other at the time of the sexual activity.
- (paragraph 5.112)
62. It should be a defence to the offence in relation to a person with a mental disorder that a sexual relationship existed between the parties at the time when the relationship of trust between them was constituted.
- (paragraph 5.112)

Part 6 Offences based on public morality

63. Any existing common law offence relating to homosexual conduct should be abolished.
- (paragraph 6.9)
64. Section 13 of the Criminal Law (Consolidation) (Scotland) Act 1995 should be repealed.
- (paragraph 6.9)
65. In addition to offences based on lack of consent by the victim and offences based on the protective principle, should there continue to be a separate offence of incest? If so, why?
- (paragraph 6.30)
66. It should be an offence for a person to expose his or her genitals with the intent of causing alarm or distress to someone else.
- (paragraph 6.34)
67. 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.
- (paragraph 6.37)

68. Should it be an assault where the activity referred to in proposal 67 results in, or is likely to result in, serious injury?

(paragraph 6.37)

69. Sexual activity with an animal should attract criminal liability only where it is a form of public indecency or of cruelty to animals.

(paragraph 6.40)

70. Consideration should be given to the creation of an offence of unlawful interference with human remains.

(paragraph 6.42)

Part 7 Evidence

71. Should the requirement of corroboration be removed for proof of sexual offences? If so, for which offences?

(paragraph 7.26)

72. Should the law on corroboration by distress be set out in statute?

(paragraph 7.34)

73. The law on mutual corroboration (the *Moorov* doctrine) should not be reformed solely in respect of sexual offences.

(paragraph 7.39)

74. Further consideration of the law on sexual history evidence should await the completion of the research on the impact of the changes made by the Sexual Offences (Procedure and Evidence) (Scotland) Act 2002.

(paragraph 7.50)

75. Any consideration of the law relating to evidence of the character of a person accused of a sexual offence should be conducted as part of a wider review of the law of evidence.

(paragraph 7.54)

Appendix A Definitions of consent

This Appendix contains the text of statutory definitions of 'consent' which are in force in other jurisdictions and also definitions which have been proposed in the Draft Criminal Code and by the Law Commission for England and Wales.

A. Sexual Offences Act 2003 (England and Wales)

"Consent"

74. For the purposes of this Part, a person consents if he agrees by choice, and has the freedom and capacity to make that choice.

Evidential presumptions about consent

- 75 (1) If in proceedings for an offence to which this section applies it is proved —

- (a) that the defendant did the relevant act,
- (b) that any of the circumstances specified in subsection (2) existed, and
- (c) that the defendant knew that those circumstances existed,

the complainant is to be taken not to have consented to the relevant act unless sufficient evidence is adduced to raise an issue as to whether he consented, and the defendant is to be taken not to have reasonably believed that the complainant consented unless sufficient evidence is adduced to raise an issue as to whether he reasonably believed it.

- (2) The circumstances are that –

- (a) any person was, at the time of the relevant act or immediately before it began, using violence against the complainant or causing the complainant to fear that immediate violence would be used against him;
- (b) any person was, at the time of the relevant act or immediately before it began, causing the complainant to fear that violence was being used, or that immediate violence would be used, against another person;
- (c) the complainant was, and the defendant was not, unlawfully detained at the time of the relevant act;
- (d) the complainant was asleep or otherwise unconscious at the time of the relevant act;

(e) because of the complainant's physical disability, the complainant would not have been able at the time of the relevant act to communicate to the defendant whether the complainant consented;

(f) any person had administered to 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.

(3) In subsection (2)(a) and (b), the reference to the time immediately before the relevant act began is, in the case of an act which is one of a continuous series of sexual activities, a reference to the time immediately before the first sexual activity began.

Conclusive presumptions about consent

76 (1) If in proceedings for an offence to which this section applies it is proved that the defendant did the relevant act and that any of the circumstances specified in subsection (2) existed, it is to be conclusively presumed –

(a) that the complainant did not consent to the relevant act, and

(b) that the defendant did not believe that the complainant consented to the relevant act.

(2) The circumstances are that –

(a) the defendant intentionally deceived the complainant as to the nature or purpose of the relevant act;

(b) the defendant intentionally induced the complainant to consent to the relevant act by impersonating a person known personally to the complainant.

B. Draft Criminal Code for Scotland

Rules on consent

111 (1) For the purposes of any part of this Act any consent given by a person is to be disregarded if at the time when the consent was given –

(a) the person giving the consent was, by reason of his or her young age or mental disorder,¹ unable to understand what was being consented to or to withhold consent;

(b) the consent was induced by force or fear or was otherwise not freely given; or

(c) the consent was induced by fraud as to the nature of what was being consented to or the identity of the person doing what was consented to.

¹ " 'mental disorder' " has the same meaning as in s 328 of the Mental Health (Care and Treatment) (Scotland) Act 2003 (asp 13)" (Draft Criminal Code, s 112(1)(d)).

(2) For the purposes of Part 2 of this Act (Non-sexual offences against life, bodily integrity, liberty and other personal interests) any consent given by a person is to be disregarded if the consent was to a socially unacceptable activity likely to cause serious injury or a risk of serious injury.

(3) For the purposes of Part 3 of this Act (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.

C. California: Penal Code 1873

261.6 In prosecutions...in which consent is at issue, "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.

A current or previous dating or marital relationship shall not be sufficient to constitute consent where consent is at issue in a prosecution...

261.7 In prosecutions...in which consent is at issue, evidence that the victim suggested, requested, or otherwise communicated to the defendant that the defendant use a condom or other birth control device, without additional evidence of consent, is not sufficient to constitute consent.

D. New South Wales: Crimes Act 1900

Consent

61R (2) For the purposes of subsection 61I, 61J and 61JA without limiting the grounds on which it may be established that consent to sexual intercourse is vitiated:

(a) a person who consents to sexual intercourse with another person:

(i) under a mistaken belief as to the identity of the other person; or

(ii) under a mistaken belief that the other person is married to the person,

is to be taken not to consent to the sexual intercourse, and

(a1) a person who consents to sexual intercourse with another person under a mistaken belief that the sexual intercourse is for medical or hygienic purposes (or any other mistaken belief about the nature of the act induced by fraudulent means) is taken not to consent to the sexual intercourse, and

(b) a person who knows that another person consents to sexual intercourse under a mistaken belief referred to in paragraph (a) or (a1) is to be taken to know that the other person does not consent to the sexual intercourse, and

(c) a person who submits to sexual intercourse with another person as a result of threats or terror, whether the threats are against, or the terror is

instilled in, the person who submits to the sexual intercourse or any other person, is to be regarded as not consenting to the sexual intercourse, and

(d) a person who does not offer actual physical resistance to sexual intercourse is not, by reason only of that fact, to be regarded as consenting to the sexual intercourse.

E. Canada: Criminal Code

265 (3) For the purposes of this section, no consent is obtained where the complainant submits or does not resist by reason of

(a) the application of force to the complainant or to a person other than the complainant;

(b) threats or fear of the application of force to the complainant or to a person other than the complainant;

(c) fraud; or

(d) the exercise of authority.

273.1 (1) Subject to subsection (2) and subsection 265(3) 'consent' means, for the purposes of sections 271, 272, and 273, the voluntary agreement of the complainant to engage in the sexual activity in question.

(2) No consent is obtained ... where

(a) the agreement is expressed by the words or conduct of a person other than the complainant;

(b) the complainant is incapable of consenting to the activity;

(c) the accused induces the complainant to engage in the activity by abusing a position of trust, power, or authority;

(d) the complainant expresses, by words or conduct, a lack of agreement to engage in the activity; or

(e) the complainant, having consented to engage in sexual activity, expresses, by words or conduct, a lack of agreement to continue to engage in the activity.

(3) Nothing in subsection (2) shall be construed as limiting the circumstances in which no consent is obtained.

F. Law Commission of England and Wales: *Consent in Sex Offences (2000)*

2.12 We recommend that, for the purposes of any non-consensual sexual offence,

(1) "consent" should be defined as a subsisting, free and genuine agreement to the act in question; but

(2) the definition should make it clear that such agreement may be

(a) express or implied, and

(b) evidenced by words or conduct, whether present or past.

G. Victoria: Crimes Act 1958 (as amended)

Meaning of consent

36 For the purposes of subdivisions (8A) to (8D) "consent" means free agreement. Circumstances in which a person does not freely agree to an act include the following—

(a) the person submits because of force or the fear of force to that person or someone else;

(b) the person submits because of the fear of harm of any type to that person or someone else;

(c) the person submits because she or he is unlawfully detained;

(d) the person is asleep, unconscious, or so affected by alcohol or another drug as to be incapable of freely agreeing;

(e) the person is incapable of understanding the sexual nature of the act;

(f) the person is mistaken about the sexual nature of the act or the identity of the person;

(g) the person mistakenly believes that the act is for medical or hygienic purposes.

Jury directions on consent

37 (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 is normally 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 be taken 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.

Appendix B Legislation on sexual history evidence

This Appendix contains the text of sections 274 to 275B of the Criminal Procedure (Scotland) Act 1995. The text is shown as amended by the Sexual Offences (Procedure and Evidence) (Scotland) Act 2002¹ and the Criminal Procedure (Amendment) (Scotland) Act 2004.²

Criminal Procedure (Scotland) Act 1995

Restrictions on evidence relating to sexual offences

274 (1) In the trial of a person charged with an offence to which section 288C³ of this Act applies, the court shall not admit, or allow questioning designed to elicit, evidence which shows or tends to show that the complainer —

(a) is not of good character (whether in relation to sexual matters or otherwise);

(b) has, at any time, engaged in sexual behaviour not forming part of the subject matter of the charge;

(c) has, at any time (other than shortly before, at the same time as or shortly after the acts which form part of the subject matter of the charge), engaged in such behaviour, not being sexual behaviour, as might found the inference that the complainer —

(i) is likely to have consented to those acts; or

(ii) is not a credible or reliable witness; or

(d) has, at any time, been subject to any such condition or predisposition as might found the inference referred to in sub-paragraph (c) above.

(2) In subsection (1) above —

"complainer" means the person against whom the offence referred to in that subsection is alleged to have been committed; and the reference to engaging in sexual behaviour includes a reference to undergoing or being made subject to any experience of a sexual nature.

¹ Sections 7–10 of the Sexual Offences (Procedure and Evidence) (Scotland) Act 2002 substituted new ss 274–275B in the Criminal Procedure (Scotland) Act 1995, restricting the extent to which evidence could be led in respect of the character and sexual history of the complainer where a sexual offence was charged.

² Section 275B was amended by the Criminal Procedure (Amendment) (Scotland) Act 2004, Sch 1, para 45.

³ That is, sexual offences.

Exception to restrictions under section 274

275 (1) The court may, on application made to it, admit such evidence or allow such questioning as is referred to in subsection (1) of section 274 of this Act if satisfied that —

(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 those 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.

(2) In subsection (1) above —

(a) the reference to an occurrence or occurrences of sexual behaviour includes a reference to undergoing or being made subject to any experience of a sexual nature;

(b) "the proper administration of justice" includes —

(i) appropriate protection of a complainer's dignity and privacy; and

(ii) ensuring that the facts and circumstances of which a jury is made aware are, in cases of offences to which section 288C of this Act applies, relevant to an issue which is to be put before the jury and commensurate to the importance of that issue to the jury's verdict,

and, in that subsection and in sub-paragraph (i) of paragraph (b) above, "complainer" has the same meaning as in section 274 of this Act.

(3) An application for the purposes of subsection (1) above shall be in writing and shall set out —

(a) the evidence sought to be admitted or elicited;

(b) the nature of any questioning proposed;

(c) the issues at the trial to which that evidence is considered to be relevant;

(d) the reasons why that evidence is considered relevant to those issues;

(e) the inferences which the applicant proposes to submit to the court that it should draw from that evidence; and

(f) such other information as is of a kind specified for the purposes of this paragraph in Act of Adjournal.

(4) The party making such an application shall, when making it, send a copy of it —

(a) when that party is the prosecutor, to the accused; and

(b) when that party is the accused, to the prosecutor and any co-accused.

(5) The court may reach a decision under subsection (1) above without considering any evidence; but, where it takes evidence for the purposes of reaching that decision, it shall do so as if determining the admissibility of evidence.

(6) The court shall state its reasons for its decision under subsection (1) above, and may make that decision subject to conditions which may include compliance with directions issued by it.

(7) Where a court admits evidence or allows questioning under subsection (1) above, its decision to do so shall include a statement —

(a) of what items of evidence it is admitting or lines of questioning it is allowing;

(b) of the reasons for its conclusion that the evidence to be admitted or to be elicited by the questioning is admissible;

(c) of the issues at the trial to which it considers that that evidence is relevant.

(8) A condition under subsection (6) above may consist of a limitation on the extent to which evidence —

(a) to be admitted; or

(b) to be elicited by questioning to be allowed,

may be argued to support a particular inference specified in the condition.

(9) Where evidence is admitted or questioning allowed under this section, the court at any time may —

(a) as it thinks fit; and

(b) notwithstanding the terms of its decision under subsection (1) above or any condition under subsection (6) above,

limit the extent of evidence to be admitted or questioning to be allowed.

Disclosure of accused's previous convictions where court allows questioning or evidence under section 275

275A (1) Where, under section 275 of this Act, a court on the application of the accused allows such questioning or admits such evidence as is referred to in section 274(1) of this Act, the prosecutor shall forthwith place before the presiding judge any previous relevant conviction of the accused.

(2) Any conviction placed before the judge under subsection (1) above shall, unless the accused objects, be —

(a) in proceedings on indictment, laid before the jury;

(b) in summary proceedings, taken into consideration by the judge.

(3) An extract of such a conviction may not be laid before the jury or taken into consideration by the judge unless such an extract was appended to the notice, served on the accused under section 69(2) or, as the case may be, 166(2) of this Act, which specified that conviction.

(4) An objection under subsection (2) above may be made only on one or more of the following grounds —

(a) where the conviction bears to be a relevant conviction by virtue only of paragraph (b) of subsection (10) below, that there was not a substantial sexual element present in the commission of the offence for which the accused has been convicted;

(b) that the disclosure or, as the case may be, the taking into consideration of the conviction would be contrary to the interests of justice;

(c) in proceedings on indictment, that the conviction does not apply to the accused or is otherwise inadmissible;

(d) in summary proceedings, that the accused does not admit the conviction.

(5) Where —

(a) an objection is made on one or more of the grounds mentioned in paragraphs (b) to (d) of subsection (4) above; and

(b) an extract of the conviction in respect of which the objection is made was not appended to the notice, served on the accused under section 69(2) or, as the case may be, 166(2) above, which specified that conviction,

the prosecutor may, notwithstanding subsection (3) above, place such an extract conviction before the judge.

(6) In summary proceedings, the judge may, notwithstanding subsection (2)(b) above, take into consideration any extract placed before him under subsection (5)

above for the purposes only of considering the objection in respect of which the extract is disclosed.

(7) In entertaining an objection on the ground mentioned in paragraph (b) of subsection (4) above, the court shall, unless the contrary is shown, presume that the disclosure, or, as the case may be, the taking into consideration, of a conviction is in the interests of justice.

(8) An objection on the ground mentioned in paragraph (c) of subsection (4) above shall not be entertained unless the accused has, under subsection (2) of section 69 of this Act, given intimation of the objection in accordance with subsection (3) of that section.

(9) In entertaining an objection on the ground mentioned in paragraph (d) of subsection (4) above, the court shall require the prosecutor to withdraw the conviction or adduce evidence in proof thereof.

(10) For the purposes of this section a "relevant conviction" is, subject to subsection (11) below —

(a) a conviction for an offence to which section 288C of this Act applies by virtue of subsection (2) thereof; or

(b) where a substantial sexual element was present in the commission of any other offence in respect of which the accused has previously been convicted, a conviction for that offence,

which is specified in a notice served on the accused under section 69(2) or, as the case may be, 166(2) of this Act.

(11) A conviction for an offence other than an offence to which section 288C of this Act applies by virtue of subsection (2) thereof is not a relevant conviction for the purposes of this section unless an extract of that conviction containing information which indicates that a sexual element was present in the commission of the offence was appended to the notice, served on the accused under section 69(2) or, as the case may be, 166(2) of this Act, which specified that conviction.

Provisions supplementary to sections 275 and 275A

275B (1) An application for the purposes of subsection (1) of section 275 of this Act shall not, unless on special cause shown, be considered by the court unless made

(a) in the case of proceedings in the High Court, not less than 7 clear days before the preliminary hearing; or

(b) in any other case,

not less than 14 clear days before the trial diet.⁴

⁴ Amended by the Criminal Procedure (Amendment) (Scotland) Act 2004, Sch 1, para 45.

(2) Where —

(a) such an application is considered; or

(b) any objection under subsection (2) of section 275A of this Act is entertained,

during the course of the trial, the court shall consider that application or, as the case may be, entertain that objection in the absence of the jury, the complainer, any person cited as a witness and the public.



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