Working paper on sexual offences / Home Office, Criminal Law Revision Committee.

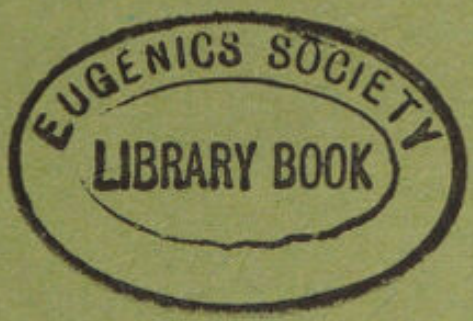
wellcome collection

Wellcome Collection
183 Euston Road
London NW1 2BE UK
T +44 (0)20 7611 8722
E library@wellcomecollection.org
https://wellcomecollection.org

CRIMINAL LAW REVISION COMMITTEE

Working Paper on Sexual Offences

OCTOBER 1980



LONDON
HER MAJESTY'S STATIONERY OFFICE
£3.70 net

This Working Paper, completed for publication in July 1980, is circulated for comment and criticism only. It does not represent the final views of the Criminal Law Revision Committee.

The Committee will be grateful for comments before 1 April 1981.

All correspondence should be addressed to:

The Secretary,
Criminal Law Revision Committee,
Home Office,
Queen Anne's Gate,
London SW1H 9AT.

HOME OFFICE

CRIMINAL LAW REVISION COMMITTEE

Working Paper on Sexual Offences

OCTOBER 1980

LONDON

HER MAJESTY'S STATIONERY OFFICE

First published 1980

ISBN 0 11 340734 3

CRIMINAL LAW REVISION COMMITTEE

GENERAL TERMS OF REFERENCE

The Criminal Law Revision Committee was set up on 2nd February 1959 by the then Home Secretary, Lord Butler, "to be a standing committee to examine such aspects of the criminal law of England and Wales as the Home Secretary may from time to time refer to the committee, to consider whether the law requires revision and to make recommendations".

MEMBERS OF THE COMMITTEE

The Right Honourable Lord Justice LAWTON, Chairman

The Right Honourable Lord Justice WALLER, O.B.E.

His Honour Judge FRANCIS

Mrs. Audrey FRISBY

Mr. John HAZAN, Q.C.

Sir Thomas HETHERINGTON, K.C.B., C.B.E., Q.C.

Mr. J. Hampden INSKIP, Q.C.

Sir Kenneth JONES, C.B.E., Q.C.

Her Honour Judge LOWRY

Mr. Charles MCCULLOUGH, Q.C.

Sir David NAPLEY

Mr. William SCOTT, O.B.E.

Sir Norman SKELHORN, K.B.E., Q.C.

Professor J. C. SMITH, Q.C.

Professor Glanville WILLIAMS, Q.C.

Mr. D. J. BENTLEY, Secretary
Mr. A. M. C. INGLESE, Assistant Secretary

NOTES

The late Mr. J. M. G. Griffith-Jones (the Common Serjeant) was a member of the Committee when the subject of sexual offences was referred to them and took part in their consideration of it until his death in August 1979.

The late Professor Sir Rupert Cross was a member of the Committee when the subject of sexual offences was referred to them and took part in their consideration of it until his retirement in December 1979.

CONTENTS

INTRODUCTION

The Reference

1. By letter dated 8th July 1975, the Home Secretary, the Rt. Hon. Roy Jenkins, asked us to review, in consultation with the Policy Advisory Committee on Sexual Offences, the law relating to and penalties for sexual offences.

2. In accordance with our usual practice, after receiving our terms of reference, we invited observations from the members of the Appellate Committee of the House of Lords, the judges of the Supreme Court and from interested bodies and others who were likely to help us in our task. We allowed them a substantial period in which to submit observations, and received a large number of replies. With the benefit of that advice and comment, for which we are grateful, we were in a position to proceed with the formulation of our provisional views set out in this Working Paper.

Objects

3. There is an important difference between the law governing sexual behaviour and other parts of the criminal law. Everyone is agreed that offences such as murder and theft are morally wrong and that those who kill and steal should be dealt with under the criminal law. There is not the same measure of agreement where sexual conduct is concerned. Even where conduct is generally thought to be morally wrong, there is also more hesitation over subjecting it to the criminal law. This is particularly the case for those kinds of sexual conduct between consenting adults which at present fall within the criminal law. Again, there are some sexual acts, such as sexual intercourse between a father and an adopted daughter just over 16, which do not at present come within the criminal law and which some people think should.

4. This Working Paper contains provisional conclusions where we have been able to reach them, but also at many places states the problems as we see them for comment. As lawyers we want to know what the public think about these problems on which we must advise the Home Secretary. For example, should a homosexual act between consenting adults continue to be an offence even if committed in private if it takes place in the presence of any other person? Should it be a crime for sexual intercourse to take place in a public place but in circumstances where what is done is unlikely to be seen by anyone other than by a policeman using his torch? Should a husband who forces his wife to have intercourse with him against her will be guilty of rape? There are many such problems to which we will refer in this Working Paper. In respect of some of them we have made provisional recommendations: sometimes we have decided only to set out the arguments for and against a proposal and to postpone our decision until after we have considered such comments as we may receive.

5. In the course of our discussions we have considered minor defects in the present law but we have not thought it necessary to refer to these details in this Working Paper since it is designed to elicit comment on the main issues arising on our present review. Lawyers may be aware of them, and perhaps of others which we have missed. We shall, of course, welcome any comments upon matters of this kind to which we have not referred, and shall deal with them in our final report.

Policy of the Law

6. The reference of sexual offences necessitated the Committee making an important provisional decision at the beginning of our deliberations, viz. to what extent the criminal law should reflect the fact that certain kinds of sexual conduct are commonly thought to be morally wrong or an outrage to public standards of decency. We have tried to bear in mind that what was commonly thought to be morally wrong in one age may not be so in another; and sexual acts which by common consent called for legal sanctions at once time may not be regarded in the same way a century, or even a decade, later. The converse is also true. Buggery was not established as a statutory offence until the reign of Henry VIII and ceased to be one for consenting adult males in private in 1967. Incest did not become a crime in England and Wales until 1908. Sexual intercourse outside marriage has always been contrary to Christian morality but has only been a crime when the female has been below a certain age, and that age has varied from 12 in the 13th century to 16 at the present time. It is however pertinent to point out that until comparatively modern times many kinds of sexual misconduct were dealt with by the ecclesiastical courts. This problem had to be considered and resolved by the Committee on Homosexual Offences and Prostitution (the Wolfenden Committee). They asked themselves what was the function of the criminal law in the field of sexual conduct and concluded that it was:

> "to preserve public order and decency, to protect the citizen from what is offensive or injurious, and to provide sufficient safeguards against exploitation and corruption of others, particularly those who are specially vulnerable because they are young, weak in body or mind, inexperienced, or in a state of special physical, official or economic dependence."[1]

They went on to say:

> "It is not, in our view, the function of the law to intervene in the private lives of citizens, or to seek to enforce any particular pattern of behaviour, further than is necessary to carry out the purposes we have outlined."[2]

We have attempted to follow the same approach. There are a few areas in which a proposal to exclude from the criminal law sexual acts which can harm no one but the doer may still be controversial; for example, an act of bestiality in a cowshed committed by a man of low intelligence and witnessed only by a police officer who was peeping through a chink in the weather-boarding.

---

[1]Cmnd. 247 (1957), paragraph 13.
[2]Ibid., paragraph 14.

7. We appreciate, as did the Wolfenden Committee, that on many aspects of our inquiry opinions will differ as to what is harmful. We have had the benefit of the advice of the Policy Advisory Committee on Sexual Offences which was set up by the Home Secretary in December 1975. The advice of such a body, representing as it does a wide range of experience, was most valuable, particularly in relation to changes in moral and social attitudes towards some kinds of sexual acts. We have been helped by the Home Office Research Unit, which provided us with much evidence about the kinds of offences with which we have been concerned. We have also had the benefit of opinions expressed by judges, lawyers, the churches and religious bodies, police associations, social workers, women's organisations and many members of the public who responded to our first invitation to submit memoranda. We thank them all. We would like to have their further comments on our provisional recomendations and on specific questions which we have discussed, and we summarise these matters at the end of this Working Paper.

Sentencing

8. As we have done ever since our Committee was first established in 1959 we have proposed maximum sentences which we think would be appropriate for the most serious kind of case that from time to time occurs. The maximum, or any sentence near it, may seldom be imposed; but provision for it is necessary for the protection of the public. The crime of rape illustrates this. The statistics seem to show that most rapists get sentences in the range of 3–5 years, but from time to time cases occur that call for the offender to be sentenced to life imprisonment; in 1978 there were six such cases. In our opinion there is no branch of the law which requires flexibility in sentencing more than that relating to sexual offences. This does not mean, however, that maximum sentences should be fixed at too high a level. In the light of our experience of the cases which come before the courts we have tried to keep maximum sentences as low as is reasonably necessary for the protection of the public.[1]

Classification of Offences

9. The important dividing line between the different sexual offences lies in the relevance of consent. Sometimes, as in rape, the essence of the offence is the absence of consent in one party to the act. Such kinds of sexual interference must surely come within the criminal law. But in many sexual offences there is no need for the prosecution to prove an absence of consent to the act. For example, a man commits an offence if he has sexual intercourse with a girl under 16 or a woman who is severely subnormal. In these cases, as the Wolfenden Committee pointed out, the object of the law is to safeguard those who are specially vulnerable from exploitation and corruption. Consent is immaterial.

---

[1]For the reasons given in our report on Offences against the Person (Cmnd. 7844, paragraph 5) we do not take account of the scheme of penalties in the report of the Advisory Council on the Penal System published in June 1978.

10. Few would dispute the need for the law to protect the vulnerable, but how far such protection should extend and the most suitable way to provide it are matters over which differing opinions are held and which we have had to consider. Different issues are raised by certain sexual offences (incest between adults is commonly taken as an example) where consent is also immaterial but where the object, or at least the prime object, of the law may not be to protect the weaker partner. Such conduct often brings moral condemnation, but that, as we have said, cannot in itself be regarded as a sufficient ground for making consensual adult behaviour a criminal offence. Nor do we consider on the other hand that the mere fact that sexual conduct is consensual should always be decisive against its criminality. In assessing the factors that should be taken into account in relation to these offences we are particularly grateful for the advice given us by the Policy Advisory Committee.

11. In this Working Paper we deal first with sexual acts of interference with others, whether of the same sex or a different sex, without their consent, and then with those acts which have been done with consent or where consent is immaterial, as with the young. We consider too the special problems that arise in connection with sexual acts done in public and bestiality. We shall examine prostitution and certain allied offences in a separate Working Paper.

12. Although the Sexual Offences Act 1967 relaxed the general law relating to homosexual acts in private between consenting adult males, a male homosexual act remains an offence if committed on a United Kingdom merchant ship by a member of the crew of that ship with a member of the crew of that or any other United Kingdom merchant ship (Sexual Offences Act 1967, section 2(1)). The Act of 1967 also contains a declaratory provision that the Act shall not prevent homosexual acts from being penalised as a matter of discipline under the enactments relating to the armed services (section 1(5)). We understand that the responsible bodies representing both the armed services and merchant seamen wish this to remain the position. These provisions raise questions of service discipline which are primarily the concern of those responsible bodies and we do not consider them within the scope of our reference.

The Age of Consent

13. There are, we know, a few people who think that there should be no fixed age of consent for sexual intercourse. Everyone else recognises that the interests both of children and of society calls for a fixed age of consent. Over the centuries and in different countries opinions have differed as to the age at which restrictions on sexual acts with the young should be imposed. Now that adult male homosexual conduct has in some circumstances ceased to be an offence, there is also the question whether the age should be the same for boys and girls. These questions were referred by the Home Secretary to the Policy Advisory Committee. Having consulted us, in June 1979 they issued a

Working Paper,[1] in which they provisionally recommended that there should continue to be an age of consent for sexual intercourse with girls and that that age should remain at 16. That was a unanimous recommendation. All the members of that Committee were also in favour of reducing the minimum age for homosexual acts between males from 21 at least to 18; a minority would have reduced it further to 16. After we had examined their draft Working Paper we informed the Policy Advisory Committee that, subject to consideration of any representations made by the public on their Working Paper, we accepted that the age of consent for sexual intercourse should be 16 years and that the minimum age for homosexual relations should be no higher than 18 years. We share the view of the Policy Advisory Committee that "there has been no significant increase in recent times in the level of psychological maturity of girls under 16 [and that] these girls face greater problems today than their mothers did at their age. Although they are physically mature at an earlier age, their mental development does not necessarily keep pace. They are therefore at risk for a longer period."[2] The present law serves to protect them while they are still at risk. We agree too that the present age of majority, 18, is a most important factor in determining what should be the minimum age for homosexual acts; and like the majority of the Policy Advisory Committee most of us believe that in order to protect those young men between 16 and 18 whose sexual orientation has not yet become firmly settled the minimum age should be 18.

14. Some countries penalise sexual relations with a young man above the minimum age where the defendant is in a position of authority or advantage over him, for instance his teacher or employer. The Policy Advisory Committee asked us whether it would be practicable to introduce such a concept into our criminal law. They accepted our advice that it would not be practicable. Our legislative tradition, unlike that of most continental states, requires statutes to state explicitly what the law prohibits, and a statutory provision based upon general principles would be likely to lack the precision necessary for the criminal law. On the other hand, a long detailed list would be bound to prove incomplete. The provision would, for example, have to cover schools and colleges, youth clubs and youth organisations. Sexual acts procured by gifts and other inducements would also need to be covered. The Policy Advisory Committee accepted our advice that the undertaking would present the legislature with a well-nigh impossible task.

Codification

15. The present law relating to sexual offences is largely statutory but common law concepts have become mixed with statutory provisions. An example is provided by indecent assault. Section 14 of the Sexual Offences Act 1956

---

[1]Working Paper on the Age of Consent in relation to Sexual Offences, H.M.S.O., June 1979. In that Working Paper they invited comment on their provisional recommendations on the age of consent and on the minimum age for homosexual relations.

[2]Working Paper on the Age of Consent in relation to Sexual Offences, paragraph 23.

makes an indecent assault upon a female an offence but the Act does not define what constitutes indecency or an assault. We have considered whether we should recommend statutory definitions where there are none at present. Some of our members are of the opinion that the law should define clearly every element in sexual offences; but the majority of us decided that we should only recommend definitions of common law elements when the law is uncertain or difficult to apply. We have not been asked to produce a code of sexual offences and do not intend to do so. We hope, however, that our recommendations may help those who at some future date have the task of producing a criminal code.

RAPE AND ALLIED OFFENCES

RAPE

16. Rape is generally regarded as the most grave of all the sexual offences. It can be, and usually is, punished severely. During the past decade there has been much discussion, some of it indignant, about the law of rape and the way it has been applied in the courts. This was brought about largely by what seemed from newspaper reports to be surprising leniency in a few cases and from misunderstandings about the decision of the House of Lords in *Morgan* [1976] A.C. 182, as publicised. In that case it was adjudged that a man would not be guilty of rape, even if the woman had not consented to sexual intercourse, if he honestly believed she had. (The appeals were, however, dismissed under the proviso to section 2(1) of the Criminal Appeal Act 1968, since it was clear that the jury rejected the defendants' allegations of the wife's cooperation, and would not have acquitted even if they had been properly directed by the judge.) A departmental committee was set up in 1975 under Mrs. Justice Heilbron. This committee recommended changes in both law and practice.[1] In 1976 Parliament passed the Sexual Offences (Amendment) Act which now contains much, but not all, of the law relating to rape.

17. That Act provides that a man commits rape if—

> (a) he has unlawful (that is extra-marital) sexual intercourse with a woman who at the time of the intercourse does not consent to it; and
> (b) at that time he knows that she does not consent to the intercourse or he is reckless as to whether she consents to it.

The Act leaves unchanged section 1(2) of the Sexual Offences Act 1956, which provides: "a man who induces a married woman to have sexual intercourse with him by impersonating her husband commits rape". This is a very rare form of rape. The maximum penalty for rape is life imprisonment and for attempted rape 7 years.

18. Since as recently as 1976 Parliament defined rape and the words used cover adequately nearly all the cases which are likely to come before the courts, we can see no reason for trying to improve upon the statutory definition. However, as we have already said, the Act of 1976 does not purport to cover the whole of the law of rape. It is the matters not dealt with in the Act which need scrutiny, even though they seldom give rise to difficulties.

19. It seems to us that the following questions are the ones most in need of an answer—

> (1) What amounts to consent? If a woman consents to sexual intercourse with X, thinking that he is Y, and X knows that she thinks he is Y, has she consented to that intercourse? If a woman is told by a man purporting to treat her for a medical condition that the insertion of his penis into her vagina is part of the treatment, has she consented to sexual intercourse? Unlikely though these two sets of circumstances may be, the reported cases do show that

---

[1]Report of the Advisory Group on the Law of Rape, Cmnd. 6352 (1975).

they have occurred. If a woman is induced by threats not involving the use of violence (for example by a threat of dismissal from a job) to allow sexual intercourse, has she consented to it? If she is induced to consent by a promise fraudulently made, for example, a promise of employment, has she consented?

(2) When a man encourages another (in lawyer's language, aids and abets another) to have sexual intercourse with a woman knowing that she is not consenting and that other believes that she is consenting, of what offence, if any, should the man who does the encouraging be convicted?

(3) Should the law continue to presume irrebuttably, as it does at present, without allowing any evidence to the contrary, that all boys under the age of 14 are physically incapable of sexual intercourse (and so of committing rape), although boys under this age are capable of sexual intercourse and do in fact commit acts which would be rape if they were over 14?

(4) Should husbands be guilty of rape, which they are not at present, if, whilst cohabiting, they make their wives have sexual intercourse with them when they know there is no consent?

(5) Should so-called oral intercourse without consent be a form of rape and punishable as such?

(6) Should anal intercourse (buggery) whether with a man or woman without consent be a form of rape and punishable as such?

(7) Should any form of vaginal penetration without consent be rape?

Consent in Rape

20. Until the second half of the nineteenth century, the courts seem to have had no problems about what amounted to consent. If a woman was made by the use of force to have sexual intercourse, or submitted in fear under a threat of force, she was adjudged to have been raped. She had not consented to the intercourse. This is still the law and, in our opinion, should continue to be the law. In the ordinary case of rape there has been force or the threat of force. Where sexual intercourse is procured by fraud, there is under section 3 of the Act of 1956 a special offence which we propose should continue. The judges and Parliament have intervened, in a few situations, to interpret the notion of absence of consent so as to extend the law of rape to what are basically cases of fraud. In paragraphs 21 to 25 we consider whether the law in this respect should be altered.

21. Thus in *Flattery* (1877) 2 Q.B.D. 410 it was adjudged that there had been no consent when a woman allowed sexual intercourse in the belief, induced by the defendant, that he was performing a surgical operation. This case was followed in *Williams* [1923] 1 K.B. 340 in which the defendant, who had been engaged to give lessons in singing and voice production to a girl aged 16, had sexual intercourse with her under the pretence that her breathing was not quite right and that he had to perform an operation to enable her to produce her voice properly. These cases have to be considered against another line of cases starting with *Jackson* (1822), Russ and Ry 487 C.C.R. and culminating in *Barrow* (1868) 11 Cox C.C. 191. In the latter case, the Court for Crown Cases Reserved held that the woman's consent to sexual intercourse was a defence even though she was deceived into thinking that the defendant was her husband. The decision was not well received: in *Flattery* (supra) four out of

the five judges thought it ought to be reconsidered and in *Dee* (1884) 15 Cox C.C. 579 the Irish Court for Crown Cases Reserved dissented from it and upheld the impersonator's conviction. Parliament intervened to extend the law of rape to that situation. Section 4 of the Criminal Law Amendment Act 1885, re-enacted as section 1(2) of the Sexual Offences Act 1956, provided that a man who induces a woman to have sexual intercourse with him by impersonating her husband commits rape. As this statutory provision only applies to the impersonation of husbands it would seem that the *Barrow* line of cases would still allow acquittal where someone other than a husband has been impersonated.

22. A well known and much used text book on the criminal law[1] is very critical of this situation. If a woman knows what is happening to her and that it is penile penetration, it is not easy to understand why the law should distinguish a mistake as to the purpose of the penetration from a mistake as to the identity of the man doing the penetrating, or should distinguish between the woman who believes she is having intercourse with her husband and the woman who believes the other party is her lover. It is arguable that all these cases should amount to rape, or none. In all these cases the woman's consent has been obtained by statements or conduct intended to deceive. This is what the law regards as fraud, which can take many forms. The question arises why in rape one form of fraud should provide a defence and others not. The two kinds of fraud illustrated by such cases as *Flattery* and *Barrow* are not the only ones. Take, for example, the case of a homeless young woman with a child who is told untruthfully by a housing official of a local authority that he will provide her with accommodation if she will have sexual intercourse with him. In her desperation she agrees and then finds out that the man had no authority to provide her with accommodation. This is not rape under the present law; but it is arguable that it should be. The difficulty lies in knowing where to draw the line. Few would consider that a young woman had been raped if she consented to sexual intercourse because she believed her seducer when he told her untruthfully that he owned a valuable piece of jewellery which he would give her the next day.

23. As well as fraud in the sense that lawyers use that word, there is the problem of threats and intimidation. At common law a woman who submitted to sexual intercourse because of threats of force was adjudged to have been raped. But what if the threats which induced submission were not threats of force, as for example a threat to terminate the woman's employment, or to give information to the police about her husband? At present such conduct is criminal under section 2 of the Sexual Offences Act 1956 (see paragraph 51 below) but it is not rape.

24. A majority of us are of the opinion that the offence of rape should not apply when a woman has knowingly consented to the defendant putting his penis into her vagina. Mistake as to his identity, whether as a husband or otherwise, or as to the purpose for which the penetration has been made

---

[1]Smith and Hogan, 4th edition, p. 406.

should be irrelevant. Nor should the use of threats or other intimidation short of threats of force amount to rape. Most of us are of the opinion that the distinctions drawn in the cases cannot bear the weight they have been made to carry, and we doubt whether many laymen would regard the examples we have given as cases of rape. In particular, we consider that the distress which the victim of such frauds or threats may suffer is, though a serious matter, not really comparable with the fear and shock that often accompanies true rape. Most of us therefore take the view that inducing sexual intercourse by fraud or threats (other than threats of force) or other intimidation should be criminal and attract heavy penalties but should not be forms of rape.

25. A minority of our members consider that the present is not the right time in which to narrow the law of rape. For over 100 years now the crucial question to be asked in rape cases has been not whether the act was against the woman's will but whether it was without her consent. The victims in *Flattery* and *Williams* would not have consented to the penetration if they had known the defendant's purpose; nor would they have done so in the impersonation cases had they known the true identity of the defendants. It may be thought that in sexual intercourse the personality of the other partner is of the highest importance. In the opinion of the minority, while there may be sound arguments for not extending the law of rape so as to include all, or some other forms of fraud, threats or intimidation, there can be none, other than a desire for legal tidiness, for excluding from the law of rape conduct which is now rape. Leaving the law as it is at present is not likely to affect adversely many persons. Cases of the kind under discussion are very rare and when they occur they are difficult of proof.[1] We invite comment.

Aiding and Abetting

26. When dealing with rape cases the courts sometimes have to consider unusual and revolting circumstances. The Court of Appeal had to do so in the case of *Cogan and Leak* [1976] 2 Q.B. 217 in which C was charged with rape and L with aiding and abetting in circumstances where L invited C to have intercourse with his, L's wife. C believed that she was consenting but she was not, and L knew that she was not; she submitted because she feared that she would be beaten by her husband if she refused. The Court of Appeal quashed C's conviction because of the decision of the House of Lords in *Morgan* [1976] A.C. 182. L then submitted that he was entitled to be acquitted as charged because C had been adjudged not to have raped Mrs L and, as all that had been alleged against him had been that he aided and abetted C, he could not be guilty of aiding and abetting an offence which had not been committed. The Court of Appeal thought that such a result would bring discredit on the law. They upheld L's conviction on the ground that under the Accessories and Abettors Act 1861 L could have been charged as a principal in the first degree (that is as one who had done the criminal act) and punished as such. It followed that no injustice had been done. The House of Lords refused L leave

[1] Under our proposals sexual intercourse with a woman who did not consent because she was unconscious or asleep would continue to be rape.

to appeal. The difficulty about this decision is that if L had been charged as a principal in the first degree the evidence would have proved that he was not one. He was an aider and abettor and nothing else. In another case of a similar kind the aider and abettor could be a woman. If the Court of Appeal's judgment stands as the law then women could be convicted as the doer of the physical act involved in rape. Men—and women—behaving like L should be punished for what they have done, that is, for aiding and abetting a man to have sexual intercourse with a woman without her consent. It should matter not that the man who had such intercourse was acquitted of rape. We provisionally recommend that the subtleties, and probably faulty reasoning, of the Court of Appeal's judgment should be replaced by a statutory provision to the effect we have indicated. The Law Commission have the law of accessories and abettors under review and we hope that they will accept this recommendation.

Presumption of Physical Incapacity in Boys Under 14

27. Under the present law, as we have already stated, a boy under 14 cannot be convicted of either rape or unlawful sexual intercourse whatever his actual physical capacity. Boys under this age are capable of sexual intercourse, however, and do in fact commit acts which would be rape if they were over 14, and the fact that they do is, we think, a matter of public concern. Cases of this kind occur in what have come to be known as "gang bangs", that is a series of sexual assaults by a group of youths on a girl. Such cases are very serious indeed as the girl often suffers severe emotional injury as well as physical harm. The older boys will be convicted of rape and punished severely, while a boy under 14, who may have had a leading part in the rape, can only be treated as having aided and abetted. Many think it is a scandal that this should be the law. At present we can see no justification for the continued existence of this limitation of the law of rape. If our recommendation was accepted the prosecution would, of course, have to prove, as in all cases involving defendants under 14, that the boy knew that he was doing wrong.

Marital Rape

28. For the purposes of this Working Paper we adopt the generally accepted opinion that at common law, with certain exceptions, a husband does not commit rape if during marriage he forces his wife to have sexual intercourse with him, and that the effect of the phrase "unlawful sexual intercourse" in section 1 of the Sexual Offences (Amendment) Act 1976 is to incorporate the common law into the section. If, in the course of forcing her, he inflicts injury upon her he may be guilty of an offence, the nature of which will depend upon the seriousness of the injury and the intention with which it was inflicted. Further, the courts having jurisdiction in matrimonial cases may be able to provide the wife with some protection. Many think that the time has come for this law to be changed. During the passage of the Sexual Offences (Amendment) Bill, arguments were put forward in favour of change. The Home Secretary, on behalf of the Government, gave an undertaking that the question

of rape by a husband on his wife would be specifically drawn to our attention.[1] We have considered this question. We find ourselves divided about both the need and the desirability of change; but a majority of us favour change.

29. The present law, which is part of the common law, has an archaic flavour to it. It is generally taken to be as stated by Hale in his Pleas of the Crown, which he wrote in the 1650's.

> "The husband cannot be guilty of rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given up herself in this kind unto her husband which she cannot retract."[2]

The critics of this law point out that since Hale's time wives can retract this consent. They can get divorces and separation orders. The courts have had to recognise in relation to rape modern changes in attitude towards marriage. Thus in *Miller* [1954] 2 Q.B. 282 it was held that, though the husband had a right to sexual intercourse, he was not entitled to use force or violence in order to exercise that right:

> "If he does so, he may make himself liable to the criminal law, not for the offence of rape, but for whatever other offence the facts of the particular case warrant. If he should wound her, he might be charged with wounding or causing bodily harm, or he may be liable to be convicted of common assault" (per Lynskey J. at 292).

30. A husband can be guilty of rape if a decree *nisi* has been granted (*O'Brien* [1974] 3 All E.R. 663), or if an injunction has been granted to restrain him from molesting his wife or he has given an undertaking to the court not to do so (*Steele* (1977) 65 Cr. App. Rep. 22) or if the court has granted a separation order (*Clarke* [1949] 2 All E.R. 448). But a husband, it seems, can still force his wife to have sexual intercourse with him without being guilty of rape even if she has left him, provided he does so before she gets a protective order from a court. The most glaring anomaly of all, say the critics, is that a woman who is cohabiting with a man—and maybe she has done so for many years—can refuse him sexual intercourse and her refusal, if it can be proved, will come within the law of rape, whereas a wife's will not. Cohabitation outside marriage is becoming increasingly common and this adds to the anomaly of drawing the distinction as it is now drawn. Stated at its simplest, the criticism is that the present rule denies married women something to which all other women are entitled.

31. We are all agreed that the present law may sometimes lead to a failure of justice. For example, it is not uncommon for a wife to be living apart from her husband without a court order. If the husband breaks into her house and forces her to have sexual intercourse with him it is hard to see why it should not be possible to charge him with rape. Again, where a wife refuses her husband sexual intercourse because he has a venereal disease, we think it right that he should be liable to be charged with rape if he forces her to have intercourse

---

[1] 911 H.C. Official Report (5th series) 1976, Col. 1957–58.
[2] 1 P.C. 629.

against her will. We do not, though, wish to see the functions of the family courts in practice usurped by the criminal law. There are strong reasons for treating family law as the main protection for married women against the unreasonable demands of their husbands.

32. We referred these matters to the Policy Advisory Committee, who told us that in their opinion there was no longer sufficient ground to justify the husband's exemption, and that it should be removed. They did not see marital rape as a serious social problem, and shared our view that in practice these matters should be left where possible to the family courts. They did not believe that there was any real danger that a change in the law would result in any substantial number of improperly motivated threats to bring charges of rape against husbands. However, they regarded it as essential that a prosecution for rape by a husband on his wife should not be brought without the consent of the Director of Public Prosecutions.

33. Some of our members take the view that despite the apparent anomalies the law is better left unaltered. Their reasons are as follows. The relationship between husband and wife is probably the most complex with which the courts deal. Spouses have responsibilities towards one another and to any children there may be as well as having rights against each other. If a wife could invoke the law of rape in all circumstances in which the husband had forced her to have sexual intercourse without her consent, the consequences for any children could be grave, and for the wife too. In many, probably most, such cases a quarrel would be likely, followed a few days later by a reconciliation. But if an angry wife could call in the police, who would have a duty to investigate her complaint with all that follows when rape is alleged, some of us consider there might be little chance of a reconciliation. The type of questions which investigating police officers would have to ask would be likely to be greatly resented by husbands and their families. The family ties would be severed and the wife with children would have to cope with her emotional, social and financial problems as best she could; and possibly the children might resent what she had done to their father. Nearly all breakdowns of marriage cause problems. A breakdown brought about by a wife who had sought the protection of the criminal law of rape would be particularly painful.

34. Before the passing of the Divorce Reform Act 1969, the making of unreasonable sexual demands on a wife was always regarded as a form of cruelty entitling the wife to protection. Nowadays when a petition for divorce may be presented to the court on the ground that the marriage has broken down irretrievably, a factor to be considered is whether the husband has behaved in such a way that the petitioner cannot reasonably be expected to live with him (Matrimonial Causes Act 1973, section 1). A wife cannot reasonably be expected to live with a husband who forces her to have sexual intercourse with him when she does not want to do so. In addition, both in the High Court and in the County Court a wife can obtain an injunction against her husband restraining him from molesting her (Domestic Violence and Matrimonial Proceedings Act 1976, section 1). Magistrates' courts too have limited powers of giving protection (sections 16 to 18, Domestic Proceedings (Magistrates' Courts) Act 1978).

35. Even if wives cohabiting with their husbands were given the protection of the law of rape there would be many problems to be solved. First, there would be that of proof. Proof of rape is always difficult but would be particularly difficult when husband and wife had been cohabiting. Unless the wife could show marks of injury (and they would have to be relevant marks) or the husband (after being cautioned) made admissions to investigating police officers, the prosecution's case would nearly always rest solely on the wife's evidence. The difficulties which already exist in obtaining sufficient evidence in cases of rape would be of necessity greater in the case of the cohabiting husband and wife. Prosecutions in such cases would be unlikely, and the police would have had the time-wasting and distasteful task of investigating the wife's complaint.

36. Deciding when to prosecute is likely to be difficult also because of the time that may elapse between the occasion of the alleged rape and the complaint. This is a particularly likely problem, some of us consider, since a threat to reveal to the police an occasion of alleged rape could be used as a bargaining counter in negotiations for maintenance and the division of property on the breakdown of marriage.

37. Such are the reasons advanced by those of our members who wish to retain the present law. The majority of us, however, while recognising the difficulties involved, do not regard them as sufficient ground for leaving the law as it is. The present immunity of a husband does not rest on any sound basis of principle, and is in some quarters much resented. In the paragraphs that follow we set out the arguments which satisfy the majority of us that this immunity should now be abolished, and we make proposals which we believe will substantially meet the objections of the minority.

38. We have already said that as a statement of the subjection of the wife to the husband, Hale's doctrine is totally out of accord with present-day attitudes, whatever may have been the justification for it in former times. In *Miller* (see paragraph 29 above) Lynskey J. undoubtedly narrowed the scope of the immunity by holding that a husband who raped his wife could be convicted of assault occasioning her actual bodily harm. The jury there found that the hysterical and nervous condition to which the wife had been reduced by the rape amounted to actual bodily harm; more commonly, it may be supposed, the evidence would be of physical injury.

39. It is difficult to explain why wives should be outside the protection of the law of rape when unmarried cohabitees are not. The explanation has been advanced that wives, unlike cohabitees, are protected in the family court. But there is no obvious reason why the protection given in the family court should disentitle the wife to the protection of the law of rape. Moreover, a cohabitee is now protected by the Domestic Violence and Matrimonial Proceedings Act 1976 but this has not been thought to be a reason for extending Hale's rule to cohabitees.

40. Those who support Hale's rule fear that if it were altered the police would have to make distasteful enquiries into the details of married life, and courts would be faced with issues of fact that would be hard to determine. But these

possibilities as we have seen already exist in the present law (see paragraph 29 above). The fact is that the police are reluctant to bring criminal charges in these circumstances, since they think that such matters are better left to the remedies provided by the family court. There is no reason to suppose, therefore, that an abandonment of Hale's rule would result in a great intrusion of the criminal law into family matters.

41. Lastly, there are technical as well as social reasons for acknowledging the simple principle that a wife is as much entitled to withhold consent to sexual intercourse as anyone else. The problem of constructing a provision on more restrictive lines would be formidable. We have mentioned some cases where we suppose that everyone would agree that the husband should be liable for raping his wife (see paragraph 31 above). However, there is really no satisfactory way of listing the marital rapes that should be punishable as rape and not merely as some kind of assault. There would, too, we consider, be difficulty in drafting and applying a provision that would replace the present exceptions to the husband's immunity by a more general exception based on the termination of cohabitation.

42. How then should the law deal with marital rape? We have said above that to enact specifically that certain types of conduct should be rape would create insuperable problems of definition. However, if wives were to be treated in relation to rape in the same way as other women, that might lead to prosecutions which some would think were not desirable in the interest of the family or the public, although the police would probably only want to prosecute in the clearest cases. We are agreed that the only practical way in which control could be exercised is through a requirement for the consent of the Director of Public Prosecutions for prosecutions for marital rape. The Director has told us that if the law is changed such a provision would be essential, although he foresees difficulties in exercising his discretion in relation to these cases. In exercising his discretion in any crime he has two main concerns: whether there is sufficient evidence to warrant prosecution, and whether the public interest points to prosecution. He tells us that while he would be able to assess the evidence, it would be hard in many cases to exercise his usual function of judging the public interest served by prosecuting. We recognise that marital rape may well differ in this respect from other cases where the Director's consent is required, and we certainly would not recommend that the legislature should seek to spell out the factors which he should take into account in these cases. We anticipate, however, that with experience, as in other cases where his consent is required, the Director would be able to form a policy on prosecution for marital rape.

43. As we have said, we are divided on these matters. We should welcome comment on the problems that we have outlined and the proposals that we have made to meet them.

Should the Concept of Rape be Widened?

44. Under this heading we consider the last three questions set out at paragraph 19 above. We asked there whether rape should be extended to cover non-consensual oral intercourse, non-consensual anal intercourse (whether

on a man or woman), or any form of non-consensual vaginal penetration, for instance by means of a bottle. Those who would favour this kind of change argue in particular that the present law operates to the disadvantage of women by treating them as a special case, instead of assimilating rape to analogous sexual assaults on men; and that some sexual assaults which in law fall short of rape may be just as serious in character as rape.

45. We recognise the force of these views, especially that indecent assault has to cover an extremely wide range of acts, from the most gross such as forcible oral intercourse to the relatively minor such as bottom-pinching. Nevertheless, our provisional opinion is that rape should not be extended in any of the ways proposed. In this we share the opinion of the Heilbron Committee, that "the concept of rape as a distinct form of criminal misconduct is well established in popular thought, and corresponds to a distinctive form of wrongdoing".[1] The risk of pregnancy is a further and important distinguishing characteristic of rape.

46. However we are agreed that the penalties for bad cases of indecent assault are too low: apart from forcible buggery, where the maximum is life, the maximum penalty for indecent assault on a woman is 2 years' imprisonment (5 years' in the case of a girl below 13). One way to remedy this would be to increase the maximum penalty in the case of the woman, perhaps to 5 years. Some of our members object to this expedient, on the ground that it would enable the court to impose a severe sentence for what might be a relatively minor indecent assault. They would prefer a new offence of aggravated sexual assault, and point to the example of the United States. We consider the case for such an offence in connection with our review of indecent assault at paragraphs 59–60 below. At this stage we confirm that we provisionally favour confining rape to non-consensual sexual intercourse with a woman and we invite comment on that decision.

Strengthening the Law of Rape

47. Some of those who have written to us want the law of rape to be strengthened so as to make sure as far as is possible that the guilty are convicted. It is said that too many defendants who are guilty get acquitted. The arguments are first, that juries are not allowed by the law of evidence to know all the relevant facts, for example that the defendant has been previously convicted of rape or indecent assault. Secondly, it is said that the rules relating to the need for corroboration of a victim's evidence are too stringent and operate to the advantage of the offender who chooses his victim and the time and place of his crime carefully and knows the value to him of saying nothing when questioned by the police. Thirdly, so it is said, juries are sometimes reluctant to convict young men whose good characters have been revealed in court, because of the severe penalties which convicted rapists usually get. This is particularly so when the alleged victim has willingly allowed herself to get into a situation of a kind in which a sensible woman would have appreciated the possibility that sexual intercourse might be

---

[1]Report of the Advisory Group on the Law of Rape, Cmnd. 6352.

expected, as for example when she has not objected to some degree of sexual familiarity or has agreed to go to a quiet place with someone whom she does not know—the "pick-up" situation.

48. We have kept in mind that an acquittal on a charge of rape may bring anguish and distress to the complainant and her family if the prosecution's evidence had been strong and the defence of consent flimsy. We doubt, however, whether many charged with rape have been previously convicted of that offence (or, for that matter, acquitted on a charge of rape). The criticism that the law of evidence keeps away from the jury relevant facts is one which could be applied to other offences. Many men charged with burglary have previous convictions for that offence. The law of evidence, most of which is based on experience as to what is expedient to ensure a fair trial, provides that proof of a defendant's propensity to commit the kind of offence with which he is charged is irrelevant, save in special circumstances, to prove that he committed the offence with which he is charged. Still less relevant to proof of guilt of rape would be proof that on some previous occasion the defendant had been acquitted of such a charge (*Maxwell v D.P.P.* [1935] A.C. 309). All but one of us can see no compelling reason why rape should provide an exception to the general rule of evidence. Professor Williams, however, is of the opinion that rape should provide an exception. The reason he gives is that rape, unlike theft for example, is a crime of highly specific character which is committed only by a small minority of men. If there is a conflict of evidence between the woman and the defendant on the question whether the latter used force or threats to obtain sexual intercourse, any ordinary person would regard it as highly relevant that the defendant had previously been convicted of rape. The evidence would not necessarily be conclusive, but taken in conjunction with other evidence (for instance the fact that the woman was given a lift in a car and taken to a remote spot where the act occurred) it might well be convincing.

49. As to corroboration, we appreciate that the victim of rape may find it offensive to hear a judge directing a jury, as he should, that it would be dangerous to convict on her uncorroborated evidence. This rule is said to be based on long judicial experience. Women and girls, particularly young girls, sometimes allege that they have been raped in order to explain away evidence leading to the inference that they have recently had sexual intercourse. Occasionally false allegations of rape are made vindictively. In our Eleventh Report, which was published in June 1972, we considered the rules as to corroboration.[1] We thought that there was substance in many of the criticisms which had been made of them; but a majority of us were of the opinion that the judges should continue to warn juries in sexual cases that if they found that a complainant's evidence was not corroborated there would be "a special need for caution" before convicting the defendant on that evidence (paragraph 188). We continued as follows: "A direction to this effect will, we think, convey what is the real difficulty in sexual offences, and it will avoid preserving the seeming anomaly in the present law of directing the jury that there is 'a danger' which nevertheless need not prevent them for convicting. What form the warning

[1]Evidence (General), Cmnd. 4991, paragraphs 174–203.

should take will be a matter for the judge to decide according to the circumstances." We are still of the same opinion.

50. To meet the third of the criticisms made of the law, it has been suggested that there should be two degrees of rape, one carrying the same maximum penalty as at present, that is life imprisonment, and one carrying a much lower maximum penalty, say 3 years. The first category should apply to rapists who inflict violence on their victims or who are strangers to them and use threats of violence to induce submission. All other cases of rape should go into the second category. It is argued that with this division into categories juries would not be worried, as they are thought to be, about the possibility of a young man of previous good character being sentenced to a long term of imprisonment for going too far with a woman who had not behaved as sensibly as she should have done. Further, such a division would tend to get rid of the disparity of sentences which are said to occur. On the other hand it may be thought that the existence of a lesser form of rape might lead to unjust convictions. The majority of us, however, do not agree with this proposal and reaffirm our general position, that so far as possible offences should be stated simply, the maximum penalty being set high enough to take account of varying circumstances. We invite comment on these suggestions for strengthening the law of rape.

Obtaining Sexual Intercourse by Threats, False Pretences, Etc.

51. We have already mentioned certain lesser offences which may be invoked to supplement the offence of rape. By section 2 of the Act of 1956 it is an offence to "procure a woman, by threats or intimidation, to have sexual intercourse in any part of the world". By section 3 it is an offence similarly to procure a woman by "false pretences or false representations". These offences are grouped with rape in the Act of 1956, and not with offences of prostitution and procuration (sections 22–31), but their original object was the white slave traffic and for the purposes of criminal statistics they are classified with the other procuring offences, of which they form a very small proportion. We have considered whether sections 2 and 3, which are in wide terms, ought to be remodelled to fit more closely their original purpose. The majority of us are not in favour of so restricting these offences. Although they are rarely charged, they will remain available to the prosecution to deal with the occasional example of conduct that will not amount to rape but that should not be allowed to fall outside the criminal law. We acknowledge the width of these sections and some of our number would like to see them made more specific.[1]

---

[1]By confining them to frauds as to marital status, as to identity, as to a medical or nursing qualification, or as to the prospects of the deceived woman if she leaves the United Kingdom. This would exclude fradulent statements made by the man as to his wealth or as to gifts that he proposed to make to the woman. (There is no need to cover the case of an employee or a member of a public body who obtains sexual intercourse by promising the woman a benefit in virtue of his position, because the man would in such a case commit an offence under the Prevention of Corruption Act 1906 or the Public Bodies Corrupt Practices Act 1889.)

Most of us, however, take the view that sections 2 and 3 have in practice been used with restraint and present no real problems for judges or juries on the rare occasions when they are invoked. Accordingly the majority of us favour retaining them in substantially the same terms as at present. We suggest that in section 3 the reference to "false pretences or false representations", which may unnecessarily narrow the scope of the provision, should be replaced by a reference to "deception". The maximum penalty for offences under these provisions, at present 2 years, should, we consider, be increased to 5 years if our other recommendations are accepted and there ceases to be an offence of rape by fraud.

52. By section 4 of the Act of 1956 it is an offence to administer "any drug, matter or thing with intent to stupefy or overpower" a woman for the purpose of obtaining sexual intercourse with her. There have been few prosecutions under this section. We have considered whether the offence should be expanded in any respects and conclude that it should be extended to protect males as well as females and that it should cover all sexual acts (including homosexual acts). However, we believe that the essence of the offence should be retained, most of us considering that an offence in terms of an intent substantially to impair a person's power to appraise or control his conduct (on the lines of the American Model Penal Code) would be too wide. This is because the present wording covers the administration of alcohol, which is right if the intent is to get the victim dead drunk, but unacceptable if there is merely an intent to reduce inhibitions or excite sexual feelings. Nor do we see any need to amend section 4 so that it reaches the administration of substances merely intended to excite sexual feelings. Our proposals for the general law of offences against the person will cover such cases where the substance in question is a harmful one such as cantharides (Spanish fly).[1]

[1]Report on Offences against the Person, Cmnd. 7844 (1980), paragraph 188.

NON-CONSENSUAL BUGGERY

53. Until 1967 anal intercourse, whether between males or with a woman, and whether consensual or not, constituted the crime of buggery, punishable with a maximum penalty of imprisonment for life. As a consequence of the Sexual Offences Act 1967, anal intercourse between consenting adult males in private ceased to be an offence (save in certain special circumstances); non-consensual buggery on a male who has reached 16 became punishable with a maximum penalty of 10 years' imprisonment. The law as to anal intercourse with a male under 16 and with a woman remains unaltered. We are provisionally recommending that consensual anal intercourse with a woman above a minimum age should cease to be an offence (see paragraph 79 below). In this section of the Working Paper we consider what provision the criminal law should make as to non-consensual buggery.

54. The main proposals that were put to us for reforming the offence of non-consensual buggery concerned its classification. It was argued that it was so much akin to rape that the two offences should be merged into one. On the other hand, it was said that, because the notion of non-consensual buggery provoked strong feelings of revulsion which could be prejudicial to a defendant, the offence should be subsumed under the heading of indecent assault. A trial where the facts alleged constituted non-consensual buggery could then, so the argument went, proceed in a more dispassionate atmosphere. We have already stated above, in the context of a discussion upon whether the offence of rape should be extended to include certain grave assaults (penetration by a bottle for example) our provisional conclusion that rape corresponds to a distinctive form of wrongdoing and should be retained as a separate offence. This also applies to non-consensual buggery, which most of us consider should be neither merged with rape nor subsumed under indecent assault.[1] To the victim it must be, in the opinion of most of us, an especially humiliating and distressing experience.

55. A further reason why buggery should be regarded as distinct from indecent assault concerns the maximum penalties for the offences. We propose below (paragraph 58) that the maximum penalty for indecent assault should be 5 years' imprisonment. This, we believe, would be inadequate to deal with all cases of non-consensual buggery. We consider that life imprisonment should be available to the courts in exceptional cases of non-consensual buggery where, as in some cases of rape, the trial judge might not be able to predict when it would be safe for the defendant to be released. This is already the maximum penalty where the victim is a male under 16 or a female, as we have mentioned above. We propose, with one dissentient, that life imprisonment should become available again for all cases of non-consensual buggery.

---

[1]Professor Williams would favour the abolition of the crime of buggery, which would be subsumed under his proposed offence of aggravated sexual assault (see paragraph 59 below).

INDECENT ASSAULT

56. An indecent assault is committed where a person assaults another in circumstances of indecency. The assault may be relatively minor (for example, the touching of a woman's breasts without her consent) or it may be very serious indeed (for example, forcible fellatio or anal or vaginal penetration with a bottle or other object). Under section 14 of the Sexual Offences Act 1956 it is an offence, triable either way, for a person (male or female) to make an indecent assault upon a female. The maximum penalty is 2 years' imprisonment where the offence is committed upon a female aged 13 years or over and 5 years' imprisonment where it is committed upon a girl under 13. Under section 15 of the 1956 Act it is an offence, triable either way and punishable with 10 years' imprisonment, for a person (male or female) to make an indecent assault upon a male.

57. As a general rule consent negatives assault, but under present law a person may be convicted of indecent assault upon a girl or boy under 16 without the prosecution having to establish that consent was not present (by virtue of sections 14(2) and 15(2) respectively). The problems connected with this are discussed below in the section on indecency with the young. We emphasise that this section is concerned only with the case where there is real assault, that is to say, where the victim has not consented.

58. Three different maximum penalties for indecent assault are mentioned above: 2 years' imprisonment for an offence against a female aged 13 years or over, 5 years for an offence against a girl under 13 and 10 years for an offence against a male. It is the experience of most of us, coinciding with the evidence we have received upon this point from the judiciary, that the 2 year maximum for the offence against a female aged 13 years or over is sometimes found to be inadequate in some of the very serious cases that from time to time occur. We have considered the argument advanced to us against an increase in the maximum penalty, that where injury is caused by an indecent assault a charge in respect of the assault causing the injury could be brought under the legislation on offences against the person, where the maximum is greater than 2 years' imprisonment. It is not, however, always possible to prove injury even in a case of forcible oral intercourse or penetration by a bottle and we consider that the penalty for indecent assault should be adequate to deal with such cases. In our opinion, with two dissentients, a maximum of 5 years' imprisonment should be available for indecent assault upon a female aged 13 years or over as it is when she is under 13. Most of us do not share the fears of the two dissentients than an increase in the maximum penalty on this scale would have an inflationary effect upon sentencing in the ordinary case of indecent assault upon a woman, where the 2 year maximum is adequate. As regards indecent assaults on males, we can see no reason why the maximum should be higher than for assaults on women. We therefore propose that the maximum penalty for any form of non-consensual indecent assault should be 5 years' imprisonment.

59. During our deliberations on the penalty for indecent assault, Professor Williams expressed doubts about raising the maximum for indecent assault

upon a woman to 5 years' imprisonment and suggested that there should be two degrees of indecent assault, an ordinary form and an aggravated form punishable with a higher maximum penalty. The different maxima could be 2 years and 5 years respectively. It was argued that the creation of the aggravated offence would allow the present 2 year maximum for indecent assault on a woman to be retained for the generality of cases and it would carry the advantage that the judge in sentencing would have the verdict of the jury defining what the defendant had done. The proposal involved our having to consider where a dividing line would be drawn between indecent assault and aggravated indecent assault, and we therefore looked at the sort of provision found in some criminal codes in the United States defining aggravated indecent assault, homosexual or heterosexual.[1]

60. Having given Professor Williams' suggestion our consideration, however, the rest of us remain unconvinced that it is possible to settle the dividing line in this sort of way. If penetration by an object is to constitute the aggravated offence, why should not penetration by the hand (or one or more fingers)? Even if it were possible to produce a dividing line that would not attract criticism, the existence of the two offences would involve the courts in having to concern themselves with a number of complex and detailed questions of fact in order to decide which offence the defendant had committed. At present these matters are relevant only to sentence. If they were to become relevant to whether the defendant was guilty of the aggravated offence, the issue would be likely to be fought hard by the defence. This would not be in the interests of the victim (especially a child) who might have to give detailed evidence, which would be challenged in cross-examination, of the precise nature and extent of any vaginal or anal penetration. The majority of us are not convinced that any form of aggravated offence could be created which would satisfactorily identify those indecent assaults which should be punished with special severity. We accordingly propose that there should be one offence of indecent assault punishable with a maximum of 5 years' imprisonment, but we invite comment upon the matters discussed in this paragraph.

61. Professor Williams is of opinion that the term "*indecent* assault" is somewhat inappropriate to describe the act of a man who uses a bottle forcibly upon a woman in simulated intercourse. He considers that to imply that the objection to the attack is that it is indecent greatly understates the position: indecency has almost nothing to do with it, since the objection to the man's action upon the ground of indecency is swamped by the objection based on pain and humiliation. He has suggested that the term "sexual assault", which is coming into increasing use in the United States, is more appropriate to

[1] In the context of an extended definition of sexual intercourse the penal code of the State of Washington refers to "any penetration of the vagina or anus, however slight, by an object . . . and . . . any act of sexual contact between persons involving the sex organs of one person and the mouth or anus of another". Insofar as this formula involves the abolition of non-consensual buggery as a separate offence and its subsumption under the heading of "aggravated indecent assault", see paragraph 54 above.

describe all cases of indecent assault. The term "indecent assault" has, however, been in use for over a century without there having been perceived any practical need for it to be altered in relation to a genuine, non-consensual assault in circumstances of indecency. It is suitable to describe the generality of cases and, in the opinion of the rest of us, it is not inappropriate to describe penetration by a bottle or other object. We consider that the traditional name of the offence should be retained, especially since we are not proposing that the offence should be altered in substance.

62. We have already indicated our provisional agreement with the Policy Advisory Committee, that there should continue to be an age of consent for intercourse with girls and that it should stay at 16 (paragraph 13 above). As everyone acknowledges, offences in this category will vary greatly in their character and seriousness. An offence committed on a 12 year old girl by a middle-aged man is not comparable with sexual intercourse between a boy of 16 and his 15 year old girlfriend. In *R. v Taylor* [1977] 1 W.L.R. 112 the Court of Appeal described the "wide spectrum of guilt" which is covered by the offence of having unlawful sexual intercourse with a girl under 16, and provided guidance for sentencing in the kinds of cases that come before the courts.

63. We have considered how far it is practicable for such distinctions to be reflected in the criminal law by having a variety of offences, of differing gravity, or by providing special defences, for example that the couple were close in age. The alternative which we considered was, as at present, to leave a great deal to the discretion of those administering the law, whether in prosecuting or in sentencing. In considering sexual intercourse with young girls, we have tried to bear in mind that most cases never reach a court. In the nature of things most instances of this offence will go undetected and unpunished. In 1977, for instance, as shown in the Policy Advisory Committee's Working Paper on the Age of Consent, more than 5000 pregnancies were recorded in Great Britain among girls below 16: 3681 offences came to the notice of the police in England and Wales.[1]

64. The Home Office Research Unit have undertaken a study of convictions for this offence in 1973.[2] Their findings indicate that most of the girls involved were aged 14 or 15. A man aged 17 to 29 was most usually the partner as long as the girl was aged 12 or over; but a very high proportion of men of 40 or over were involved with girls below 12. We have no reason to suppose that 1973 was untypical in this respect. As the Policy Advisory Committee have pointed out (Working Paper on the Age of Consent, paragraph 29) cases of unlawful sexual intercourse are subject to an unusually high degree of discretion in deciding not to prosecute. Broadly, for every adult prosecuted in the years 1967–77, two were cautioned; the ratio for juveniles was one to ten. The Home Office Research Unit study shows too that offenders were generally dealt with by means of a non-custodial penalty, but that the younger the girl and the older the offender the more likely it was that a custodial penalty would be imposed. A majority of offenders over 40 and of offenders who had been involved with girls under 12 received a custodial penalty in 1973.

---

[1]Paragraphs 26, 29.

[2]Walmsley R. and White K. (1979), Sexual offences, consent and sentencing, Home Office Research Study No. 54, H.M.S.O., pp. 28–30; see also p. 64. The information in this study is supplemented by Walmsley and White (1980), Supplementary information on sexual offences and sentencing, Home Office Research Unit Paper 2, H.M.S.O.

65. At present there are two offences: sexual intercourse with a girl under 13, for which the maximum penalty is life imprisonment, and sexual intercourse with a girl under 16, with a maximum of 2 years (Sexual Offences Act 1956, sections 5 and 6). The latter offence is triable either way. With the factors mentioned above in mind, we looked at these two offences.

66. The first point we considered was whether there should continue to be two offences of unlawful sexual intercourse, or whether the graver cases could be dealt with suitably by the award of a more severe sentence. We also considered whether, if there were to continue to be two offences, the line between them is rightly drawn at 13. Offences against girls under 13 are regularly treated more severely than offences under section 6, although where the adult is under 25 there is some evidence that in practice the courts nowadays draw a slightly different line from that in the statute, treating 12 (roughly the age of puberty for many girls today) as the dividing line. We asked the Policy Advisory Committee for their advice on where the line should be drawn. They told us that girls of 12 are at an extremely vulnerable stage of their lives, in particular because they are usually in their first year at a senior school and there is a risk that they will imitate the behaviour, including the sexual ways, of older girls. The Policy Advisory Committee recommended strongly that the age for the serious offence should remain unaltered, and we accept their advice. Our provisional recommendation is therefore that there should continue to be separate offences corresponding to sections 5 and 6 of the Act of 1956, the line between them being drawn as at present at 13.

Defences

67. Our next concern was with the defences that should be available under sections 5 and 6. We have considered as well as the existing defences, which most of us consider right in principle but in need of some revision, various suggestions for relaxing the law where mitigating circumstances exist. Between 1885 and 1922 it was a defence to a charge under what is now section 6 of the Act of 1956 that the defendant believed on reasonable grounds that the girl in question had attained the age of 16. The Bill that became the Criminal Law Amendment Act 1922 at first contained no such defence, but a political compromise to secure the passage of the Bill led to acceptance of the "young man's defence" now contained in section 6(3) of the Act of 1956:

> "A man is not guilty of an offence under this section . . . with a girl under the age of sixteen, if he is under the age of twenty-four and has not previously been charged with a like offence, and he believes her to be of the age of sixteen or over and has reasonable cause for the belief."

This tightened the law, since the defence is open only to men under 24. If the defendant is unable to bring himself within section 6(3) then mistake as to age is no defence (*Prince* (1875) L.R. 2 C.C.R. 154).

68. This is an unusual provision, not only in making the availability of a defence turn upon the age of the defendant, but in providing for a prior criminal charge to operate as an absolute bar to the defence. We believe that it is excessively restrictive and have considered how it should be dealt with. In the first place, most of us consider that the defendant should be allowed to

plead that he was honestly mistaken, without being held to a standard of reasonableness. Where the girl is plainly under age, the jury or court need not accept the defence. At the same time, a defence of honest belief preserves the principle of *mens rea*. We think too that the defence should be available irrespective of the age of the defendant. We find it difficult to understand why it should be thought that the judgment of a man over 24 should be sounder in this respect than that of a younger man. We have considered what provision, if any, should be made to prevent the defence from being exploited by men who have previously been convicted of offences against girls below 16. At the very least, in the interest of fairness, we believe that any restriction on the defence should apply only where the defendant has been *convicted* of a similar offence. However, we do not wish to preserve the bar as it operates at present. One possibility would be to replace it by a provision on the lines of section 27(3) of the Theft Act 1968, which allows the Crown to prove previous convictions where a defendant denies guilty knowledge on a charge of handling stolen property. However, in the experience of our members this provision is rarely used, and it is not looked upon favourably by practitioners. We believe that an analogous provision in the present context would be even less attractive. The prejudicial effect of such evidence would be much higher than its probative value in many cases. For example, a man convicted of an offence with his landlady's 13 year old daughter might well, some years later, make an honest mistake about the age of a girl he met at a discotheque in another town. For this reason there is a good case for dispensing with a special provision and leaving the matter to the general law of evidence as recently stated by the House of Lords in *Boardman* [1975] A.C. 421. We invite comment on these questions.

69. A man who has gone through a ceremony of marriage with a girl under 16 has a defence by section 6(2) of the Act of 1956 that at the time of intercourse he believed her to be his wife and had reasonable grounds for his belief. We consider that a defence on these lines should be retained, although (like mistake as to her age) it should be a defence of honest belief.

70. Liability under section 5 is strict. It is no defence that the defendant believed that the girl was over 12 even if his error was a reasonable one (*Prince*, paragraph 67 above). The justification for such strictness is the need to afford the maximum protection to the girl: a man has sexual intercourse with a young girl at his peril. Most of us consider that some derogation from the general requirement of *mens rea* is justifiable on that ground, though some argue that the fact that the girl is below 13 is a circumstance of aggravation so that a defence of no *mens rea* in relation to that circumstance should on principle be permitted. We are all agreed, however, that the defendant should have a defence that he believed the girl to be over 16.

71. Under section 47 of the Act of 1956 it is for the defendant to establish his belief (as to age or marriage), which casts on him the burden of satisfying the jury of it on the balance of probabilities. This burden, we consider, should be removed in any new legislation. In our Eleventh Report[1] we recommended

[1]Evidence (General), Cmnd. 4991 (1972) paragraphs 137–140.

strongly that burdens on the defence should be evidential only; that is, in such cases it should be for the defence to raise an issue proper to be left to the jury, but for the prosecution thereafter to have the burden of satisfying the jury or court beyond reasonable doubt in the normal way. We affirm that recommendation in relation to these defences; although we should prefer such a change to be made by means of a provision on the lines of clause 8 of the draft Bill appended to that Report dealing in general terms with the position where the burden of proof falls on the defence.

72. We have referred to the wide discretion in prosecuting and sentencing that characterises these offences. It has been suggested in evidence to us from a number of quarters that this discretion should receive statutory recognition to some degree. For instance, section 6 might not apply where the girl had reached 13 and the boy was under 17. The Policy Advisory Committee, however, were opposed to the introduction of rigid dividing lines and the majority of us agree with them.[1] A further question arises whether it would be possible and desirable to allow a special defence to protect the man from prosecution where it was the girl (being over 13) who took the initiative, and where she was not corrupted. Such cases of course are met with in the courts. Professor Williams would favour a defence along the lines of section 138(3) of the Canadian Criminal Code, whereby on a charge of sexual intercourse with a girl of 14–16 the court may find the defendant not guilty if the evidence does not show that, as between the defendant and the girl, the defendant was wholly or chiefly to blame. He suggests that such a defence might be qualified by the condition that the defendant must not have accepted a police caution in respect of conduct with the same girl on an earlier occasion, or have refused a caution on the present occasion. The general view of the Committee, however, is that this matter too is best left, as now, to the discretion of the police in prosecuting and of the court in sentencing.

73. We are agreed that the 12 month time limit on bringing prosecutions should be retained.

74. We have also considered what the penalties for these two offences should be, bearing in mind that since 1977 it has been possible for charges under section 6 of the Act of 1956 to be tried summarily. The present 2 year maximum for offences under that section is sometimes imposed, and we consider that it should be retained. While we see no need to increase it, we point out that in appropriate cases consecutive terms of imprisonment may be imposed. Although the age limits have changed, the maximum penalty for the more serious of the two offences of unlawful sexual intercourse has for a long time followed the maximum for rape. It is now life imprisonment. We think it right that this maximum should be retained for the offence under section 5. Sexual intercourse with a very young girl may be as serious as rape. It may be necessary on occasion for an offender to be sentenced to life imprisonment.

---

[1]Working Paper on the Age of Consent, paragraph 30. Professor Williams favours such a provision.

CONSENSUAL BUGGERY

75. If there had been a comprehensive review of the law on sexual offences at the time of the passing of the Sexual Offences Act 1967, it seems unlikely to us that Parliament would have legislated to permit anal intercourse in private between consenting adult males while keeping an offence of buggery to punish such intercourse between adults of the opposite sexes. We have already indicated our provisional acceptance of 18 as the minimum age for male homosexual acts, i.e. buggery and gross indecency. Here we consider—

(a) whether there should be a minimum age for consensual heterosexual anal intercourse, and what it might be, and
(b) whether the time has come to merge the offences of consensual buggery and gross indecency.

76. Very few men are prosecuted for heterosexual buggery, consensual or non-consensual. In 1973, for instance, as the Home Office Research Unit's Study shows, there were only 22 convictions for buggery on a female. Of these, all but five were either for acts involving girls under 16 or in circumstances classified by the authors of the Study as "rape-like". The five offences were committed by three husbands, one common law husband and one former cohabitee. None of the five was detained in custody after sentence, although one of them was given a prison sentence of four months, which he had already spent in custody awaiting trial.[1]

77. In spite of the rarity of prosecutions, a number of those who sent observations to us thought that the present law should be retained in the interest of the dignity of the individual and of the marital relationship. More pragmatically, some doubt was expressed as to whether it would be possible to prove lack of consent where the parties were married or living together. We recognise that to many people anal intercourse, like certain other sexual practices, may be abhorrent. Nevertheless, we do not believe that that is sufficient to justify making it a criminal offence when occurring between consenting adults. We sought the advice of the Policy Advisory Committee and they told us that in their opinion the only live issue was the appropriate minimum age. To that we turn.

78. The Policy Advisory Committee, with one dissentient, told us that there is no reason to single out anal intercourse from other practices in which a girl becomes free to engage when she reaches 16. They considered that such conduct is one of a variety of kinds of sexual behaviour, apart from ordinary sexual intercourse, in which couples may engage for a variety of reasons. They recognised that the desire for anal intercourse by one partner may cause the other distress, but took the view that that was an aspect of their relationship more properly dealt with by agencies other than the criminal law. They do not believe that social ill effects flow from this kind of intercourse in itself or that it is materially different from other kinds of sexual activity in which girls are free

[1]Walmsley R. and White K. (1979) Sexual offences, consent and sentencing, Home Office Research Study No. 54, H.M.S.O., p. 27.

to engage at 16. It was observed that girls of this age who are involved in sexual activity are more likely to be interested in gaining experience of normal sexual intercourse anyway. The dissentient view, which some of us share, is that in fixing the age of consent at 16, which is also the minimum age for marriage, the law recognises the natural development of sexual feelings in a girl, and that this is not relevant to anal intercourse. Girls may need protection from pressure to engage in such intercourse till an age later than 16, even though they may be married, and the sanction of the criminal law should therefore remain, as proposed in the case of boys, until they reach the age of 18. The majority see the possible invasion of marital privacy by the criminal law as a strong ground for resisting an age above 16; nor would they consider it practicable to distinguish married (or cohabiting) couples from others.

79. We provisionally recommend that consensual anal intercourse should no longer be an offence where the woman has reached a specified age, and we invite comment on whether that age should be 16 or 18.

80. We have already given our reasons for recommending that there should be distinct offences of non-consensual buggery and indecent assault. It has been argued that one of the reasons, the especial humiliation felt by the victim of buggery, does not apply with the same force where the act does not amount to an assault. Professor Williams would therefore merge the offences of consensual buggery and serious or gross indecency with a child above the age of 13, since in his view neither the possibility of physical damage resulting from the act, nor the psychological consequences that might follow from it, warrants a distinct offence of buggery above that age. On this view there is no place for a minimum age for heterosexual anal intercourse above 16.

81. The rest of us, however, consider that buggery with a male aged 13–18 and with a female between 13 and whatever should be decided as the minimum age in her case (16 or 18) should remain a separate offence because this distinctive conduct has such potentialities of physical and psychological damage that it ought to be distinguished from lesser forms of sexual conduct. For buggery with a child below 13, we consider that a sentence of life imprisonment should be available, as at present. Buggery with a child above 13 does not, in our view, require a maximum penalty higher than 5 years' imprisonment. In the case of buggery with a male below the minimum age, we believe that both parties should continue to be guilty of the offence. However, in the case of heterosexual acts, the girl below age should be able to rely on *Tyrrell* [1894] 1 Q.B. 710, so that she will not be liable as an accomplice to the man's offence.

INDECENCY WITH THE YOUNG

82. We now consider certain other offences intended to protect the young engaging in consensual sexual activities which do not amount to full sexual intercourse. At present all sexual activity with a boy or girl under 16 is illegal. In this section we consider to what extent it is necessary to preserve that protection for the child under 16 when the activity is wholly consensual. Although we favour replacing the present law by offences applicable to the young of both sexes alike, for convenience we treat girls and boys separately in this section.

Girls

83. It is an offence for a person (male or female) to make an indecent assault on a woman or girl. As well as true assaults, consensual sexual acts with a girl under 16 are caught by this offence, since the law deems her incapable of consenting to the act in question (Sexual Offences Act 1956, section 14(2)). The maximum penalty is 2 years' imprisonment (5 years if the girl is under 13). Apart from the fiction of lack of consent, the offence is treated strictly as one of assault so that the accused must be proved to have done some positive act to the girl. It is not an indecent assault for instance, where at the request of the defendant the girl has touched his genitals; nor is it an offence at common law to invite the girl to do so. To meet this deficiency, the Indecency with Children Act 1960 (applying to children of either sex) makes it an offence for a person to commit an act of gross indecency with or towards a child under 14, or to incite a child under that age to such an act with him. The maximum penalty is 2 years' imprisonment.

84. The Home Office Research Unit examined the 3,000 convictions of males for indecent assaults on girls and women in 1973.[1] They found that 80% of offenders were aged 17 or over and that 70% of victims were girls below 16. As with unlawful sexual intercourse (paragraph 64 above) the older men tended to be involved with the young girls; and while custodial sentences were rare, the ages of victim and offender were important factors in sentencing. The figures suggest that, although the offence is defined in the most general terms, in practice it is invoked only in the more serious kinds of cases. The experience of our members is that it is very rare for a young man to be prosecuted for consensual indecent assault on a girl close to the age of consent. We think that this is a proper exercise of discretion in prosecuting; we would not wish to see the criminal law used against adolescent "petting". In examining these offences we have been particularly concerned with these questions: Should the fiction of assault be abolished, and, if so, how should the elements of the offence be stated? Should the "age of consent" remain at 16? Should there be any special defences, corresponding to those available on a charge of unlawful sexual intercourse?

---

[1]Walmsley R. and White K. (1979), Sexual offences, consent and sentencing, Home Office Research Study No. 45, H.M.S.O., pp. 31–33; see also p. 65.

85. Most of us think that the fiction of indecent assault where the girl is below 16 is a source of confusion and that it should not appear in a revised offence. Instead, there should be a provision stating in straightforward terms what conduct is proscribed with a girl below a certain age. Indecent assault would remain available where the girl's consent could be shown to be lacking. However, it is convenient to use the expression "age of consent" in the present context. Because of the width of the present offence of indecent assault, which includes quite minor indecencies as well as much graver conduct, the Policy Advisory Committee suggested to us that there should be two offences with separate "ages of consent". For the more serious offence, involving genital contacts, the age would be 16; lesser acts would under their proposal become permissible at 14. One advantage of such a scheme, it is claimed, would be to encourage pleas of guilty to the lesser offence, sparing the victim from giving evidence. We have much sympathy with the idea behind this proposal, for what may be excusable with a girl of 14 or 15 may cease to be when done with a younger girl. But most of us consider that the practical difficulty of drawing the line between the two offences in terms that could be explained to a court or jury, and the problems over evidence that might arise in contested cases, must rule out this proposal. We think that the present law, expressed as it is in terms of indecency, already achieves in practice what the Policy Advisory Committee are seeking, and we do not favour the attempt to embody that in a formal distinction of the kind they propose. We develop this point in considering the elements of the proposed provision below.

86. Most of us would retain the present age of consent of 16. We are agreed that it should not be set below 15, although we have received a number of submissions advocating such a change. Some of us believe that there is a danger of a creeping effect in these matters, so that a minimum age tends to become eroded in practice. Most of us think that acts such as oral sex are extremely serious (perhaps more likely to disturb a young girl meeting them for the first time than ordinary sexual intercourse). They consider too that many parents would expect the assistance of the law in discouraging children from engaging in such acts at an early age. These members do not wish to see the minimum age for such acts in danger of the kind of erosion we have mentioned. Professor Williams, nevertheless, holds that the age should be set at 15, since marriage is permitted at 16 and couples are bound to engage in intimacies before marriage. Most young people, however, will not marry at 16, and the rest of us prefer to rely on the common sense of those concerned with the enforcement of the law to exclude such cases from the courts (as in practice they are now excluded). More pertinent, we consider, is the school leaving age, which is 16: the present law protects girls while still at school. What is to be the "age of consent" is not primarily a question for lawyers, we appreciate. It is for

[1]We have indicated our provisional acceptance of the recommendation of the Policy Advisory Committee that the age of consent for sexual intercourse should remain at 16 (paragraph 13 above). Here we are concerned only with acts not amounting to full sexual intercourse.

society to decide what should be the age at which sexual familiarities are allowed with its young, and we invite comment on the provisional view of the majority of the Committee that the age should remain at 16.

The Elements of the Offences

87. We have said that we favour the removal of the fiction of assault. The offences that we have in mind, which would also replace section 1 of the Act of 1960, would follow the form of that provision. The substance of the offences would be the commission of proscribed conduct with or towards a child or the incitement of the child to the conduct. The question is therefore how best to state the proscribed conduct. Professor Williams proposes a total departure from existing terminology. In his view the offence should follow modern legislation in the United States in dispensing with the word "indecent", since this is now regarded as an inapt expression for consensual sexual conduct in private, and smacks of nineteenth-century sexual morality which should have no place in the criminal law. Expressions used in modern American legislation instead of references to indecency include "sexual contact", "sexual touching", "sexual abuse" and "sexual misconduct". Professor Williams prefers the last, and, again following American practice, he would define it in anatomically explicit terms. Sexual misconduct would be defined as the touching of a child in the region of the genital organ (or inciting a child to touch any other person in this way) for the purpose of arousing or gratifying sexual desire. Touching through clothing would be included. However, as in the case of other sexual offences, most of us are not in favour of provisions embodying this degree of anatomical detail (see paragraph 60). Such a definition may also be thought to be too restrictive: the offence would not for instance apply to the handling of a girl's breasts, whatever the circumstances. While all of us wish to exclude trivial acts, most of us would prefer to secure that by enabling courts and juries to apply a more generally expressed provision to the facts of particular cases. It might be thought too that, however imperfectly, the epithet "indecent" serves to explain and justify the intervention of the criminal law in this area in a way that the more detailed provision cannot.

88. Most of us favour stating the new offences in terms of gross indecency with or towards a child. The expression "gross indecency", which derives from the Criminal Law Amendment Act 1885, has, as the Wolfenden Committee pointed out,[1] acquired a fairly fixed connotation in relation to male homosexual acts, including mutual masturbation and genital-oral contact. Those of us who favour a reference to acts of gross indecency in the proposed offence do not believe that extending this concept beyond male homosexual acts will create uncertainty in the application of the law. The use of "gross indecency" in the Indecency with Children Act 1960 is a precedent for what we propose. A number of our members dislike the expression "gross indecency", which they would replace by "serious indecency" as being less emotive and better suited to relating the conduct of the accused to all the circumstances of the case. They

[1]Cmnd. 247, paragraph 105.

consider that "gross indecency" directs attention too narrowly to the character of the act in question and is likely to be interpreted in the light of its long use in connection with homosexual acts. On the other hand, the expression "serious indecency" will make it more plain that the defendant's conduct is to be assessed having regard to such circumstances as the age of the victim (which bears on its seriousness) as well as the character of the act itself. Most of us, however, believe that not only is the expression "gross indecency" sufficiently flexible to allow the necessary differentiation between age groups, but that it also gives appropriate emphasis to the nature of the conduct as a factor in rendering the conduct culpable in relation to a girl or boy of any particular age.

89. Another view is that the basis of the offences should remain merely indecency on analogy with the present offence of indecent assault. Most of us regard that as unsatisfactory, for it may lead to differing decisions on very similar sets of facts, and therefore consider that the opportunity should be taken in revising the offence to remove this potential source of injustice by requiring the indecency to be gross or serious. We should welcome comment on the possible effects of adopting these various courses, and provisionally suggest for consideration the following scheme: it should be an offence (1) to commit an act of gross (serious) indecency with *or towards* a girl under 13, or to incite her to such an act; (2) to commit an act of gross (serious) indecency with a girl between 13 and 16. It will be noted that only for the younger girl is the 1960 Act followed exactly. The effect of the italicised words is to remove the need to show any participation in the indecent act by the girl. Incitement will also constitute the offence. In the case of the older girl, however, we believe that this sort of conduct, not involving the participation of the girl, will continue to be dealt with adequately through the various offences of public indecency and insulting behaviour. As under the present law, the girl would not be regarded as committing an offence. We suggest maximum penalties of 5 years' imprisonment for the offence against girls under 13, and 2 years' imprisonment for offences against girls between 13 and 16.

Boys

90. Indecent assault on a man or boy is an offence by virtue of section 15 of the Act of 1956, and consent is disregarded in the case of a boy under 16. As mentioned, the Indecency with Children Act 1960 applies to boys under 14 as well as girls. We propose that the offences we have described in the previous paragraph above should apply also to boys of the ages there specified. We have stated already that we provisionally accept the proposal of the majority of the Policy Advisory Committee that the minimum age for homosexual acts should be lowered from 21 to 18. If that is done, then homosexual acts involving boys between 16 and 18 would continue to be punishable by an offence replacing section 13 of the Act of 1956, which makes it an offence for a man to commit an act of gross indecency with another man, whether in public or in private. The maximum penalty for this homosexual offence should be 2 years' imprisonment.

91. The only special defence at present available in respect of the offences considered in this section is to be found in section 14(3) of the Act of 1956, permitting the defendant to prove that he reasonably believed that he had gone through a valid ceremony of marriage with the girl. We propose that instead of requiring reasonableness, it should suffice that the belief was honestly held by the defendant. We consider that it should be a defence that the defendant honestly believed that the other party was over 16 (or 18, if that is to be the minimum age, for the male homosexual offence). Professor Smith and Professor Williams would further wish it to be a defence to the more serious offence that the defendant honestly believed the child to be over 13. Professor Williams would like consideration to be given to two special defences reflecting the circumstances in which these offences are often committed. There should, he considers, be a defence corresponding to that which he proposes in relation to unlawful sexual intercourse, to meet those cases where the girl took the initiative and was not corrupted (see paragraph 72 above). It should also in his view be a defence that the man was not more than 3 years older than the girl. Most of us, however, remain of the opinion that this sort of consideration is more appropriately left to the exercise of discretion in deciding to prosecute and in sentencing and we were supported in this view by the Policy Advisory Committee. As explained in connection with unlawful sexual intercourse (see paragraph 71 above) we consider that the burden of proof in respect of these defences should be removed from the defendant, who should be required only to adduce sufficient evidence to raise the issue.

SEXUAL RELATIONS WITH SEVERELY SUBNORMAL MEN AND WOMEN

Present Law

92. For almost one hundred years there have been special criminal offences designed to protect the mentally defective by penalising persons who have sexual relations with them. The law extended protection in this way because of the difficulty of establishing that a mentally defective woman had, for example, been raped when she was probably unable to give evidence and when there was doubt whether mentally defective persons could genuinely consent to sexual acts.

93. Under the present law it is an offence for a man to have sexual intercourse with a woman who is a defective (section 7 of the Sexual Offences Act 1956). By virtue of section 1(3) of the Sexual Offences Act 1967 it is still an offence for a man to commit buggery (under section 12 of the Act of 1956) or gross indecency (under section 13 of that Act) with a man who is a defective. Defectives of either sex cannot in law give any consent which prevents an act being an indecent assault (sections 14(4) and 15(3) of the Act of 1956). For the purpose of these offences a defective is a person suffering from severe subnormality within the meaning of the Mental Health Act 1959, section 4(2) of which defines "severe subnormality" as—

> "a state of arrested or incomplete development of mind which includes subnormality of intelligence and is of such a nature or degree that the patient is incapable of leading an independent life or of guarding himself against serious exploitation when of an age to do so."

In practice persons suffering from severe subnormality are always in the care of somebody else, whether at home or in a mental institution or a community home or hostel.

94. A person charged with one of the special offences relating to defectives has a defence if he can prove that he neither knew nor had any reason to suspect that the other person was a defective.

95. It is also an offence, under section 128 of the Mental Health Act 1959, for a man who is a member of staff or a manager of a hospital to have unlawful sexual intercourse with a mentally disordered patient (the term "mentally disordered" includes the severely subnormal). By section 1(4) of the Sexual Offences Act 1967 the prohibition extends to the commission of homosexual acts with male patients. A review of the provisions of the Mental Health Act 1959 is not within our terms of reference, but it is as well to note that the severely subnormal are protected by these provisions.

96. We have borne in mind that the definition of defective may be changed before the issue of our final report on sexual offences. In a White Paper published in 1978 it was proposed that the terms "subnormality" and "severe subnormality" under the Mental Health Act 1959 be replaced by "mental handicap" and "severe mental handicap". The definition of the latter would

refer to "a state of arrested or incomplete development of mind which includes severe impairment of intelligence and social functioning . . . ."[1] We are informed that this proposal would be likely to result in a slight increase in the number of those classed as defectives for the purposes of the sexual offences legislation.

Proposals for Reform

97. Before discussing the proposals that were made to us for reforming the special offences relating to defectives it must be pointed out that we are concerned only with offences committed by persons who are not defectives with persons who are. Technically a male defective could be convicted of an offence by having sexual intercourse with a female defective but such cases in practice never come to court.

98. Those who responded to our initial invitation to comment directed themselves chiefly to section 7 of the Act of 1956 (unlawful sexual intercourse with a defective), but many of the proposals made to us for reforming this offence apply with equal force to other offences concerning defectives. Although we use section 7 as the main example in our discussion of the subject, we regard it as desirable that any solution proposed for section 7 should also be able to be applied to heterosexual acts short of sexual intercourse and to homosexual relations (see paragraph 93 above). References to section 7 below should be read with this in mind.

99. The comments we received covered the whole spectrum and were made against the background of the infrequency of prosecutions and convictions for sexual relations with defectives (in 1973 there were 5 convictions under section 7 of the Act of 1956). The Sexual Law Reform Society and the National Council for Civil Liberties both thought that section 7 should be repealed on the ground that it unduly restricted the freedom of severely subnormal women to have sexual intercourse. They were of opinion that such women were protected adequately by section 128 of the Mental Health Act 1959 (sexual intercourse with patients) and the general law relating to sexual offences. The Senate of the Inns of Court and the Bar considered that section 7 was necessary for the protection of such women and required no amendment. The British Medical Association suggested that section 7 should be extended in scope to protect not only the severely subnormal but also all those suffering from mental disorder within the Mental Health Act 1959. A judge of the High Court also suggested that section 7 should be extended, but only to include the subnormal.

100. Our provisional conclusions upon these matters are, first, that section 7 should not be repealed unless a satisfactory replacement can be devised. There is a growing trend for the severely subnormal to be cared for at home rather than in mental hospitals. The protection afforded by section 128 of the Mental Health Act 1959 would therefore not be relevant and they might be exposed to exploitation. We are not persuaded that the offence of rape offers adequate protection to severely subnormal women in the absence of section 7: such

---

[1]Review of the Mental Health Act 1959, Cmnd. 7320, paragraph 1.21.

women would probably not be able to give evidence in a case of genuine rape, and their acquiescence in acts of sexual intercourse without properly appreciating the significance of their actions would probably not amount to lack of consent in rape. Secondly, we do not consider that section 7 should be extended to include the subnormal or other mentally disordered persons. Such an extension would need to be supported by strong evidence of need (bearing in mind that we are now dealing with persons who are capable of leading an independent life) and such evidence has not been forthcoming. When we put these matters to the Policy Advisory Committee they agreed that section 7 should not be repealed without replacement or extended beyond the severely subnormal. One of the doctors from whom they heard oral evidence was in favour of extending the offence to the subnormal because he thought that they were in practice more vulnerable than the severely subnormal, who are always under the supervision of others. The Policy Advisory Committee were not, however, convinced that a case had been made out for extending the protection of the criminal law to the subnormal.

101. The Policy Advisory Committee were told by some medical witnesses that fear of a prosecution for aiding and abetting inhibited the staff of a hospital or other residential establishment for the severely subnormal from allowing sexual relations between patients which they believed could be of therapeutic value. The Policy Advisory Committee were of opinion that the present law denies to defectives, very few of whom are able to marry, opportunities for tender and close relationships which it is a fundamental right of all people to enjoy. They went on to investigate a number of proposals for replacing section 7. They considered whether it was possible to define a subcategory of mental defectives who, for their own sakes, required the protection of the criminal law from sexual relations; section 7 could then be restricted to those whom it was necessary to protect. Possible criteria for membership of this class might be inability to consent or likelihood of suffering grave harm from sexual intercourse. The medical advice given to them was that, whilst it should be possible to obtain a professional opinion as to whether these criteria were met in an individual, it would not be possible to define a general class of this nature, and certainly not in such a way that a layman could be expected to recognise it. They also considered a proposal of the Interdepartmental Committee on the Review of the Mental Health Act that the special offences concerning defectives should be replaced by a provision penalising sexual relations which would be likely to cause grave harm to the defective. They concluded that any offence relating to "grave harm" would also be difficult to define in such a way that a potential offender could recognise what would constitute an offence. We agree with the Policy Advisory Committee's objections to these proposals.

102. The proposal that commended itself to the Policy Advisory Committee was elaborated following discussion with officials from the Department of Health and Social Security. This was that section 7 should be replaced by a specially devised civil procedure to protect defectives from molestation. The Policy Advisory Committee have in mind that any person responsible for a defective should be able to apply a county court for a non-molestation order which would in effect prohibit a named man from associating with the

defective. Breach of the order should constitute contempt of court. Those entitled to apply for such an order would include the nearest relative, any guardian under the Mental Health Act, a mental welfare officer and the manager of any services for the mentally handicapped used by the defective. Before making a non-molestation order the court should have before it a medical or social work report (or both) on the individual case. In the meantime, however, some form of interim order might be made, which would lapse after a short time. Similar provisions should also apply to homosexual activities with defective men.

103. The criteria relevant to the making of an order might be—

(a) whether the man against whom the order is to be made is likely to have sexual relations with the defective or has already done so; and
(b) whether either
(i) the defective is likely to suffer harm from having sexual relations with this particular man, or
(ii) the defective is incapable of giving or withholding consent to sexual relations.

104. The Policy Advisory Committee have pointed out to us that the proposed non-molestation order procedure has both advantages and disadvantages. The advantages are that—

(a) it would allow defectives as a class broadly the same rights as other people;
(b) it would take account of the professionally assessed needs of defectives in that it could distinguish between a sexual relationship likely to be harmful to a defective and one likely to be beneficial;
(c) it would leave a man who proposed to have sexual relations with a person who was a defective in no doubt as to the legality, or otherwise, of his actions.

The disadvantages are that—

(a) it would seem as removing the protection afforded to all defectives by the present law in that it would not operate as a general deterrent (we consider further the substance of this objection in paragraph 106 below);
(b) it would not cover sexual relations which have already occurred (although the Policy Advisory Committee were told that section 7 was in practice rarely invoked unless the man had been warned that the woman in question was a defective);
(c) it would not provide full protection for defectives who were promiscuous or were open to exploitation by a number of men.

105. Some of us fear that the repeal of section 7 would make it more difficult to punish a man who had raped a severely subnormal woman in circumstances where evidence of lack of consent was not forthcoming. There are some of us who foresee greater difficulties in applying the proposed scheme to homosexual conduct. Further, some members of our Committee think that local health authorities, on whom some of the burden of applying for orders would fall, might be reluctant to undertake the task, and that some parents might not have the means or the initiative to institute proceedings. Others of us think that parents could cope with the procedure.

106. Our Committee are all agreed that pregnancies among the severely subnormal are undesirable. In theory section 7 has value as a general deterrent against sexual intercourse with severely subnormal women, but we are uncertain how effective a deterrent it is. In deciding whether to replace section 7 by some such protective scheme as we have described, we attach weight to the consideration that the proposed scheme, which would have no general deterrent value (although it would, of course, have value as a particular deterrent), may increase the risks of pregnancy occurring in severely subnormal women. However, it must be said that some members of the Policy Advisory Committee do not share this assessment; for one thing, they tell us, there are differing levels of fertility among the severely subnormal and in their view the likelihood of pregnancy will always be low. At most hospitals friendships and social contact exist between the sexes, but sexual intercourse is not encouraged; nor do defectives have many opportunities for sexual intercourse in a hospital, although they may occasionally engage in it surreptitiously. If, however, the number of defectives in care outside hospital increased, the opportunities for sexual intercourse and possibly pregnancy would correspondingly increase. The effectiveness of contraceptive methods among the severely subnormal is open to conjecture; and there are ethical and legal problems in deciding whether the pill should be prescribed to a severely subnormal woman or whether she should be fitted with an intra-uterine device in the absence of an effective consent. Notwithstanding these considerations some members of the Policy Advisory Committee think that section 7 cannot be justified even partially as a means of avoiding pregnancies in the severely subnormal. We invite comment, therefore, on the likely practical effects of the proposed scheme on pregnancy among the severely subnormal and, if it were thought that there would be some increase in pregnancies, on the weight, if any, which we should attach to this factor in considering what provision should be made in respect of sexual intercourse with defectives.

107. As the proposed scheme would be for the civil courts, it does not properly fall within our terms of reference to make recommendations about it. If it proved acceptable, the necessary legislation would be the responsibility of the Department of Health and Social Security. Despite this we consider that our Working Paper is a suitable vehicle for comments to be sought on the proposed scheme. If, following those comments, the scheme commends itself to the Department and they are able to embody it in legislation, our recommendation is that the special offences relating to defectives should be abolished. If, however, the scheme does not commend itself, we see no satisfactory alternative to the retention of these offences.

INCEST

108. The crime of incest, described more fully below, penalises sexual intercourse between parent and child, brother and sister, and grandfather and granddaughter. While it quite commonly involves consensual behaviour, at least in the sense that there is no overt compulsion, consent is no defence and there is no age of consent.[1] We have doubt that incest is regarded with repugnance by most people, and we do not believe that relaxing the law would lead to incest becoming an acceptable practice. Nevertheless, we have asked ourselves whether, consistently with our broad approach to sexual offences, there should be an age of consent for this offence, and, if so, what age. Some of those commenting on the law have suggested that it needs to be strengthened, in particular by extending the offence (or creating an analogous offence) to protect members of a family unit who are outside the blood-tie, for example adopted children. We consider this question too. We wish, however, to stress that any sexual intercourse with a girl under 16, whether by a relative or anyone else, will, if our proposals are accepted, continue to be an offence.

109. We recognise that there are sharp differences of opinion over how the criminal law should deal with incest. Some of these differences have manifested themselves among our own members and on the Policy Advisory Committee. We have therefore tried in this part of the Working Paper to set out the considerations that we believe to be material to the review of this offence. We have been much assisted by the advice of the Policy Advisory Committee. On a number of issues we have found it desirable to set out alternative courses for comment without at this stage attempting to make a recommendation ourselves.

110. Incest was first made a crime in England and Wales[2] (apart from a period when it was criminal under the Commonwealth) by the Punishment of Incest Act 1908.[3] The ecclesiastical courts had once punished incest but their jurisdiction had long since ceased to be exercised. Nevertheless by that time a great deal of evidence had been gathered by social reformers indicating that children of the poor were at risk of sexual abuse within the family, and existing legislation protecting minors was said to be inadequate. After some years of pressure by private members of Parliament, the Government lent its support to the measure which became the 1908 Act. The law is now to be found in the Sexual Offences Act 1956:

> "It is an offence for a man to have sexual intercourse with a woman whom he knows to be his grand-daughter, daughter, sister or mother." (Section 10(1))
>
> "It is an offence for a woman of the age of sixteen or over to permit a man whom she knows to be her grandfather, father, brother or son to have sexual intercourse with her by her consent." (Section 11(1))

---

[1] But, as would be expected, age and consent affect sentencing.

[2] In Scotland it has been a statutory offence since 1567. The offence was referred in 1977 to the Scottish Law Commission and we have had the benefit of their examination of the offence and provisional proposals for it (Scottish Law Commission, Memorandum No. 44, The Law of Incest in Scotland, 1980).

[3] See V. Bailey and S. Blackburn, The Punishment of Incest Act 1908: A Case Study of Law Creation [1979] Crim. L.R. 708.

"Brother" and "sister" extend to the half-blood, and relationships need not be legitimate. The offence is triable on indictment only and is punishable with 7 years' imprisonment (or life imprisonment where committed with a girl under 13). Prosecutions may not be brought except by or with the consent of the Director of Public Prosecutions. Under section 38 of the Act of 1956 a parent convicted of an offence with a child under the age of 18 may by order of the court be divested of parental rights over the child.

111. We have not come across any reliable estimate of the incidence of incest in England and Wales, and many cases of incest are bound to remain concealed. In recent years about 300 cases annually have been brought to the notice of the police, and it appears that prosecutions are brought in at least 80% of them.[1] A study of the data for 1973[2] shows that most convictions were for incest with a daughter below 16. Where the girl is over 16 the extent to which she welcomed the advances is one of the factors taken into account in deciding whether to prosecute. Another factor is the effect of the incest on other members of the family, and the likelihood of their also being at risk. It would appear too that the older the daughter the less likely was the father to receive a custodial sentence (no woman received a custodial sentence in the period under review). The age of the girl was also an important factor in sentencing in the cases of incest between brother and sister. Overall, the penalties imposed were well below the maximum available.

112. The importance of the exercise of the Director's discretion in deciding whether to institute proceedings for this offence, and the range of sentences awarded by the courts for it, indicate how various may be the circumstances in which incest occurs. At one extreme is the seduction, or even rape, of a very young daughter. Few would put into the same category consensual incest between adult brother and sister, or even between father and adult daughter. As in the offence of unlawful sexual intercourse with young girls, the present law singles out as especially grave incest with a girl below 13.

The Genetic Risks

113. We were surprised to find how few medical studies there have been of the genetic risk for the offspring of incestuous unions. Although doubts have been expressed as to the seriousness of the risk, such evidence as we and the Policy Advisory Committee had seems to show that where the parties to an incestuous union are related in the first degree (father and daughter, brother and sister) their children have a high risk, nearly one chance in two, of being born with serious defects. The chance of transmission of a hereditary defect decreases but does not disappear as the relationship becomes more distant.

114. It is not easy to know what conclusions should be drawn from the admitted genetic risks. Some of our members (like a majority of members of the Policy Advisory Committee) consider that while it is most undesirable that

---

[1]Walmsley R. and White K. (1979) Sexual offences, consent and sentencing, Home Office Research Study No. 54, H.M.S.O., pp. 41–42.

[2]*Ibid.* pp. 24–26, see also pp. 12, 63.

the parties to an incestuous relationship should have children, the genetic risk is not in itself a sufficient ground for retaining the offence in its present form, although it is a background to the other factors. They point out that couples with known hereditary defects are not prevented from marrying or having sexual intercourse under our law. Others of us are not attracted by this argument; they consider the genetic risk to be a substantial, though not the sole, consideration for retaining the offence. The British Medical Association and the Royal College of Psychiatrists rested the case for keeping the offence substantially on genetic grounds. The issues here are not so much legal as social, and we invite comment on the weight which should be attached to the genetic factor as an argument for retaining the offence of incest.

115. It is sometimes suggested that the genetic risks are relatively slight nowadays when contraception is widely practised. We do not believe that it is possible to be confident about the extent to which contraception is likely to be employed when incest takes place, for instance, between parties of low intelligence or where drink has played a part. In any event, none of us would favour the introduction of a defence based on proof of sterility or the use of contraceptives. Both social and practical considerations would appear to rule out any such defence. However, Professor Williams would wish consideration to be given to punishing brother-sister incest only where a child has been born.

Psychological and Social Consequences of Incest

116. As well as the genetic harms likely to result from incest, any study of this conduct must take into account evidence of its psychological and social consequences. We are satisfied from the evidence that we have examined, and the advice of the Policy Advisory Committee, that incest can have ill-effects of a psychological and social kind on the immediate parties and on other members of the family. This is particularly so in the case of incest between father and dependent daughter, which most people would consider to be an abuse of parental relationship. In particular, children may as a result of incestuous relationships find their capacity to form normal emotional and social relationships impaired. We do not believe that evidence of such ill-effects is inconsistent with the view that incest tends to occur where the familial relationships are already unsatisfactory, or is vitiated by evidence that some children suffer no apparent harm from an incestuous relationship. If it is granted that incest may result in this kind of harm, the problem is to know how best to prevent or minimise it.

117. We are at present divided on the question whether incest should continue to be a criminal offence at all ages or whether it should constitute an offence only where one (or each) of the parties is below a specified age. Those of us who would keep the present law find in the genetic risks a substantial ground to which must be added the aversion which many feel to incestuous unions.[1]

---

[1]The Scottish Law Commission provisionally favour the retention of incest as a specific offence, with no minimum age: Memorandum No. 44, The Law of Incest in Scotland, paragraphs 6.7–6.11.

118. Of those of us who favour a minimum age, all are agreed that the law should, at the very least, continue to prohibit fathers from committing incest where the daughter is below the age of 18. Few children achieve real independence from their families before that age and we do not consider that it would be right to treat incestuous relationships as freely chosen in the case of a daughter of 16 or 17. Also, where a daughter is living at home, the disturbing effects of the relationship on other members of her family may be considerable. Some of us who favour a minimum age indeed consider that even above 18 she may often not be truly emancipated from paternal control and domination, especially as the incestuous relationship is likely to have started when she was below that age. That possibility suggests that prudence would set the minimum age higher than 18, perhaps at 21. When we put these matters to the Policy Advisory Committee, they advised us that a substantial majority of their number were in favour of allowing incest with a daughter of 21 or above, while a narrow majority would allow it at 18, in the light of the considerations we have mentioned. We invite comment on whether incest between father and daughter should remain an offence in all cases or only where the daughter was below a specified age: and if the latter, whether the age should be 18 or 21.

119. It does not follow from the considerations relating to paternal incest mentioned in the previous paragraphs that other kinds of incest should remain offences. Incest between brother and sister may be in many cases no more than adolescent sexual experimentation, presenting no more likelihood of lasting harm to the parties than other adolescent sexual activity. Yet in some circumstances incest between brother and sister may have a specific harmful effect, interfering with the normal development of the parties: this will be a particular danger for a young girl under the domination of an older brother. Professor Williams considers that there is no need to continue the offence, because this conduct can be adequately controlled by the law against sexual intercourse with girls under 16. A majority of the Policy Advisory Committee, we were told, favour the introduction of a minimum age at which incest between brother and sister would become lawful. Of that majority, most would have set the age at 18, but there was some support for a minimum age of 21. The majority of us see a need to continue a specific offence of incest between brother and sister, but are divided on whether it should remain an offence at all ages, or be permitted where the parties have reached a specified age. We invite comment on this, and on whether, if there is to be a minimum age, it should be 18 or 21.

120. We have considered certain other aspects of this offence. It has been suggested that incest between mother and son should cease to be an offence. In such cases, which are in any event rare, one or both of the parties will often be found to be suffering from a degree of mental abnormality. To this extent their conduct may seem unsuitable for the intervention of the criminal law. But we have no doubt that this kind of incest can be most harmful to the parties and others in the family. Most of us think that for this reason it should remain an offence. If the incest is not to remain an offence at all ages, it may be thought that a son who has reached the age of 18 should be regarded as sufficiently independent not to require the protection of the law. We consider

that incest between a grandfather and granddaughter (also rare) should remain an offence, subject to whatever the specified age may be in respect of paternal incest. We have received no evidence to suggest that incest between grandmother and grandson, or between uncle and niece and aunt and nephew should become criminal offences. In the law of Scotland, incest between uncle and niece and aunt and nephew is prohibited, and the Scottish Law Commission provisionally recommend that this should continue to be the law.[1]

121. It has been suggested to us that a party to incest below some age to be specified (possibly 18) should always be exempted from criminal liability. At present the law is that a girl under 16 does not commit an offence by engaging in incest (Sexual Offences Act 1956, section 11(1)). We are agreed that a person under 18 should be exempted from liability for incest with a father, grandfather or mother. However, we do not consider that this exemption should apply to incest between brother and sister. If incest is to remain a criminal offence at all ages, then consideration should be given, we believe, to allowing a daughter or granddaughter above 18 (or 21) to plead that she acted under the coercion of her father or grandfather.

122. It is sometimes claimed that the present law of incest, based as it is on consanguinity, is too narrow to afford adequate protection to those who are outside the blood-tie but in a dependent familial relationship (for instance, by adoption) that renders them vulnerable to sexual abuse. Indeed, this risk may exist in other kinds of relationship, for example where a young person (generally a girl) is liable to be exploited by a person such as a school-teacher or employer. In their Working Paper on the Age of Consent (at paragraph 64) the Policy Advisory Committee accepted our advice that it would be impracticable to make, within the framework of our criminal law and procedure, these cases subject to criminal liability. We have explained the point in our opening remarks, see paragraph 14 above. Therefore we reject suggestions that incest (or some new offence) should be extended to a wide range of relationships presenting a risk of exploitation of one party.

123. We have considered whether an offence could be devised that would protect the young female members of a household from sexual exploitation. We are agreed that an adopted daughter ought to have this protection, and provisionally recommend that it should be an offence for a man to have sexual intercourse with his legally adopted daughter under 18.[2] We have found difficulty in deciding what other categories, if any, should be afforded such protection. We considered first the case of step-children. We hesitate to recommend that sexual intercourse between a man and his 16 or 17 year old step-daughter should for the first time become a criminal offence. We have received no evidence that the abuse by step-fathers of girls of this age constitutes a serious problem. Also, while step relations are at present not able to marry, a Private Peer's Bill which would have allowed such marriages at 21 recently found a measure of support in the course of its consideration by the

---

[1]Scottish Law Commission, Memorandum No. 44, paragraph 6.20.

[2]The Scottish Law Commission do not favour this: Memorandum No. 44, paragraph 6.22.

House of Lords.[1] It is not inconceivable that such marriages, perhaps at an age as low as 18, might in a few years become permissible. Such a development would render the suggested offence even less attractive. Nor do the Scottish Law Commission favour the introduction of such an offence.[2]

124. There are other situations that we have considered: foster children, *de facto* adopted children, and the children of the female party to a "common law" relationship. The difficulty here is to find a definition sufficiently precise for the purposes of the criminal law. Most of us, for instance, would consider the concept of a "child of the family", as defined in section 52(1) of the Matrimonial Causes Act 1973, to be too imprecise: it would require the determination of whether the child had been "treated . . . as a child of [the] family". Moreover, it would be difficult to adapt it to parties cohabiting outside marriage.

125. If there is evidence that serious abuse of girls of 16 or 17 is occurring, then it will be necessary to give further consideration to these problems. We should be grateful for any evidence relevant to this. Meanwhile we provisionally recommend that our proposed offence should not extend beyond legally adopted children.

126. While, as has been said, we are as a Committee divided on the scope of the offence of incest, we all believe that the intervention of the criminal law should be as limited as possible in practice, and principally directed to ending the relationship and protecting other members of the family at risk. We recognise that the institution of criminal proceedings, and the punishment of those involved, may cause added distress to and even harm the very persons whom the law is seeking to protect. On the other hand we are told by the Policy Advisory Committee that social workers consider that they would be hampered if no criminal offence existed. We are satisfied that the policy of the office of the Director of Public Prosecutions has been successful in preventing the institution of unnecessary proceedings, and we see no need to fetter his discretion in respect of this offence. A number of suggestions have been made to us with a view to mitigating the ill-consequences of the present administration of the law and these we now consider.

127. At present incest is triable only in the Crown Court. One suggestion favoured by some of us is that incest between brother and sister should be triable either way. It is said that it is rarely punished severely and should not be treated as comparable with the kinds of serious offence that are triable in the Crown Court. Most of us do not consider this suggestion to be well founded. Sentencing problems in this class of case are very difficult indeed and in our view there should be available a wider experience than may be found in some magistrates' courts. Our provisional recommendation is therefore that all cases of incest should continue to be triable only on indictment in the

---

[1]In July 1980 a private Bill enabling a step-father to marry his step-daughter received the Royal Assent (Edward Berry and Doris Eilleen Ward (Marriage Enabling) Bill).
[2]Scottish Law Commission, Memorandum No. 44, paragraph 6.24.

Crown Court. The maximum penalties, namely life imprisonment where a man commits the offence with a girl under 13, and 7 years in all other cases, should be retained.

128. It has been suggested that incest is unlike other sexual offences and that the factors relevant to sentencing are peculiar to it. A sentence of imprisonment, for instance, which will commonly be visited upon a father guilty of incest with a young daughter, may serve to break up the family in a damaging and distressing manner. While most of us are content to leave sentencing in incest cases to the discretion of the court, which may be expected to take the special considerations of this class of case into account, Professor Williams would favour a statutory provision whereby imprisonment would be suspended, at least where both parties are over 16, unless immediate imprisonment seemed to be needed to protect the victim or other members of the family. We should welcome comment on these proposals for improving the administration of the law relating to incest.

129. The name "incest" is thought by some of us to be undesirably emotive and to add to the distress of those involved. As less likely to arouse strong feelings, the offence might, they propose, be known in future as "unlawful familial intercourse". A majority of the Policy Advisory Committee, for similar reasons, would abolish the name "incest" for this offence; but those favouring abolition did not consider "unlawful familial intercourse" an attractive substitute. The majority of us, however, 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 and is justifiable for that reason. We do not, though, favour extending the label to sexual acts other than sexual intercourse.

SEXUAL ACTS IN PUBLIC

130. We have already said that we agree with the Wolfenden Committee that part of the function of the criminal law is "to preserve public order and decency, [and] to protect the citizen from what is offensive". Within the very broad field of public indecency, we are concerned in our review only with sexual acts taking place between two or more people. We have not concerned ourselves with indecent acts by a single person in public circumstances, since such acts are a matter for consideration under the heading of public and street nuisances.

131. Most of us consider that the law on indecent acts in public should be the same whether those committing these acts are of the same sex or of different sexes. Because of the way that the present law has come about, we have not found it easy to construct a provision to replace it. We have decided to present in this Working Paper alternative courses for public consideration and comment. One would be the adoption of our new offence, which we describe below, which would apply to conduct whether between the same or opposite sexes. The alternative would be to retain the existing law on male homosexual acts while providing a new offence to deal with other sexual acts in public.

132. Section 1(1) of the Sexual Offences Act 1967 provides that "a homosexual act in private shall not be an offence provided that the parties consent thereto and have attained the age of 21 years". The expression "in private" is not defined but by section 1(2) it is provided that:

> "An act which would otherwise be treated for the purposes of this Act as being done in private shall not be so treated if done—
>
> (a) when more than two persons take part or are present; or
> (b) in a lavatory to which the public have or are permitted to have access, whether on payment or otherwise."

By "homosexual act" is meant buggery or gross indecency. The maximum penalty where the parties are consenting adults is 2 years' imprisonment.

133. It is important to understand how this provision works. Section 1 preserves the existing offences of buggery and gross indecency between males while relaxing the law by providing that these acts when done by consenting adult males in private are not to be offences. Furthermore, in an attempt to reduce the risks of corruption, especially of young adults, Parliament enacted in section 1(2)(a) a considerable restriction on the liberty conferred by section 1(1). Wherever a homosexual act occurs, if more than two persons are present, those committing the act (who may of course be all or some of the persons present) are treated as not acting in private. Accordingly the act remains an offence.

134. A number of persons and organisations who submitted evidence to us were critical of section 1(2)(a). They said that it is discriminatory and that it places a homosexual couple, if another person is present, at risk of prosecution for conduct that would usually be regarded as taking place in private, for instance in the home or in a hotel bedroom (as well as in clubs and similar

places). We sought the advice of the Policy Advisory Committee on section 1(2)(a), in particular on a matter that troubled Parliament in 1967, namely, the character of some clubs catering for homosexuals and the need for regulation of their activities. The Policy Advisory Committee said that in their opinion section 1(2)(a) is discriminatory and an excessive interference with privacy. As to homosexual clubs, they told us that on the information available to them such places are in general at present well conducted. Indecencies in the presence of others do not take place on their premises, and while no doubt people may visit them in search of partners they cater for people who have already adopted a homosexual way of life. The Policy Advisory Committee felt unable, however, to forecast what might happen to standards in these clubs if section 1(2)(a) were repealed without any replacement, so that homosexual acts in the presence of others became allowable. They considered that the right to privacy does not require that conduct in clubs should be unregulated by law, and recommended accordingly that the law should continue to prohibit homosexual acts in the presence of others in clubs as well as acts in public in the ordinary sense of those words. They recommend too that heterosexual acts should be prohibited on the same basis.

135. Most of us agree with the Policy Advisory Committee that the stringency of the present law is excessive and that the time has come to replace it by provisions designed to state more particularly the circumstances in which male homosexual acts would constitute criminal offences. We turn now to the elements of our proposed offence penalising offensive sexual conduct in public.

The New Offence

136. We considered first what kinds of conduct should be covered and how they should be defined in the new provision. We think that the offence should cover sexual intercourse, whether with a person of the same or the opposite sex, and other sexual conduct (again between the same or opposite sexes) which might be expected to cause serious offence to members of the public observing it. Most of us believe that it would not be desirable for the law to go into anatomical detail in defining this conduct. That sort of detail is not at present found in the law of sexual offences, and is indeed not a feature of modern criminal statutes in this country. Under a proposal of the kind we have in mind, it would be for the magistrates' court or the jury to determine the offensiveness of the conduct in question; and in doing that, not to give effect to their personal views but to take account of prevailing standards in the community.

137. For these reasons we propose a more general form of words. Most of us consider that it is not enough to refer simply to sexual conduct likely to cause serious offence. Such a formulation may work well enough for a byelaw, where the penalties are minor, but our provision would need to deal with grossly offensive conduct such as at present may command a substantial fine or a term of imprisonment. A majority of us doubt whether it will be found easy to improve on a definition in terms of sexual intercourse (whether with a member of the same or the opposite sex), or gross indecency with another person. Some of our members, however, as explained at paragraph 88 above, would prefer offences to be expressed in terms of serious indecency. In the

present context, as they see it, the advantage of this form of words is that it allows account to be taken of the fact that some conduct may well be worthy of punishment when it occurs at some places and between some individuals, while not meriting punishment in other circumstances.

138. Professor Williams believes that both "gross indecency" and "serious indecency" are too vague to form a satisfactory basis for a criminal offence in the absence of further definition. He agrees that, as was stated in paragraph 88 above, the expression "gross indecency" has been given a fairly fixed meaning in relation to homosexual acts by the courts, but believes that that meaning might not readily be appreciated by the ordinary citizen or indeed by some magistrates. For this reason the statute should, in the opinion of Professor Williams, declare that an act is not grossly indecent for the purposes of this offence unless it involves contact with or in the region of the genital organ of a person, whether directly or through clothing. The rest of us consider that this proposal would give rise to more problems than it solves.

139. We consider next the public character of the new offence. Whatever else it ought to cover, we do not intend to put at risk every couple who choose a secluded spot for their courting merely because the public have a right of access to it. On the other hand, sexual acts which are observable by and likely to cause serious offence to others should not enjoy immunity merely because they are committed on private property. The offences under the present law of outraging public decency and indecent exposure can both be committed through acts done on private property, their essence being their offensiveness to others. We note that the Home Office Working Party on Vagrancy and Street Offences[1] and the Law Commission in their Report on Conspiracy and Criminal Law Reform[2] take this view in their proposals for penalising indecent acts likely to offend others. We set out some possible ways of securing this in the following paragraph.

140. The bulk of the sort of cases that we have in mind would, we believe, fall within a provision that referred to acts done in a public place and observable by others, and to acts observable from a public place. But some conduct, which we consider should also amount to an offence, might not be covered. An example would be sexual conduct in a private garden where the conduct is visible only to the occupiers of surrounding flats or houses. For that reason it may be that the provision should simply require that the acts should be likely to be seen by others to whom they would be likely to cause serious offence. This formulation is already to be found in the Law Commission's Report.[3]

---

[1]Report, paragraph 52.

[2]Law Com. No. 76, paragraph 3.111.

[3]The Law Commission recommend an offence in the following terms (Report on Conspiracy and Criminal Law Reform, Law Com. No. 76, p. 196):

"(1) A person who—

(a) has sexual intercourse; or

(b) whether alone or with anyone else, engages in any other sexual behaviour;

is guilty of an offence if he does so in such circumstances that he knows or ought to know that his conduct is likely to be seen by other persons to whom it is likely to cause serious offence."

The maximum penalty would be a fine of £100.

Alternatively, the provision could require that the acts should be likely to be seen by members of the public and be likely to cause serious offence. By "members of the public" we mean to include the occupiers of neighbouring premises, and the draftsman would be instructed to make this clear if necessary. It may be thought that a reference to members of the public is desirable to prevent the offence from extending, in theory at least, to acts occurring in the home and witnessed by others of the household. If this latter form of provision were chosen, it is arguable that the ingredient of causing serious offence might be dispensed with, reducing the complication of the offence; and we should welcome comment on this aspect of the definition.

141. Although our proposed offence will be relatively minor, we consider that it should be necessary to prove that a defendant knew that the conduct in question was likely to be seen by others or was reckless as to that (but not that it was likely to cause offence).

142. We have found it hard to decide on an appropriate penalty. The Law Commission's proposed offence is punishable only by a fine, and for many instances of the conduct with which we are concerned a fine would seem adequate; other acts may be grossly offensive. It may also be necessary to deal with the repeated offender. For these reasons we consider that the proposed offence ought to be punishable with a sentence of imprisonment for the worst cases. We consider that, if the offence is to be triable on indictment as well as summarily, a maximum penalty of 12 months' imprisonment would be appropriate. (Professor Williams would make the maximum 3 months.) There is, however, a problem as to how these cases should be tried. Many of them will be minor but a prosecution could have serious consequences for the defendant. For this reason it may be thought right to retain trial by jury if the defendant or prosecution wish it. In the ordinary course of things we would expect that the great majority of these cases would be tried summarily, and it is arguable that, at a time when the Crown Court is seriously congested, these cases should be kept from it. We invite comment on the appropriate maximum penalty and the desirability of allowing jury trial.

143. We recognise as indicated above that the proposed offence as we have formulated it presents certain problems, but it may be thought that they are inherent in this part of the criminal law. Most of us believe that the offence that we have outlined is a workable means of securing that grossly indecent conduct of an offensive nature is penalised, while meeting the criticisms that are made of the present law, especially as it bears on homosexuals. However, some of us are not persuaded that such a provision with its relative complication would be worthwhile; nor do these members consider that it has been shown in practice that section 1(2)(a) creates real hardship for homosexuals. A further argument for retaining section 1(2)(a) is that it would render unnecessary the provision relating to homosexual acts in clubs and other places of common resort considered below. Accordingly we offer for public consideration and comment the possibility of retaining section 1(2)(a) of the 1967 Act, while penalising heterosexual conduct in public by a provision

along the lines of the offence proposed by the Law Commission,[1] though we think that the maximum penalty of £100 which the Law Commission proposed might be stiffened. It is for consideration, if that course were favoured, whether section 1(2)(a) could be relaxed by an exception for acts occurring in the home, in some such terms perhaps as "on a domestic and private occasion".

144. We are in general agreement with the Policy Advisory Committee, but we have some reservations about their proposals for an offence penalising grossly indecent acts in clubs, on the assumption that section 1(2)(a) will disappear. The difficulty, we believe, is that while the proposal is aimed at the kind of club—homosexual or heterosexual—where indecent conduct is likely to occur, it will be capable of extending to all manner of clubs. It would not be possible to define the category that the Policy Advisory Committee have in mind. Not only is it the case that many clubs are well conducted; it can be argued that there are many other premises to which people resort in numbers, for instance discotheques and other places of entertainment, where there is an equal likelihood of the commission of such acts. Yet an offence which reaches only clubs will not include these premises. We recognise the mischief that the Policy Advisory Committee are concerned with. We suggest therefore that there might be considered a provision making it an offence for anyone to engage (whether alone or with another person) in acts of gross indecency in the presence of others when in a building constituting premises of common resort. We envisage that for the purposes of this provision premises may be treated as being of common resort even though they are private property and even though membership of a club is necessary for admission to them. This proposal is put forward tentatively for comment.

145. While in some respects this proposed offence has an echo of the existing common law offence of keeping a disorderly house, it is a much more restricted offence. Moreover, the occupier of the premises would not be liable except as an aider and abettor. (It may be noted that the Law Commission have proposed the abolition of the offence of keeping a disorderly house.[2]) We should make two points about this proposed offence. First, it is not intended to deal with live sex shows, which are a matter for those concerned with the implementation of the Williams Report on Obscenity and Film Censorship.[3] Secondly, we appreciate that our proposed offence, applying as it would to clubs and to conduct in a hotel room, may appear to some to depart from the approach of the Wolfenden Committee to which we have given our general assent. We ourselves doubt if there is any inconsistency. The sorts of places that we have in mind are likely, we believe, to constitute a source of outrage to neighbours and a public scandal. We think that the criminal law may be quite justifiably employed to check the activities occurring in such places. We should welcome comment on this provisional recommendation.

146. Although we think that a case can be made to justify an offence on these lines applying to places of common resort, we should not wish to pursue the

---

[1]See paragraph 140, footnote 3, above.

[2]Report on Conspiracy and Criminal Law Reform, Law Com. No. 76, paragraph 3.149.

[3]Cmnd. 7772 (1979).

proposal if a satisfactory alternative way could be devised of penalising the kind of conduct we have in mind when it takes place in clubs and other places of resort in the presence of others who are themselves unlikely to be offended. One way which would enable the common resort provision to be dispensed with would be to adopt the simpler form of provision referred to in paragraph 140 above and designed to penalise gross indecency which takes place in public. In paragraph 140 we suggested that one possible form that provision might take would be to require that the act was likely to be seen by members of the public (including neighbours) and that such a form of wording might make it possible to dispense with any requirement of causing offence. If the provision could be simplified in this way, it would be apt to cover the cases where the gross indecency occurred in a place to which the public were admitted (for example a public discotheque) notwithstanding that it was in practice frequented by persons who (unlike the ordinary members of the public) would not be likely to be in the least offended by conduct of that kind. In that event the only addition which would be required to apply the provision to acts of gross indecency taking place in the presence of others in clubs would be one which made it clear that the reference to members of the public included persons admitted to clubs notwithstanding that admission was restricted to members. We should welcome comments too on this possible form of provision.

Acts in Public Lavatories

147. There is a last matter to consider, the special provision made by section 1(2)(b) of the 1967 Act relating to homosexual acts in public lavatories (see paragraph 132 above). Homosexual acts in the cubicles of lavatories to which the public have or are permitted to have access, whether on payment or otherwise, are not at present treated as occurring in private and are therefore punishable. We consider that they should continue to be punishable by means of a special offence. We appreciate that they generally attract a comparatively small fine. Nevertheless, they may cause gross offence to others using the lavatory and cannot be regarded as an altogether minor matter. Imprisonment should, we consider, be available as a last resort against the persistent offender. It is for consideration whether there should continue to be a right of trial for this offence. It may be thought that in this type of case the allegations will be strenuously contested by the defendant and that he should be able to have the matter considered by a jury. The maximum penalty should not, in our view, be more than 12 months' imprisonment. It would be lower than that if it were decided that the offence should be triable summarily only. We provisionally recommend therefore that the commission of homosexual acts in public lavatories should remain an offence. The penalty should be governed by the considerations that we have set out above in relation to our proposed offence of public indecency (see paragraph 142). We invite comment on these provisional recommendations.

148. We leave for consideration in our examination of the law on prostitution and allied offences the offence of solicitation by men in section 32 of the Act of 1956. While this offence is not restricted to solicitation for the purposes of prostitution, we believe that the kinds of conduct which would need examination, including "kerb-crawling" by men, make that a more convenient course.

CONSENSUAL HOMOSEXUAL ACTS BETWEEN WOMEN (LESBIAN ACTS)

149. In 1921 an attempt was made to extend the prohibition on acts of gross indecency between males in the Criminal Law Amendment Act 1885 to consensual acts of a similar nature occurring between women. Although passing the House of Commons the proposal was rejected in the Upper House and since that date there does not appear to have been any call to penalise such conduct. Indecent acts with a girl below 16 constitute indecent assault, however, and will continue to be an offence under our proposals. We consider below whether the minimum age is rightly set at 16 for homosexual acts between women.

150. On principle we consider that consensual homosexual conduct between adult women in private should continue to be lawful. In considering what the minimum age should be, we have been assisted by the Policy Advisory Committee. They have told us that the considerations which led them provisionally to recommend a minimum age of 18 for male homosexual conduct do not have the same force in the case of females. They say that homosexual relationships tend to arise later in life among women than among men, and that there is no comparable group of 16 to 18 year old girls whose sexual orientation has not yet become fixed and who are consequently in need of special protection. We are told too that adolescent girls do not seem especially attractive to older women in search of a partner of the same sex and that there is not the same emphasis as in male homosexual culture on this age group.

151. Accordingly we can see no ground for treating homosexual relationships between women any differently from relationships between men and women and we provisionally recommend that any new legislation should leave the law in this area unaltered.

ABDUCTION

152. Sections 17 to 21 of the Sexual Offences Act 1956 contain a number of offences concerned with the abduction of girls and women. Section 18 (fraudulent abduction of an heiress from her parent or guardian) was repealed in 1969, but, even so, much of what remains, we consider, is not suitable for a modern statute.

153. Section 17 makes it in certain circumstances an offence to take away or detain a woman against her will, with the intention that she shall marry or have unlawful sexual intercourse. We consider that this offence is sufficiently covered by the existing law of false imprisonment and will be covered by our proposals for offences of unlawful detention and kidnapping.[1]

154. Sections 19 and 20 may be considered together. By section 19(1) it is an offence to take an unmarried girl under the age of 18 out of the possession of her parent or guardian against his will, with the intention that she shall have unlawful sexual intercourse with men or with a particular man. By section 20(1) it is an offence, without lawful authority or excuse, to take an unmarried girl under the age of 16 out of the possession of her parent or guardian against his will. These two offences have in common that the consent of the girl is irrelevant; but only in the case of the older girl (section 19) is it necessary to prove a specific sexual intent on the part of the defendant.

155. We have already proposed in our Report on Offences against the Person an offence of abduction, where a child under 14 is taken from a parent or other person with lawful control without the consent of the parent or other person.[2] Since the consent of the child is immaterial in our proposed offence, it would serve to replace sections 19 and 20 for children up to 14. The question is whether similar protection should be afforded up to some higher age, and, if it should, what that age should be. We have no doubt that the age of 18 is too high at the present time, and that if section 19 is to be retained the age should be lowered to 16. The retention of section 20 is incompatible with our proposed abduction offence. That leaves two possibilities: (1) an offence on the lines of section 19 of abduction of a girl under 16 with intent to have sexual intercourse, or (2) reliance on our proposed general abduction offence up to 14, and on the law of unlawful sexual intercourse for girls between 14 and 16.

156. The problem is whether an offence on the lines of section 19 would be capable of serving any useful purpose. It may be thought that the argument justifying an age of 14 for our proposed abduction offence, namely, that parental control becomes difficult when children reach 14, would apply also to an offence of abduction for the purpose of sexual intercourse. Moreover, unless there is evidence of sexual intercourse (in which case another offence would have been committed) the intent of the abduction offence might be hard to prove. On the other hand, it can be argued that the retention of a specific offence of abduction for these purposes (though prosecutions would be rare)

---

[1] Report on Offences against the Person, Cmnd. 7844 (1980) paragraph 231.
[2] At paragraph 240.

would make it easier for a parent to seek the assistance of the police, for example to warn the man of his potential criminal liability or to trace the runaways and secure that the girl and her parents are brought together with a view to her return to her home. We call attention to this problem and invite comment on whether an offence of abduction on the lines of section 19 is worth while.

157. We are agreed that if there is to be such an offence, the intent should be limited as at present to the commission of sexual intercourse, and should not extend (as we suggested in our Working Paper on Offences against the Person[1]) to the commission of any sexual offence against the girl. Proof of any other intent would be very difficult and the probability is that there would be very few cases with any other intent in mind. It should be a defence that the defendant honestly believed the girl to have reached 16.

158. There is at present no special offence of abducting a boy over 14 in order to commit buggery or gross indecency. We have received no representations that there is a need for such an offence, and in view of the difficulties of proof of the intent we doubt whether there should be a special offence. The same applies to the abduction of girls or boys by women. There is a special offence under section 21 of the Act of 1956 of abduction of a severely mentally subnormal woman. We do not consider that there is any practical need for the retention of this offence, which would in any case need revision if the suggested civil procedure were to replace section 7 of the Act of 1956 (see paragraph 102).

[1]Working Paper on Offences against the Person, H.M.S.O., 1976, at paragraph 153.

BESTIALITY

159. It is an offence for a person to commit buggery with an animal (Sexual Offences Act 1956, section 12). The offence consists in intercourse per anum or per vaginam by a man or a woman with an animal. The maximum penalty is life imprisonment. The offence is triable only on indictment. It is commonly called bestiality and this serves to distinguish it from other forms of buggery.

160. As comparatively little is known about bestiality we asked the Home Office Research Unit to provide us with details of convicted offenders in a typical year. They told us that in 1973 there were five convictions, all of men. The offenders' ages ranged from 17 to 60. Three offenders were placed upon probation; one was given a suspended sentence of 2 years' imprisonment; and one was sentenced to immediate imprisonment for 2 years.

161. We are of opinion that, if bestiality is to be retained as an offence, the maximum penalty should be greatly reduced. During our initial consideration of the subject we formed the view that the maximum could be reduced to 6 months and the offence be made triable summarily only. We sought the advice of the Policy Advisory Committee both upon this proposition and upon whether bestiality should be abolished as an offence altogether. They replied that for a number of reasons it should not be abolished altogether, although a minority of two members disagreed. The opinion of the majority was that total abolition would be unacceptable to public opinion. They also thought that nothing should be done that would seem to condone bestiality or give encouragement to its increased use in magazines, films and indecent exhibitions. They considered too that to retain bestiality as an offence punishable with imprisonment would ensure that those who needed treatment for engaging in sexual conduct with animals would be able to receive it under a hospital order. They agreed that the maximum penalty for the offence should be reduced to 6 months' imprisonment. They added that it was unlikely that any person would be sent to prison for an isolated offence, but it might be necessary to impose a sentence of imprisonment where a person had committed repeated acts of bestiality. Two members of the Policy Advisory Committee, however, considered that there was no justification for a special offence of bestiality. Conduct harming an animal is punishable under the law of criminal damage and cruelty to animals, and acts of bestiality performed in public would fall under the law relating to public indecency. One of the minority considered that a case had not been made out that persons who performed acts of bestiality were in any special need of treatment. Some members considered that the need for treatment was an insufficient reason for retaining the offence.

162. We ourselves are divided along the same lines and in the same proportion as the Policy Advisory Committee. We would therefore be interested to receive comments upon the matters discussed in the previous paragraph. For the purposes of this Working Paper the proposal which we put forward for comment is that buggery with an animal should be retained as an offence called bestiality, punishable with 6 months' imprisonment and triable summarily only.

163. This is not, however, sufficient to dispose of the matter. Both the Policy Advisory Committee and ourselves unanimously agree that the maximum penalty of 6 months' imprisonment which is proposed for the substantive offence of bestiality would be inadequate to deal with some of the cases which are likely to occur of a person procuring another to perform an act of bestiality. We have in mind three sorts of cases. The first is where a person, usually for gain, arranges for others to perform acts of bestiality as part of a live sex show. The second is where a person compels another to commit bestiality (as in *Bourne* (1952) 36 Cr. App. R. 125 and in one of the 1973 cases). Thirdly, there may be cases where a person encourages a young child to perform an act of bestiality. Bearing in mind that, especially in the second and third cases, the procurer may not be guilty of any other offence, we think that 5 years' imprisonment would be an adequate maximum for procuring bestiality, in which case the offence should be triable either way.[1]

[1]Professor Williams is of opinion that a special offence of procuring bestiality should not be created. He considers that the law on indecent exhibitions should deal with procuring for live sex shows and that procuring bestiality should not otherwise be an offence in the absence of threats, in which case an offence of procuring certain sexual acts (including oral intercourse and bestiality) by threats should be created.

SUMMARY OF PROVISIONAL CONCLUSIONS

We shall welcome comment on any aspect of the law relating to sexual offences. The Policy Advisory Committee on Sexual Offences are considering the age of consent for sexual intercourse with a girl and the minimum age for homosexual relations between males. We ourselves will be dealing with prostitution and allied offences in a further working paper. Comment is particularly invited on the matters set out below.

Rape and allied offences

(1) The offence of rape should remain substantially in its present form and punishable with a maximum of life imprisonment, but sexual intercourse induced by threats (other than threats of force) or other intimidation or by fraud should not be rape. Procuring sexual intercourse by threats or fraud should, however, be punishable with a heavy penalty under the offences mentioned in paragraph (7) below (paragraph 24).

(2) The presumption that a boy under 14 is incapable of having sexual intercourse (and therefore of committing rape) should be abolished (paragraph 27).

(3) The offence of rape should be extended to enable a prosecution for rape to be brought in all cases where a man has sexual intercourse with his wife without her consent, whether they are cohabiting or not (paragraph 37). A prosecution for marital rape should need the consent of the Director of Public Prosecutions (paragraph 42).

(4) The offence of rape should not be extended to cover other forms of vaginal penetration or any form of oral or anal penetration (paragraph 45).

(5) No special provision should be introduced to make evidence of a man's previous convictions for sexual offences admissible against him on a charge of rape; such evidence should be admissible only where it now is under the present law (paragraph 48).

(6) Two degrees of rape, punishable with different maximum penalties, should not be created (paragraph 50).

(7) The offences under sections 2 and 3 of the Sexual Offences Act 1956 (procuring a woman by threats or intimidation or by false pretences respectively to have unlawful sexual intercourse in any part of the world) should be retained in substantially the same terms as at present. If, as we provisionally propose, unlawful sexual intercourse induced by threats (other than threats of force) or other intimidation or by fraud should not be rape, the present maximum of 2 years' imprisonment for these offences should be increased to 5 years (paragraph 51).

(8) The offence under section 4 of the Act of 1956 of administering to a woman any drug, matter or thing with intent to stupefy or overpower her so as to enable any man to have unlawful sexual intercourse with her should be extended to protect males as well as females and to cover all sexual acts, including homosexual acts (paragraph 52).

Non-consensual buggery

(9) Non-consensual buggery on a man or woman should be retained as a separate offence and not merged with rape or indecent assault (paragraph 54).

(10) The maximum penalty for all forms of non-consensual buggery should be life imprisonment (paragraph 55).

Indecent assault

(11) The maximum penalty for all forms of indecent assault should be 5 years' imprisonment (paragraph 58).

(12) Two degrees of indecent assault, punishable with different maximum penalties, should not be created (paragraph 60).

Sexual intercourse with young girls

(13) There should continue to be two offences of unlawful sexual intercourse with young girls, the more serious being with a girl under 13, the less serious being with a girl under 16 (paragraph 66).

(14) It should be a defence to unlawful sexual intercourse with a girl under 16 that the defendant believed that he was lawfully married to her (paragraph 69).

(15) It should be a defence to unlawful sexual intercourse with a girl under 16 or with a girl under 13 that the defendant believed her to be aged 16 or over (paragraphs 68, 70).

(16) An honest belief, as opposed to a belief on reasonable grounds, should be sufficient for the defences proposed in paragraphs (14) and (15) above (paragraph 68) and for all other defences proposed in this Working Paper. The burden on the defendant of establishing those defences should be evidential only (paragraph 71).

(17) We reject the suggestion that a man should not be guilty of unlawful sexual intercourse unless there is some fixed age difference (say 4 years) between the parties; nor should it be material to liability that the girl took the initiative (paragraph 72).

(18) The maximum penalty for unlawful sexual intercourse with a girl under 16 should continue to be 2 years' imprisonment. Where a girl is under 13 it should remain at imprisonment for life (paragraph 74).

Consensual buggery

(19) Consensual anal intercourse between a man and a woman should no longer be an offence where the woman has reached a specified age. We invite comment upon whether the age should be 16 or 18 (paragraph 79).

(20) Consensual anal intercourse by a male with a female below the minimum age or with another male below the minimum age should continue to be a separate offence called "buggery" and should not be merged with the offence which we are proposing of gross (or serious) indecency (paragraph 81).

(21) Buggery with a boy or girl under 13 should be punishable with life imprisonment. Where the boy or girl is aged 13 or over but is under the relevant minimum age for buggery the maximum penalty should be 5 years' imprisonment (paragraph 81).

Indecency with the young

(22) The age of consent for acts of sexual indecency (subject to our proposals above for buggery) with a girl should remain at 16 (paragraph 86).

(23) Consensual conduct with a girl under 16 which is now punishable under section 14 of the Act of 1956 as indecent assault and indecent conduct with or towards a child under 14 which is punishable under section 1 of the Indecency with Children Act 1960 should be punishable under the following scheme:

It should be an offence—

(a) to commit an act of gross indecency with or towards a girl under 13 or to incite her to such an act; or

(b) to commit an act of gross indecency with a girl between 13 and 16 (paragraph 89).

We invite comment on whether the offence should be drafted in terms of "serious indecency" rather than "gross indecency" (paragraph 89).

(24) The maximum penalty for the offence with a girl under 13 should be 5 years' imprisonment. Where the girl is between 13 and 16 it should be 2 years' imprisonment (paragraph 89).

(25) The scheme set out in paragraph (23) above should also apply to acts of gross (or serious) indecency with boys under 16, the same maximum penalties being applicable (paragraph 90).

(26) If the minimum age for homosexual relations between males is to be reduced from 21 to 18, as the Policy Advisory Committee on Sexual Offences have provisionally proposed in their Working Paper, there should be an offence of gross indecency between males, similar to section 13 of the Act of 1956, where one or both parties is below 18, in order to protect young men aged between 16 and 18. The maximum penalty for this offence should be 2 years' imprisonment (paragraph 90). A man aged 18 or over should have a defence if he believes that the other man is also aged 18 or over (paragraph 91).

(27) It should be a defence to the proposed offence of indecency with a girl under 16 that the defendant believed that he was lawfully married to her (paragraph 91).

(28) It should also be a defence to the proposed offence of indecency with a boy or girl under 16 that the defendant believed that the victim was over 16 (paragraph 91).

Sexual relations with severely subnormal men and women

(29) In place of the existing offences penalising sexual relations with the severely subnormal consideration should be given to the establishment of a scheme along the following lines:

> A person responsible for a defective, male or female, should be able to apply to a county court for a non-molestation order which would in effect prohibit a named man from associating with the defective. Breach of the order should constitute contempt of court (paragraph 102).

The criteria relevant to the making of an order might be—

> (a) whether the man against whom the order is to be made is likely to have sexual relations with the defective or has already done so; and
>
> (b) whether either—
>
> (i) the defective is likely to suffer harm from having sexual relations with this particular man, or
>
> (ii) the defective is incapable of giving or withholding consent to sexual relations (paragraph 103).

We should be grateful for comment on the practicability and desirability of such a scheme (paragraph 107).

Incest

(30) We invite comment on whether incest between father and daughter should remain an offence at all ages or only where the daughter is below a specified age; and, if the latter, whether the age should be 18 or 21 (paragraph 118).

(31) We invite comment on whether incest between brother and sister should remain an offence at all ages or only where one of the parties is below a specified age; and, if the latter, whether the age should be 18 or 21 (paragraph 119).

(32) Incest between mother and son and grandfather and granddaughter should remain an offence subject to any age which may be specified in respect of paternal incest (paragraph 120).

(33) A party to incest below an age to be specified (possibly 18) should be exempted from criminal liability. The exemption should not apply to incest between brother and sister (paragraph 121).

(34) It should be an offence for a man to have sexual intercourse with his legally adopted daughter under 18 but the offence should not extend to step children or *de facto* adopted children (paragraph 125).

(35) All types of incest, including incest between brother and sister, should remain triable on indictment only (paragraph 127).

(36) The maximum penalties for incest, namely life imprisonment where a man commits the offence with a girl under 13 years and 7 years in all other cases, should be retained (paragraph 127).

(37) The name incest should be retained to describe any offence that remains (excluding any offence under paragraph (34) above) (paragraph 129).

Sexual acts in public

(38) (a) Consideration should be given to the creation of an offence penalising sexual intercourse (with a member of the same or the opposite sex), or gross (or serious) indecency with another person, in circumstances where the act is likely to be seen by others to whom it would be likely to cause serious offence (paragraphs 137, 140).

(b) Alternatively the act should be likely to be seen by "members of the public" and be likely to cause serious offence, "members of the public" being defined so as to include occupiers of neighbouring premises (paragraph 140).

(c) If the form of provision described in sub-paragraph (b) above were chosen, the ingredient of causing serious offence might be dispensed with and the offence simply be defined in terms of having sexual intercourse or doing an act of gross (or serious) indecency with another person in circumstances where the act is likely to be seen by "members of the public" (paragraph 140).

Whichever formula is adopted it should be necessary to prove that the defendant knew that his conduct was likely to be seen by others or was reckless as to that (paragraph 141). The offence should be punishable with 12 months' imprisonment and triable either way (paragraph 142).

(39) (a) If the form of provision described in sub-paragraph (a) or (b) of paragraph (38) above were chosen (under which a likelihood of causing serious offence would have to be established), consideration should also be given to the creation of an offence penalising any person who, whether alone or with another person, engages in acts of gross (or serious) indecency in the presence of others on premises of common resort (paragraph 144).

(b) If the form of provision described in sub-paragraph (c) of paragraph (38) above were chosen (under which it would not be necessary to establish a likelihood of causing serious offence), the "common resort" provision in sub-paragraph (a) of this paragraph would not be needed provided that it were made clear that "members of the public" included persons admitted to the premises of a club (paragraph 146).

(40) As an alternative to the offences described in the previous two paragraphs, homosexual conduct (i.e. buggery and gross indecency) should remain punishable as such where it occurs in public, or where it occurs in private and more than two persons take part or are present, as under section 1(1) and (2)(a) of the Sexual Offences Act 1967. It is for consideration whether in that event section 1(2)(a) could be relaxed by an exception for acts occurring "on a domestic and private occasion". Heterosexual conduct in public should be dealt with by a provision along the lines of the offence proposed by the Law Commission (paragraph 143).[1]

(41) Homosexual acts between males in a lavatory to which the public have or are permitted to have access, including such acts in cubicles, should continue to be offences and should be punishable with 12 months' imprisonment and triable either way (paragraph 147).

Consensual homosexual acts between women (lesbian acts)

(42) It should remain an offence for a woman to commit a homosexual act with a girl under 16 but the criminal law should not be extended to consensual homosexual acts between women aged 16 or over (paragraph 151).

Abduction

(43) Sections 17, 19 and 20 of the Act of 1956 should be repealed and replaced by an offence of abduction of a girl under 16 from her parent or guardian against his will with intent to have sexual intercourse with her. It should be a defence that the defendant believed her to be aged 16 or over (paragraphs 156, 157).

Bestiality

(44) The offence of buggery with an animal should be renamed bestiality. It should be punishable with 6 months' imprisonment and triable summarily only (paragraph 162).

(45) It should be an offence, punishable with 5 years' imprisonment and triable either way, to procure a person to commit bestiality (paragraph 163).

---

[1]Paragraph 140 above, footnote 1.

Printed in England for Her Majesty's Stationery Office by Linneys of Mansfield
Dd 696867 K17 8/80

With the Compliments

of

Mr D Bentley

Legal Adviser's Branch
Home Office
Queen Anne's Gate
LONDON SW1H 9AT

Tel: 01-213 6010

HER MAJESTY'S STATIONERY OFFICE

Government Bookshops

49 High Holborn, London WC1V 6HB
13a Castle Street, Edinburgh EH2 3AR
41 The Hayes, Cardiff CF1 1JW
Brazennose Street, Manchester M60 8AS
Southey House, Wine Street, Bristol BS1 2BQ
258 Broad Street, Birmingham B1 2HE
80 Chichester Street, Belfast BT1 4JY

Government publications are also available through booksellers

ISBN 0 11 340734 3