

**OPINION OF SENIOR COUNSEL**

**for**

**THE CHRISTIAN INSTITUTE**

**re**

**QUESTIONS POSED ON  
CURRENT AND PROPOSED  
LAWS RE THE SEXUAL  
OFFENCES BILL**

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**The Christian Institute  
Newcastle Upon Tyne  
Ref: Mr. S. Webster**

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**QUESTIONS POSED ON  
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I have been asked to advise on the specific questions which are highlighted in bold type:

**Under the current law in Scotland, is it legal (where both parties consent to the activities):**

- 1. for a 13-year-old boy to penetrate the mouth of a 13-year-old girl with his penis?**

No

At common law this would constitute the crime of lewd, indecent and libidinous practices<sup>1</sup>

In the recent case of *Webster v. Dominick*<sup>2</sup> where a Court of five judges reviewed the law and decided that the previously charged crime of shameless indecency was not a nomen juris in the law of Scotland and that the appropriate crime was as above. The Lord Justice Clerk delivering the Opinion of the Court said, “The appropriate starting point is the original and straightforward conception of the offences of indecency set out in *McKenzie v Whyte*. That decision classified lewd indecent and libidinous practices as a crime against an individual victim, and recognises that such practices are criminal whether carried out in public or in private. It classifies indecent conduct, as such, as a crime against public morals and establishes that such conduct is not criminal where it causes no public offence.”<sup>3</sup>

The Lord Justice Clerk continued by saying,

“In the modern law, where indecent conduct is directed against a specific victim who is within the class of persons whom the law protects, the crime is that of lewd, indecent and libidinous practices. It may be committed by indecent conduct with the victim...”<sup>4</sup>

The “class of persons whom the law protects” clearly includes children under the age of puberty with or without their consent.

There is authority<sup>5</sup> at common law that girls above the age of puberty may also be protected

Under section 6 of the Criminal Law (Consolidation Act) 1995 the conduct would be criminal. It is in the following terms:

“Any person who uses towards a girl of or over the age of 12 years and under the age of 16 years any lewd, indecent or libidinous practice or behaviour which, if used towards a girl under the age of 12 years, would have constituted an offence at common law shall, whether the girl consented to such practice or behaviour or

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<sup>1</sup> *McKenzie v Whyte* (1864) 4 Irvine 570

<sup>2</sup> 2003 Scottish Criminal Case Reports (SCCR) 525

<sup>3</sup> Paragraph 48 of the Opinion

<sup>4</sup> Paragraph 49 of the Opinion

not, be liable on conviction on indictment to imprisonment for a term not exceeding two years or on summary conviction to imprisonment for a term not exceeding three months.”

**2. for a 13-year-old girl to put the penis of a 13-year-old boy in her mouth?**

Yes

Under the current law the girl commits no offence although it could be lewd and libidinous behaviour for a woman to do this but traditionally the protection has been for girls not boys.

**3. for a 13-year-old boy to penetrate the mouth of another 13-year-old boy with his penis?**

No

The statutory provision relating to consensual sexual activity between males is limited to those of sixteen or over.

**4. for a 13-year-old boy to put the penis of another 13-year-old boy in his mouth?**

No

This is again conduct which would not be legal.  
In this situation both parties are acting illegally.

**5. for a 13-year-old boy to penetrate the vagina of a 13-year-old girl with his tongue?**

No

This would possibly be lewd and libidinous behaviour at common law.

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<sup>5</sup> See Gordon ‘The Criminal Law of Scotland’ 36.09 and footnote 16 at page 530

It would be an offence under section 6 as detailed above.

**6. for a 13-year-old girl to penetrate the vagina of another 13-year-old girl with her tongue?**

No

The 'active' girl would be a 'person' within section 6.

I am bound to say that I have not known of such a prosecution.

In Scotland I do not think a case has arisen which has raised a "lesbian age of consent question" which is I think distinguishable from England where the Statute would imply an age of consent at 16 in a lesbian situation.

**7. for a 15-year-old boy to penetrate the mouth of a 13-year-old girl with his penis?**

No.

This would be an offence both at common law and under statute.

**8. for a 15-year-old boy to penetrate the mouth of a 13-year-old boy with his penis?**

No

The statutory provision would not make this legal.

**9. for a 16-year-old boy to penetrate the mouth of a 14-year-old girl with his penis?**

No

This would be illegal both at common law and under statute as detailed above.

**10. for a 16-year-old girl to put the penis of a 14-year-old boy in her mouth?**

Yes.

There has been some academic speculation about lewd and libidinous practices applying to a boy “about the age of puberty {12) but I think it extremely unlikely that this would be considered an offence. I have difficulty in envisaging circumstances where the Crown would think it appropriate to prosecute.

**11. for a 16-year-old boy to penetrate the mouth of a 14-year-old boy with his penis?**

No

This would be illegal as detailed above

**12. for a 16-year-old boy to put the penis of a 14-year-old boy in his mouth?**

No

Both parties have to be of the age of 16 as detailed above

**13. for a 16-year-old boy to penetrate the vagina of a 14-year-old girl with his tongue?**

No

This would amount to the common law and statutory offences outlined above

**14. for a 16-year-old girl to penetrate the vagina of a 14-year-old girl with her tongue?**

No

The ‘active’ girl would be a ‘person’ within the statutory prohibition

**If the Sexual Offences (Scotland) Bill in its current form became law, and both parties to the following scenarios consented to the activities, would it be legal:**

- 1. for a 13-year-old boy to penetrate the mouth of a 13-year-old girl with his penis?**

Yes

Under section 27 of the Bill both are older children (ss. 2) and the penetration is of the mouth (see subsections (3) and (6))

- 2. for a 13-year-old girl to put the penis of a 13-year-old boy in her mouth?**

Yes

For the reasons stated above no offence is committed

- 3. for a 13-year-old boy to penetrate the mouth of another 13-year-old boy with his penis?**

Yes

For the reasons stated above no offence is committed

- 4. for a 13-year-old boy to put the penis of another 13-year-old boy in his mouth?**

Yes

For the reasons stated above no offence is committed

- 5. for a 13-year-old boy to penetrate the vagina of a 13-year-old girl with his tongue?**

Yes

Subsection (6) states that in subsection (3) the reference to A's mouth is to be construed as including a reference to the tongue or teeth.

- 6. for a 13-year-old girl to penetrate the vagina of another 13-year-old girl with her tongue?**

Yes

Again for the reason last mentioned

- 7. for a 15-year-old boy to penetrate the mouth of a 13-year-old girl with his penis?**

Yes

Again for the reasons mentioned above

- 8. for a 15-year-old boy to penetrate the mouth of a 13-year-old boy with his penis?**

Yes

Both are older children so only penetration of vagina or anus by the penis would be forbidden under section 27.

**9. for a 16-year-old boy to penetrate the mouth of a 14-year-old girl with his penis?**

The 16 year old boy is a 'person' within the meaning of section 21 who penetrates the mouth of a child who has attained the age of 13 but not 16 and thus has committed an offence.

However Section 29 (3) would provide a defence and Section 29(4)(a) would apply. This is providing the age gap does not exceed two years as outlined below.

It should be noted that the provision of section 29 (3) is in the following terms, "It is a defence to proceedings under any of the sections mentioned in subsection (4) that at the time when the conduct to which the charge relates took place, the difference between A's age and B's age did not exceed two years"

There is no guidance given as to how the two years should be calculated and since the provision is "did not exceed two years" then it can only be calculated as a 24 month period thus all of the questions I am asked in this section must be answered underlining that at any period (and most of these cases will involve a period "from" and "to" since it is unlikely that precise dates will be known) which falls outwith the 24 month period will not be exempt and thus there will be an offence committed according to the conduct which would constitute that offence and no defence to it..

For completeness it is helpful to note the provisions of Section 29 subsection 4 which are as follows:

"Those sections are

- (a) section 21 [Having intercourse with an older child – penetrating the vagina, anus or mouth of a 13 but under 16 year old] in so far as the charge is founded on penetration of B’s mouth
- (b) section 22 [Engaging in sexual activity with or towards an older child] in so far as the charge is founded on
  - (i) subsection 2(a) [penetrating sexually by any means and to any extent, intentionally or recklessly as to whether there is penetration, the vagina, anus or mouth of B] of that section and penetration was of B’s mouth or by A’s mouth, tongue or teeth
  - (ii) subsection 2(b) [intentionally or recklessly touching B sexually] subsection 2© [engaging in any other sexual activity in which A recklessly or intentionally, has physical contact (whether bodily contact or contact by means of an implement whether or not through clothing) with B] subsection 2 (d) intentionally or recklessly ejaculating semen onto B
- (c) any of sections 23 to 26
  - Section 23 [Causing an older child to participate in sexual activity]
  - Section 24 [Causing an older child to be present during sexual activity]
  - Section 25 [Causing an older child to look at an image of sexual activity]
  - Section 26 [Communicating indecently with an older child]

**10. for a 16-year-old girl to put the penis of a 14-year-old boy in her mouth?**

This would be an offence under Section 22 engaging in sexual activity with an older child.

Sections 29 (3) and (4) apply thus provide a defence providing the age gap is as outlined above.

**11. for a 16-year-old boy to penetrate the mouth of a 14-year-old boy with his penis?**

This would be an offence under section 22 of engaging in sexual activity with or towards an older child as there is penetration of the mouth of the 14 year old (ss.(2)(a))

Sections 29 (3) and (4) apply and provide a defence provided the age gap does not exceed two years as outlined above.

**12. for a 16-year-old boy to put the penis of a 14-year-old boy in his mouth?**

This would be an offence under section 23 of causing an older child to participate in sexual activity

Sections 29 (3) and (4) apply and provide a defence providing the age gap does not exceed two years as outlined above.

**13. for a 16-year-old boy to penetrate the vagina of a 14-year-old girl with his tongue?**

This would be an offence under section 22 of engaging in sexual activity with or towards an older child.

Sections 29 (3) and (4) apply and provide a defence providing the age gap does not exceed two years as outlined above.

As I have indicated above my responses to the second part must be read in context of the age provision.

It is appropriate to note that although there can be requirements by the Lord Advocate which are mandatory upon Chief Constables with regard to the reporting of offences there currently exists (and will continue to exist) a power in the Lord Advocate to exercise a discretion in that which is prosecuted and whilst in the questions in the first part of this Opinion there are circumstances where I have indicated there is a common law crime or statutory offence the Lord Advocate may direct, and all Procurators Fiscal throughout Scotland would be bound to follow, that these be not prosecuted or alternatively that the matter be reported to Crown Counsel for decision. It is unlikely that private conduct of a consensual nature done in private though somehow coming to light would be prosecuted.

A fundamental question which is for the Institute to consider as a matter of policy is whether the criminalisation of consensual conduct in private engaged in by young people should be prosecuted. Consideration would have to be given to the issue of whether it would have any effective deterrent effect. Also whether in a system of children's hearings as has applied in Scotland for a number of years taking matters into the courts as opposed to allowing the panel to deal with them is advised. Furthermore consideration would have to be given to whether the record of a criminal conviction throughout the formative part of a young person's life particularly when applying for employment until the conviction is spent or being on the Sex Offender's Register when attempting to find employment or when seeking to engage in community based projects is merited. These are policy matters which are not for me to determine but which must be considered as policy is formulated.

In my opinion the definition of “consent” and the ancillary provisions related to it in various parts of the Bill will prove to be a minefield and there will be a large amount of litigation about these both at trial and appeal levels. As presently drafted the Bill will cause difficulties for both prosecution and defence and, whilst well meaning, will in fact create shadows where present law and practise is clearer.

I shall be happy to respond further if that would assist the Institute.

**THE OPINION OF**

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Parliament House,  
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20<sup>th</sup>. October 2008