

Undermining the age of consent

Part 4 of the Sexual Offences (Scotland) Bill 2008



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Contents

Introduction	5
The existing law	7
The proposed changes	9
Stripping away vital protection	11
Oral sex can transmit STIs	14
Peer pressure	17
Consequences of early sexual intercourse	19
Conclusion	22
References	23

The Christian faith

The Christian faith teaches there is a right context for sex and a wrong context for sex. Sex with or between children is certainly in the latter category. Children are more easily manipulated and open to exploitation – whether by adults or other children. The law should do all it can to protect children from this pressure. This was precisely the reason for the age of consent offence being set at 16. The Christian campaigner, Josephine Butler, was chiefly responsible for that law. She highlighted the sexual abuse of children which was taking place in many British cities. Her solution was a robust age of consent offence which made it clear that sex with young girls is off limits, regardless of their ‘consent’ which can be so easily manipulated.

Introduction

On 19 December 2007 the Scottish Government opened a three month consultation on the Scottish Law Commission's Report on Rape and Other Sexual Offences. Some of the proposals of the report and an accompanying draft bill effectively endorsed teenage sex by permitting any sexual activity between children aged 13 to 15.

The Scottish Government published the Sexual Offences (Scotland) Bill in June 2008. At the time of writing the Bill is at Stage 1 of the legislative process in the Scottish Parliament, being considered by the Justice Committee.

The Bill does not implement the proposals of the Scottish Law Commission in full – if the current draft was passed, it would be illegal for underage children to engage in full sexual intercourse. However, the Bill legalises a vast number of under-age sexual activities. The reality is that the Bill completely undermines the current age of consent. It allows a 13-year-old to consent to oral sex or many other forms of sexual stimulation falling short of vaginal or anal intercourse. For example, a 15-year-old boy could engage in oral sex with a 13-year-old boy or girl with impunity.

The Bill will inevitably create serious evidential difficulties for police and prosecutors seeking to enforce the remaining age of consent offences. It removes a critical legal protection from some of the most vulnerable in society.

Undermining the age of consent

Most parents will see the provisions of the Bill as dismantling the age of consent protections. This causes us grave concern. The change also flies in the face of the stated public policy goal of reducing sexually transmitted infections amongst teenagers.

The existing law¹

It is an offence in Scotland for a person, including someone under the age of 16, to have sexual intercourse with a girl aged 13 to 15 (section 5(3) of the Criminal Law (Consolidation) (Scotland) Act 1995).

It is a crime at common law to indulge in indecent practices towards children under the age of puberty (12 in the case of a girl, 14 in the case of a boy), with or without their consent. This offence is known as “lewd, indecent or libidinous practice or behaviour”. Section 6 of the Criminal Law (Consolidation) (Scotland) Act 1995 extends the common law offence of lewd, indecent or libidinous practice or behaviour to cover conduct with girls over 12 and under 16. The offence of lewd, indecent or libidinous practice or behaviour has been taken to include a perpetrator forcing a victim to handle his penis or touching a victim’s hair with his penis.² Oral sex would clearly seem to be within this offence.

Section 13 of the Criminal Law (Consolidation) (Scotland) Act 1995 covers homosexual offences. This section would criminalise homosexual acts, including oral sex, with a boy under the age of 16 (s 13(5)(c)).

Therefore activities such as oral sex are illegal if committed on a girl between 12 and 16 by any person. Similar homosexual acts are illegal where committed on a boy under 16. Oral sex on a boy up to 14

Undermining the age of consent

would fall within the common law offence. The only gap in the current law on these activities would therefore be offences against boys aged 14 and 15 committed by females.

The contrast between the current law and the proposals of the Scottish Government as contained in the Sexual Offences (Scotland) Bill, which would repeal the offences mentioned above, is stark.

The proposed changes

Part 4 of the Sexual Offences (Scotland) Bill will solve a major anomaly in the Scottish age of consent by ensuring that it applies to males and females equally. This is a sensible proposal that we support. However, there are serious concerns about other aspects of this portion of the Bill:

1. Under-16s

The Bill only criminalises sexual activity between 13 to 15-year-olds where it involves penetration of the vagina or anus other than by the mouth.

Children aged 13 to 15 are defined under the Bill as being ‘older’ children. Sections 21 to 26 prohibit a range of sexual activities when they are committed against an older child, but only where the perpetrator is over the age of 16. Sections 27 and 28 deal with sexual activity between two older children, making penetration of the vagina or anus otherwise than by the mouth a criminal offence. However, no mention is made of other activities falling short of vaginal or anal penetration.

This omission clearly leaves it legal for two children aged 13 to 15 to engage in a whole range of sexual activities including oral sex and mutual masturbation without the criminal law being able to intervene.

The activities would be entirely legal even if the 13-year-old had just turned 13 and the 15-year-old was about to turn 16, i.e. there were almost 3 years between them.

2. Proximity of age defence

In section 29(3) the Bill includes what the Scottish Law Commission described as a ‘proximity of age defence’. This is a defence to many of the offences as defined in sections 21 to 26. Such a defence would allow a young person aged 16 or over to engage in sexual activity with a child under 16, where there is no more than 2 years between them. The proviso included in the Bill is that this exception would not cover penile penetration of the vagina or anus. But, among other things, a 16-year-old would be able to engage in sexual activity with a 14-year-old where there is penile penetration of the mouth. As well as oral sex a 16-year-old could also engage in mutual masturbation with a 14-year-old.

Where this booklet refers to “non-penetrative” sexual activity, it should be taken as describing all sexual activity that the Sexual Offences (Scotland) Bill would permit between 13-15 year olds, i.e. any sexual activity not involving penetration, other than by the mouth, of the vagina or anus. Penetration of the mouth or penetration of the vagina or anus by the mouth would not be criminalised between under-16s (section 27(3)) or where the parties are within the proximity of age defence (section 29(4)(a) and (b)(i)).

Stripping away vital protection

Allowing 15 or 16-year-olds to engage in a range of sexual activities short of full intercourse with 13 or 14-year-olds respectively could be highly exploitative and abusive. The younger party is unlikely to fully comprehend the physical, emotional or moral implications of the activities, or the health risks, and is therefore in no position to be able to give genuine consent. Consequently, the criminal law has a clear duty to intervene by prohibiting this conduct.

The Government has a duty to guard children from exploitation and abuse. A considerable amount of child abuse is carried out by young people. According to Home Office research, adolescents commit up to a third of all sex offences and many of the victims are children.³ Children as young as 13 are not able to make sound judgments about the consequences of their actions and it is the role of the Government to put in place measures that will protect them. The emotional and physical differences between just 13-year-olds and almost 16-year-olds can be considerable and the current draft of the Bill suggests that the authors have failed to appreciate these differences. Manipulation of a child by an older adolescent or even an immediate peer may be subtle but nonetheless real. In some instances a victim does not realise until much later that exploitation has taken place. The result is that the child would not have properly consented, yet in the eyes of the

criminal law would be deemed to have done so. This child protection concern is one reason that the law should prohibit *any* sexual activity below 16.

Under the current law it is extremely rare for there to be a prosecution of a 16-year-old for engaging in sexual activity with a 14-year-old. Such prosecutions are generally not viewed as being in the public interest, except where there are aggravating factors. In these most serious cases, inevitably linked to potential manipulation or abuse, the age of consent offence can be used by prosecutors when there does not seem to be sufficient evidence to sustain a more serious charge. But the Bill will create a major loophole in the law in this area by removing this option.

For example, where there is an accusation of a 16-year-old boy raping a 14-year-old girl but there does not appear to be enough evidence to secure a conviction, the prosecutors could currently use the age of consent provisions instead. Age of consent offences are therefore used in some of the most serious cases of under-age sexual activity, where the victims are particularly vulnerable. If the Sexual Offences (Scotland) Bill is passed in its current form, the scope for prosecutors to secure a degree of justice in such a scenario will be reduced. Cases will inevitably descend into disputes over whether penile penetration of the anus or vagina took place or not, which amounts to one person's word against another's. This will raise major evidential problems in an area that is already fraught with evidential difficulties. With an absolute age of consent protection, evidence of, say, semen from the perpetrator on the victim's clothes could be conclusive evidence of guilt. The new proposals will allow the perpetrator to argue that he did engage in some sexual acts with the victim, but not vaginal or anal penetration. It could be immensely difficult for the prosecution to prove otherwise.

The proposals in the Bill will lead to a severe weakening of the law. It will allow sexual activity to take place which is abusive whilst

still being lawful. We urge that an absolute age of consent at 16 is maintained without exception. In maintaining this, a clear message is sent and the criminal law fulfils its protective role.

Oral sex can transmit STIs

As stated above, the Sexual Offences (Scotland) Bill in its current form would not legalise full intercourse under the age of 16. However, allowing other sexual activities among children ignores the clear dangers of such activities, including sexually transmitted infections (STIs).

There is an increasing awareness that young people in Scotland need to be informed of the threat of STIs, and recent years have seen an expansion of school sexual health clinics and detailed sex education programmes. Yet the Scottish Government is proposing to contradict these messages by allowing 13-year-olds to consent to a plethora of potentially harmful sexual activities.

Increasing numbers of young people are participating in oral sex and other sexual activities falling short of full sexual intercourse, under the guise of ‘safe sex’, confident in the knowledge that pregnancy and loss of virginity will not result. Yet non-penetrative sexual activity is far from risk-free, and it is concerning to see it portrayed as such through supposedly reliable sources.⁴ A whole range of infections such as herpes, syphilis, HIV, gonorrhoea, HPV, intestinal parasites and Hepatitis A can be spread through oral sex with an infected partner.⁵ There is evidence that young women in particular are biologically more vulnerable to STIs than older women (see ‘Consequences of

early sexual intercourse' below). Legalising oral sex will encourage children and young people to further underestimate the risks of these behaviours.

Consider the current rates of STIs in Scotland. Rates of acute STIs diagnosed at Scottish genitourinary clinics (GUM) have more than doubled since 1996.⁶ In particular, rates of chlamydia among young adults have increased by 400% since 1996.⁷ The largest increases in positive diagnoses between 2002 and 2006 were observed in both men and women aged 15-19.⁸ In 2007 the highest proportion of samples from women testing positive for chlamydia was again in the 15-19 age range.⁹ In allowing sexual activity below 16 the Bill would pave the way for chlamydia and other STIs, which can lead to ectopic pregnancies and infertility, to become more and more widespread amongst children.

In Scotland, the number of diagnoses of gonorrhoea doubled in the ten year period, 1997-2006. Most diagnoses were in men and women aged 15-24.¹⁰ In 2006, 246 infectious syphilis cases were recorded at GUM clinics; this is the highest annual total recorded since 1952 and represents a 31% increase on that reported for 2005. Again, the largest increases were noted in those aged 15-19.¹¹ Once again two thirds of new diagnoses of genital warts amongst women were in those aged 15-24 and the largest increase was observed in those aged 15-19.¹² Scottish data from the National Survey of Sexual Attitudes and Lifestyles 2000 indicates that overall 9% of young men and 13% of young women have had an STI at some point.¹³ This is a shocking statistic and one that the Government should be fighting to bring down by discouraging early teenage sexual activity on health grounds in the same way as smoking is discouraged.

Research from the US demonstrates that those who begin sexual activity at a young age are more likely to have a large number of sexual partners during their lifetime,¹⁴ and this in turn makes them more vulnerable to catching an STI. Younger children are likely to

Undermining the age of consent

be less knowledgeable about their risk of catching an STI, and more vulnerable to deception, coercion or flattery from an older partner they are keen to impress (see the next chapter on ‘Peer pressure’). A child who has begun some form of sexual activity will be less likely to resist ‘going all the way’, so legalising non-penetrative sex may be a direct factor in increasing the number of children engaging in full sexual intercourse. There is a real danger that legalising ‘gateway’ activities such as oral sex will encourage all forms of sexual activity.

By introducing the present draft of the Bill, the Government would thwart its own plans to improve sexual health in Scotland.

Peer pressure

The dangers of peer pressure in this area must not be underestimated, and these pressures will increase massively if the Bill is not significantly altered before becoming law. As Lord Falconer, the former Lord Chancellor, said during a debate on the Sexual Offences Bill for England and Wales:

“The testimony of many children is that they welcome the protection that is offered by the age of consent, because it enables them to withstand peer pressure to engage in sexual activity before they are ready to do so. I am not sure that we would be right to remove that protection. I simply do not accept the proposition that we should leave children without any legal grounds to help them resist coercive sex. Legalising sexual activity between minors would send the message that sexual activity below the age of consent is acceptable and normal. In my opinion, that would encourage more children to engage in sexual activity before they are emotionally and physically ready to cope with the consequences.”¹⁵

It is also naïve to believe that all teenagers have the discipline, self control and courage in the heat of the moment to draw a line at full penetrative sexual activity when they have been engaging in many other forms of sexually stimulating behaviour up to that point. It stretches credulity to think teenagers would maintain a list of ‘legal’ and ‘non-legal’ activities, or that they would even know the difference, especially if they are being pressurised by an older teenager who simply

Undermining the age of consent

asserts that ‘sex is legal for over-13s’. Introducing the Sexual Offences (Scotland) Bill will make it legal for teenagers to put themselves in situations where the temptation to engage in full sexual intercourse will be too great for them to resist.

Consequences of early sexual intercourse

As has already been mentioned, once a child has engaged in some form of sexual activity they are likely to be more easily persuaded to progress to full sexual intercourse. Any evaluation of the Scottish Government's proposals would therefore be incomplete if the consequences of early sexual intercourse were not considered. These consequences include physical and psychological health risks, some of which also apply to 'gateway' activities such as oral sex, and teenage pregnancy.

Physical health risks

There are serious health risks stemming from earlier sexual activity. In particular, medical opinion recognises that young women are biologically more susceptible to STIs than older women.¹⁶ Key medical factors include physiological and immunological issues:

1. Physiological

The hormonal activity which causes the development of secondary sexual characteristics also causes the vaginal lining to thicken considerably from just a few cell layers to around an 80 cell layer thickness. The thinner the cell layer thickness at the time of first sexual intercourse, the greater the likelihood of trauma (coital injury) which

may facilitate the spread of STI pathogens. Another key element of the vagina's defence against infection, an antibacterial mucus, only develops up to two years after a girl has had her first period.

2. Immunological

A teenage girl is still immunologically immature. In particular, levels of a key antibody called IgA (or Immunoglobulin A) in the blood have only reached 60% of the adult level by puberty, and this level increases slowly thereafter.¹⁷

Psychological dangers

Many young people who have engaged in teenage sexual activity have admitted regretting this later in life. The largest and most academically robust study ever carried out of sexual activity was the *National Survey of Sexual Attitudes and Lifestyles* published in 1994. Analysis of this British survey found that 58.5% of girls whose first act of intercourse was under-age later regretted it as “too soon”.¹⁸ A recent study in Ireland produced very similar figures – 59% of women engaging in first sexual intercourse before 16 said they should have waited longer.¹⁹ Implementing the Bill can only serve to increase the number of girls having sex before 16 and living to regret it.

Not only can teen sex lead to bitter regret, but a gathering body of research points to a link between early sex and depression. A recent study published in the *Journal of Health Economics* demonstrates that, in girls, sex is related to major depression, and may also be related to low self-esteem.²⁰ This raises obvious concerns about the mental health of under-16s who are drawn into having sexual intercourse through the ‘gateway’ of non-penetrative sexual activities, as outlined above.

However, the study also raises fears that such non-penetrative activities could have their own impact on psychological well-being. The researchers examined whether concerns over becoming pregnant or contracting STIs caused the relationship between sexual activity and depression. Their evidence did not show this to be the case. So

implications for a child's mental health are not ruled out just because a particular sexual activity cannot lead to pregnancy or has a reduced risk of STI transmission. There is every reason to believe that the sexual activities the Scottish Government intends to legalise for under-16s have the potential to cause depression and other lasting mental harm among Scotland's young people.

Teenage pregnancy

Teenage conception rates in Scotland are amongst the highest in Western Europe. The rate in the under-16 age group has fluctuated since the early nineties, peaking in 1996 at 9.0 per 1,000. The lowest rate recorded is 6.6 per 1,000 in 2001. In more recent years the rate has been around 7.0 per 1,000 and the latest figures show an increase to 8.1 per 1,000.²¹ Reducing unintended teenage pregnancy is a national target for the Scottish Government. The target is to reduce the pregnancy rate amongst those under-16 by 20% from 8.5 in 1995 to 6.8 in 2010.²² Given that the most recent rate was 8.1 per 1,000 it seems highly unlikely the Government will reach its target. An analysis of factors associated with early motherhood showed that prevalence was higher among those who had first intercourse before 16.²³ As such, the Government needs to be tightening the laws on sexual activity rather than relaxing them.

Conclusion

We are pleased that the Bill does not adopt the Scottish Law Commission's proposals in their entirety. However, the failure to prohibit any under-age sexual activity except penetration of the vagina or anus otherwise than by the mouth, and the inclusion of the proximity of age defence, will dismantle key aspects of the age of consent law. These proposals are dangerous and wrong. Many vulnerable people that the criminal law currently protects will be exposed to exploitation by peers and potentially far more mature older teenagers. Sex is not an activity for children and it can carry great physical and emotional risks. Part 4 of the Bill must be revisited in order to properly protect children.

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Undermining the age of consent

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Undermining the age of consent

Part 4 of the Sexual Offences (Scotland) Bill 2008

The Scottish Government is proposing to relax the law on the age of consent for sexual activity. Although the Government has rejected the sweeping deregulation called for by the Scottish Law Commission, its proposals will allow teenagers as young as 13 to legally engage in oral sex and other forms of sexual activity.

These proposals, contained in the Sexual Offences (Scotland) Bill, remove an important protection for children from sexual abuse. Age of consent offences have been key to convicting paedophiles and sparing children the ordeal of proving they did not consent to sexual activity.

Relaxing the law would also send out entirely the wrong message to teenagers at a time when teenage sexual health in Scotland is alarmingly poor.

