

Response of The Christian Institute to the Scottish Government Consultation on the Scottish Law Commission Report on Rape and Other Sexual Offences

Introduction

The Christian Institute is a non-denominational charity established for the promotion of the Christian faith. We have almost 3,000 supporters throughout Scotland, including 544 churches and church leaders from almost all the Christian denominations.

We hold traditional, mainstream Christian beliefs about marriage and sexual ethics. In our efforts to promote these beliefs, we have previously contributed to public debates on issues such as divorce law reform and gay rights.

We are responding to consultation questions 29, 35 and 36 relating to sexual activity amongst children. We believe that these are extremely damaging proposals, for children and society. The recommendations will undermine the current age of consent, which is in place as a result of the work of Christian social reformer Josephine Butler. Her eighteen year campaign to raise the age of consent in the UK from 12 led directly to a new age of consent of 16 in the Criminal Law Amendment Act 1885. This age is still maintained by the Criminal Law (Consolidation) (Scotland) Act 1995. If the recommendations were to be implemented in their current form the work of Josephine Butler, and other Christian campaigners over many years, will be undone.

Consultation questions responded to

29. Do you agree with the SLC's recommendation that – "The offences mentioned in recommendation 28 cannot be committed by a person who has not reached the age of 16."?
(Paragraph 4.57; Draft Bill, sections 21(1); 22(1); 23(1); 24(1); 25(1); 26(1), (2))
35. Do you agree with the SLC's recommendation that – "There should be a defence to an offence involving sexual activity with an older child that the accused was less than 2 years older than the child or had at some time earlier engaged in such activity and at that time was less than 2 years older than the child."?
(Paragraph 4.78; Draft Bill, section 28)
36. Do you agree with the SLC's recommendation that – "But this defence does not apply to an offence involving penile penetration of an older child."?
(Paragraph 4.78; Draft Bill, section 27(2), (3))

Legalising teenage sex

The recommendations related to teenage sex contained in the SLC's report and draft bill are deeply irresponsible and extremely confused.

Under the proposal covered by question 29, children aged 13-15 would be permitted to have sexual intercourse.¹ This is nothing short of legalising teenage sex. It sends out a message to 13-year-olds that having sex at their age is perfectly normal. It would allow a 15-year-old boy to have sex with a 13-year-old girl or a 15-year-old boy to commit buggery with a 13-year-old boy.

A further recommendation, covered by questions 35 and 36, is that a 'proximity of age defence' should be introduced. 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.² The proviso included in the SLC's report and draft Bill is that this exception would not cover penile penetration.³ A 16-year-old would be able to engage in sexual activity with a 14-year-old, including, for example, masturbating them. This would extend to a 17-year-old with a 14-year-old where the older party's birthday happened to arrive earlier than the younger party's, and they had had a pre-existing relationship involving sexual activity.⁴

Sex between under-16s: "no discernible social wrong"?

The rationale given for legalising sex between 13-15 year olds is given in paragraph 4.52 of the SLC's report:

"Many instances of children engaging in sexual contact with other children do not involve any degree of exploitation. Indeed, for many teenage children sexual exploration is regarded as a normal part of growing up. It seems quite inappropriate to criminalise consensual activities which in themselves involve no discernible social wrong."

We would strongly challenge the assertion that sex between children involves "no discernible social wrong". Besides the emotional trauma to vulnerable young people, the inevitable consequences of underage sexual activity are unplanned teenage pregnancy and the spread of sexually transmitted diseases, two significant social problems. The state of sexual health in Scotland was frankly acknowledged when a sexual health strategy was launched in January 2005:

¹ *Report on Rape and Other Sexual Offences*, Scottish Law Commission, December 2007, pages 72 to 74

² *Report on Rape and Other Sexual Offences*, Scottish Law Commission, December 2007, pages 79 to 80

³ *Report on Rape and Other Sexual Offences*, Scottish Law Commission, December 2007, page 79

⁴ *Report on Rape and Other Sexual Offences*, Scottish Law Commission, December 2007, pages 79 to 80

“Sexual health in Scotland is poor. Sexually transmitted infections, such as chlamydia, are widespread and increasing, while teenage conceptions are amongst the highest in Western Europe.”⁵

Between 1996 and 2006, the number of under-15s in Scotland being treated for diseases such as chlamydia more than doubled.⁶ Reducing unintended pregnancy in girls under 16 has been cited by the Scottish Government’s Minister for Public Health as being a key aim of the sexual health strategy.⁷ Any proposal to legally endorse sexual activity at a younger age is contrary to the Government’s target of, and the national interest in, improving sexual health in Scotland.

The SLC’s report acknowledges these issues of social policy in the context of the proximity of age defence when it outlines the reasoning behind the defence not extending to penile penetration:

“We propose this limitation because, although we accept the need to prevent convictions for some forms of consenting sexual activity between someone under 16 and someone older, there are social policy objectives in seeking to restrict intercourse involving penile penetration. These include the possibility of pregnancy in the case of vaginal intercourse, and, in respect of all forms of penile penetration, the increased risk of sexually transmitted diseases which does not arise in other forms of sexual conduct.”⁸

It is inexplicable why penile penetration should be illegal between over-16s and under-16s but not between under-16s when the same social policy objectives clearly apply. This epitomises the confused thinking underlying the proposals. It would mean that a 15-year-old and a 13-year-old would be permitted to have a full sexual relationship including penile penetration, but those same two individuals when aged 16 and 14 would not.

Furthermore, the SLC appears to be totally unaware that child on child abuse is a serious issue. There is clear evidence that *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.⁹ Relatively low-level activity such as kissing might be part and parcel of an older teenager seducing a younger one, and the law should recognise the exploitative dangers of this.

⁵ *Respect and responsibility: Strategy and Action Plan for Improving Sexual Health*, Scottish Executive, 2005, page 1

⁶ *The Scotsman*, 18 July 2007

⁷ *The Herald*, 31 October 2007

⁸ *Report on Rape and Other Sexual Offences*, Scottish Law Commission, December 2007, page 79

⁹ Grubin, D, *Sex Offending Against Children: Understanding the Risk*, Home Office, 1998, page v

The protective principle

At paragraph 4.55, the SLC's report contains a seemingly pointless assertion:

“Where there is exploitation by one child of another who is aged 13 to 16, then that conduct should be criminal where there is no consent to it.”

We consider this an obvious point: non-consensual sexual activity should always be criminal. However, this sentence appears to conflate two issues, namely consent and exploitation. It appears the recommendation means that only exploitation resulting in non-consensual sexual activity would be illegal. In cases where exploitation leads to 'consent' being given, there would be no criminality. This approach ignores the importance of the protective principle underlying the age of consent. In such a case, where 'consent' has been obtained by means of manipulation or exploitation, the validity of the consent is highly dubious. This is one reason why the current age of consent rightly deems sexual activity with those under the age of 16 to be an offence. As the SLC states in the report (though its actual recommendations neglect this consideration), the law in its protective role:

“...aims to protect persons who, although they may be able to consent to sexual activity, are vulnerable to exploitation by others. In this situation, a person can give consent but the consent is held to be of dubious validity because of the person's immaturity...”¹⁰

The SLC's 2006 discussion paper indicated that criminal proceedings should still be brought in cases of sexual activity between under-16s where there was evidence of exploitation.¹¹ This concern seems to have disappeared from the final report, and the genuine dangers of exploitation are ignored. The emotional and physical differences between 13-year-olds and 15-year-olds can be extensive and are not acknowledged by the SLC's proposals. The statement in paragraph 4.52 that “many instances of children engaging in sexual contact with other children do not involve any degree of exploitation” displays little understanding of the nature of exploitation in many cases. Manipulation of a child by an older adolescent or even 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 sexual activity below 16. To again quote a portion of the report the SLC themselves seem to have ignored:

“By imposing criminal liability for sexual activity involving (older) children or persons who are otherwise open to exploitation, the law sends a clear

¹⁰ *Report on Rape and Other Sexual Offences*, Scottish Law Commission, December 2007, page 60

¹¹ *Discussion Paper on Rape and Other Sexual Offences*, Scottish Law Commission, January 2006, page 75

warning to persons that they should not be involved with this type of activity.”¹²

Proof of consent

An absolute age of consent fixed at 16 also helps protect young people in cases of more overt coercion, such as rape, because it regards them as incapable of consenting to sexual activity. Changing the law would create the possibility that vulnerable children could be cross-examined in a trial to establish if they consented to sex. If the law is changed in accordance with the SLC’s proposals, a 13-year-old girl whose 15-year-old boyfriend forced himself on her would have to make an allegation of sexual assault and prove that she did not consent. Currently, the very fact that sexual intercourse took place constitutes an offence. This change would be a severe weakening of the protection afforded to children.

Proximity of age defence

We have already alluded to some of the flaws in the reasoning underpinning this defence. Stipulating that the defence will not allow penile penetration of a child under 16 does not take account of other forms of intimate activity such as masturbation, penetration with fingers or implements, or cunnilingus. Such activities are clearly sexual in nature and if carried out without consent would constitute an offence under the SLC’s proposals. It should be recognised that allowing a 16-year-old (or 17-year-old, see below) to act in such ways with a 14-year-old could be highly exploitative and abusive. The younger party is unlikely to fully comprehend what the activities would involve 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 inclusion of the proximity of age defence in the SLC’s recommendations is an attempt to resolve problems created by the legalisation of sexual activity between children under 16. It is an effort to make the suggested revision of the age of consent at least internally consistent. As we have demonstrated (with the anomaly of the fully sexually active 15 and 13-year-olds no longer being allowed to have sex at 16 and 14, see page 3) bizarre scenarios still apply. The SLC try to deal with one such scenario by suggesting an exception in the case of a 16-year-old who turns 17 when he has a 14-year-old girlfriend with whom he has been engaging in sexual activity. In creating the exception, the SLC introduced another problem. It could mean that, the day before his 17th birthday, a 16-year-old could begin a sexual relationship (not involving penile penetration) with a girl who had turned 14 the day before. Despite the fact that the age gap would be almost 3 years, this relationship could continue once the adolescent turned 17.

Such anomalies are inevitable when a fixed age of consent applicable to all is removed. The answer is not to try to cover all scenarios with exceptions, but to maintain an absolute age of consent at 16. Under the current age of consent, a clear message is sent and the criminal law fulfils its protective role.

¹² *Report on Rape and Other Sexual Offences*, Scottish Law Commission, December 2007, page 60

In addition to the reasons already outlined, the necessity of a fixed age of consent at 16 is supported by two further arguments: concerns regarding peer pressure and the health risks associated with early sexual activity.

Peer pressure

The dangers of peer pressure in this area must not be underestimated, and these pressures will increase massively if the law is changed as the SLC recommends. 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.”¹³

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”.¹⁴ The SLC’s proposals can only serve to increase the number of girls having sex before 16 and living to regret it.

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 sexually transmitted infections (STIs) than older women.¹⁵ 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

¹³ House of Lords, Hansard, 2 June 2003, col. 1107

¹⁴ Johnson A M, Wadsworth J, Wellings K et al, *Sexual Attitudes and Lifestyles*, Blackwell 1994, Table 4.13, page 96

¹⁵ *Tracking the Hidden Epidemic: trends in STDs in the United States*, Centers for Disease Control and Prevention, US Department of Health and Human Services, 2000, page 3

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 blood have only reached 60% of the adult level by puberty, and this level increases slowly thereafter.¹⁶

Health risks: anal intercourse

The age of consent law covers a range of sexual activity, including anal as well as vaginal intercourse.

Anal sex carries particularly high health risks which children would be exposed to if the age of consent was liberalised. There are inherent health risks in anal intercourse because the rectal wall is not as tough as the vaginal lining, resulting in a greater danger that penetration will cause a tear, in turn leading to infection. These dangers are true for both men and women, and both heterosexuals and homosexuals can engage in anal intercourse.

Professor Gordon Stewart (Emeritus Professor of Public Health at Glasgow University) has studied the comparative risk of HIV according to the type of sexual activity. He has calculated that for men the risk of acquiring HIV through anal intercourse is at least 2,700 times the risk from vaginal intercourse.¹⁷

Anal sex carries such a high medical risk for homosexual men that the UK Blood Transfusion Service will not accept blood from any man who has ever had sex with another man, even if it was 'safe sex' with a condom.¹⁸ Even in Canada, a country with very liberal legislation regarding sexual activity, medical regulations restrict the use of organs from active homosexuals for transplants because of the risk of transmitting HIV or hepatitis.¹⁹

Conclusion

The recommendations contained in the Scottish Law Commission's report and draft Bill relating to sexual activity below the age of consent are reckless and wrong. They would strip away essential legal protection for children. Thousands

¹⁶ Duncan, ME, Tibaux, G, Pelzer, A et al, "First Coitus Before Menarche and Risk of Sexually Transmitted Disease", *The Lancet*, 335, 1990, page 338-40; Duncan, M E, 'Anal Intercourse - The Medical Risks' (unpublished paper, 2000)

¹⁷ Stewart, G, 'Scientific Surveillance and the Control of Aids: A Call for Open Debate', *Health Care Analysis*, 2, 1994, pages 279-286

¹⁸ 'Why we ask gay men not to give blood,' see <http://www.transfusionguidelines.org.uk/index.asp?Publication=DL&Section=12&pageid=391> as at 19 December 2007

¹⁹ *Cells, Tissues, and Organs for Transplantation and Assisted Reproduction: General Requirements CSA Standard*, Annex E "Exclusionary Criteria for Risk Factors Associated with HIV, HBV, and HCV", Canadian Standards Association, March 2007, and *CBC News*, 18 January 2008, see <http://www.cbc.ca/health/story/2008/01/18/health-transplant.html> as at 1 February 2008

of 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 risks. The proposals run counter to attempts to improve Scotland's sexual health, and the particular concern to reduce teenage pregnancy. It is imperative that the Scottish Government considers the public message sent out: the change would inevitably be taken as an official endorsement of under-age sex. The recommendations must be dropped in order for the law to protect children.