# RAPE AND SEXUAL OFFENCES: PRINCIPLES FOR REFORM*

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*The Scottish Law Commission has recently presented proposals for radical reform of the law on rape and other sexual offences. Two fundamental principles informing these proposals are (i) the need for the law to promote and respect a person's sexual autonomy; and (ii) protection of people who are vulnerable to sexual exploitation. Giving practical effect to these principles involves the detailed elaboration of a positive, co-operative model of consent to sexual activity, and setting out a comprehensive statutory code of offences designed to protect children and people with mental disorder from inappropriate sexual activity. Consideration will also be given to the question whether the law on sexual offences needs to reflect principles other than respecting autonomy and protecting the vulnerable, such as legal moralism. In addition other values or strategies for reforming the law on sexual offences (such as promoting clarity in the law and removing distinctions based on sexual orientation) will be examined.*

## Introduction

In 2007 the Scottish Law Commission completed a project for the reform of Scots law on rape and other sexual offences.[1] Remarkably, perhaps, the background to this project was not concern about the low rate of convictions for the crime of rape.[2] Rather the immediate catalyst was a decision of the highest criminal court in Scotland that the core of the definition of rape was sexual intercourse with a female victim without her consent.[3] The problem was that this idea of consent was new to Scots law but there was no definition or explanation of what it meant. Furthermore, there had been criticisms that other aspects of the law on sexual offences were incoherent and out of date.

In this paper I will not focus on the detail of the recommendations which the Commission made for reforming Scots law. For one thing, legislation is yet to be enacted to give effect to the proposals and, as some are controversial, not all of the recommendations might make it to the statute book. Also, some of the issues considered by the Commission reflected maters which are special to Scots law. Rather the paper will concentrate on the normative principles which the Commission used as guiding its thinking during the project.

Our terms of reference were to "examine the law relating to rape and other sexual offences".[4] An immediate task was to identify what is covered by the category of sexual



[1] A consultative Discussion Paper was published in January 2006 and the final Report in December 2007. Both documents can be accessed via the Scottish Law Commission's website at: www.scotlawcom.gov.uk

[2] However, there is clearly nothing to be complacent about. Scotland has one of the lowest conviction rates for rape in Europe. The last available official figures suggest a conviction rate of 3.9%. (Scottish Executive data (April 2007) for 2005/2006: Crimes of rape recorded by the police: 975; Persons proceeded against for rape: 88; Convictions: 38).

[3] *Lord Advocate's Reference (No 1 of 2001)* 2002 SLT 466.

[4] We were also asked to consider the evidential requirements for proving these offences. In the event we made no recommendations on the law of evidence. We had consulted on 3 topics on evidence: corroboration (which is a general requirement in Scots criminal law); sexual history evidence; and character evidence. We concluded that the law on corroboration and character evidence was in need of examination but that those law reform exercises could not be properly done in a project dealing only with sexual offences. As for sexual history

offences. Little help was provided by looking at the definitions and classifications of the existing law or at the older textbooks but a useful framework was to be found in the more modern literature.[5]

On this basis sexual offences are classified into three broad categories. First, there are offences which are concerned with promoting or protecting a person's sexual autonomy (for example, rape and indecent assault). Secondly, there are offences which seek to provide protection to persons who are vulnerable to sexual exploitation or about whom there are doubts concerning their capacity to engage in consenting sexual conduct (for example, statutory offences prohibiting sexual activity with a child or someone having a mental disorder). Thirdly, there are offences which seek to promote a social or moral goal other than those in the previous two categories (that is, autonomy and protection). Examples here are homosexual offences, incest, and sadomasochistic conduct.[6]

At first we thought of these categories as descriptive or analytical in nature but it soon became obvious that their proper purpose were to act as normative or justificatory principles. Accordingly we set out the following three general normative principles for our law reform project:

(1) respecting and promoting sexual autonomy;
(2) protecting people who might be vulnerable to sexual exploitation;
(3) a further principle (other than autonomy and protection), which might be called legal moralism, in particular the view that the law on sexual offences should reflect public morality.

In addition we identified various other values or strategies for law reform. These included:

(4) promoting clarity in the law;
(5) removing distinctions based on sexual orientation;
(6) using types of legal intervention other than the criminal law;
(7) categorising sexual offences according to the type of wrong.

One point which was made against us during the consultation process was that we were seeking to impose moral principles on the law of sexual offences. What these critics may have in mind was the old controversy on the 'enforcement of morals'. That debate, often presented in the context of sexual offences, was concerned about the extent to which social views should influence legal development.[7] Our approach was quite different. We were of the view that all of the major issues about reforming the law on sexual offences involve

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evidence this part of the law had been revised in a statute of 2002 and the workings of that Act were being assessed by a Scottish Executive project. We concluded that any consideration of the law should await the results of that project. (In the event the report of the project was not published until shortly before the publication of the Commission's own final report: see Michele Burman, Lynn Jamieson, Jan Nicholson and Oona Brooks, *Impact of Aspects of the Law of Evidence in Sexual Offence Trials: An Evaluation Study* (Scottish Government Social Research, 2007)).

[5] We found particular value in the discussion in C Gane, *Sexual Offences* (1992), pp 1-6 and also a broadly similar approach used in the article on Criminal Law in the *Stair Memorial Encyclopaedia*, vol 7, paras 294-320 (1995). (This model was not followed in 2005 Reissue of this article.)

[6] Various other types of public morality offences, such as pornography and prostitution-related offences were excluded from the scope of the project on the more pragmatic ground that either there had been recent statutory intervention in that area or because some other reform project was considering the topic.

[7] The classical statements of the issues in this debate are P Devlin, *The Enforcement of Morals* (1965); H L A Hart, *Law, Liberty, and Morality* (1963).

giving legal effect to some or other underlying moral principle and for us the important issue was to identify what those principles are.[8]

What I want to do now is to examine each of these principles and values and indicate how each provided a basis for our proposals for reforming the law.

## 1. Respect for sexual autonomy

In trying to locate the wrongs involved in certain forms of sexual conduct the most fundamental principle is respect for a person's sexual autonomy. Autonomy is a complex idea but in the context of legal regulation of sexual conduct it involves placing emphasis on a person freely choosing to engage in sexual activity. Respect for autonomy operates at two levels. Where a person participates in a sexual act in respect of which she has not freely chosen to be involved, that person's autonomy has been infringed, and a wrong has been done to her. This generates a fundamental principle for the law on sexual offences, namely that any activity which breaches someone's sexual autonomy is a wrong which the law should treat as a crime. But respect for autonomy has also a different type of implication for the criminal law. Where a person freely chooses to engage in a sexual activity, the law should in principle not prohibit that activity. There may be exceptional instances where a person's free choice in sexual activity is overridden and the conduct is made criminal. But these instances are truly exceptional and must be based on clear and convincing reasons.

The problem for law reform is how to translate the idea of sexual autonomy into a legal framework. Often the idea of consent is seen as a key element in giving effect to sexual autonomy. At a general level this concept helps to explain exactly what is wrong about certain forms of sexual conduct. Sexual activity usually involves social interaction between different people. In order for one person to respect the sexual autonomy of another, it is necessary to obtain that other person's consent to a sexual act. This requirement applies to every person who is or may be a party to a particular act. Where one person engages in sex with another without her consent there has not been an appropriate form of interaction between them. Engaging in sexual activity without the consent of another person is a particular form of wrongdoing to that person.[9]

One value of using consent to explain the abstract idea of sexual autonomy is that it acts as a more concrete way of stating a crucial general principle for assessing rules of the criminal law. The general principles about promoting and respecting sexual autonomy can also be reformulated in terms of consent. First, non-consenting sexual conduct should be criminalised. And secondly, consenting sexual conduct should not be criminalised unless there are strong reasons for doing so.

However, we were well aware, first, of the vast literature on consent[10] and, secondly, of various criticisms made of defining sexual offences by reference to the lack of someone's consent. Two criticisms seemed to us as fundamental:[11]

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[8] We found useful earlier discussions of reforming the law of sexual offences. See, for example, D J West, "Thoughts on Sex Law Reform" in R Hood (ed), *Crime, Criminology and Public Policy* (1974) 469; B Hogan, "On Modernising the Law of Sexual Offences" in P R Glazebrook (ed), *Reshaping the Criminal Law* (1978) 174.

[9] This approach to consent as a feature of sexual autonomy is explored in J Gardner and S Shute, "The Wrongness of Rape" in J Horder (ed), *Oxford Essays in Jurisprudence, Fourth Series* (2000) 193.

[10] See for example the collection of essays in Keith Burgess-Jackson, *A Most Detestable Crime. New Philosophical Essays on Rape* (1999) which contains a selected bibliography running to 25 pages.

(i) There are problems in knowing that consent to sexual activity has been given.

(ii) The idea of consent is ambiguous. A woman who has sexual intercourse with a man because she has been threatened with violence can still be said to have consented to intercourse, albeit for invalid reasons.

(i) *Determining consent.* The first point focuses on the difficulty of knowing when consent has, or has not, been given in respect of an activity. Clearly if someone utters the words 'I consent' then it is reasonable to suppose that consent has been given. However, even in this situation there may be factors which suggest that the consent is not genuine (for example, because it is the result of threats of force, a situation which is examined below). Rather the present point is how consent can be given where there has been no express utterance of the words 'I consent' (or their equivalent). In some situations sexual conduct proceeds on the basis of the consent of the parties without there being discussion or negotiation about consent, for example where parties have a long-standing relationship and regularly engage in a particular type of sexual activity.

The giving of consent in this way (implied consent) may also arise through conventions by which certain actings, or even doing nothing at all, can be understood as the giving of consent. This approach can be summarised as 'playing by the rules'. A general example is taking part in a game. If a person takes part in a game genuinely and willingly then she can be said to have consented to the rules of the game. Her consent is implicit in her taking part. Another example is to be found in decision-making; in many types of meetings failure by a person to object to a proposal is taken to mean that the person agrees with it.

However, it is by no means clear that such conventions exist in respect of sexual conduct,[12] or if they do exist whether it is correct to continue to use them. It could well be, for example, that there are conventions to the effect that where a woman wears revealing clothes or where a man enters a certain type of gay bar, then they are to be understood as indicating their willingness to engage in sex with persons whom they may encounter. But serious questions arise whether there are in fact conventions of this type which are accepted and understood by all the parties whose actings are to be interpreted by them. In the absence of such shared acceptances of the conventions, any inference that a person is playing by the rules of the conventions cannot be drawn. Indeed there are good reasons to suppose that some of these conventions reflect a one-sided, partial view of sexuality.[13] If that is the case

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[11] We noted other related criticisms, including (i) consent is a vague term which may led to various undesirable consequences (for example, at a trial the victim might give evidence that she had not consented but the accused could nonetheless suggest that her actings at the time indicated that she had given consent. (ii) consent models of sexual offences use improper stereotypes about victims, especially where women are victims; and (iii) consent models have the effect that the focus of a trial becomes the actings of the victim rather than those of the accused.

[12] D N Husak and G C Thomas III, "Date Rape, Social Convention, and Reasonable Mistake" (1992) 11 *Law and Philosophy* 95.

[13] There is an extensive literature which indicates that men and women adopt different perspectives in the context of sexual interaction. For discussion, see D Archard, *Sexual Consent* (1998), pp 30-37. Archard quotes (pp 156-157) the following passage from one of these works (Antonia Abbey, "Sex Differences in Attributions for Friendly Behavior: Do Males Misperceive Females' Friendliness?" (1982) 42 *Journal of Personality and Social Psychology* 830, at 830 n 17): "The research described in this article grew out of the observation that females' friendly behavior is frequently misperceived by males as flirtation. Males tend to impute sexual interest to females when it is not intended. For example, one evening the author and a few of her female friends shared a table at a crowded campus bar with two male strangers. During one of the band's breaks, they struck up a friendly conversation with their male table companions. It was soon apparent that their friendliness had been misperceived by these men as a sexual invitation, and they finally had to excuse themselves from the table to avoid an awkward scene. What had been intended as platonic friendliness had been perceived as sexual interest. After discussions with several other women verified that this experience was not unique, the author began to consider several related, researchable issues."

then such conventions should not be used as a means of determining consent. And if that conclusion is adopted, then problems remain about knowing when an activity is based on the parties' consent, where there has been no express utterance to that effect.

(ii) *Ambiguity of consent.* A further problem about a consent model is that even when it can be shown that consent was given, the idea of consent is inherently ambiguous. A distinction can be drawn between consent given for good and acceptable reasons and consent given for bad and unacceptable reasons. For example, a woman may have engaged in sexual intercourse with a man for the following reasons: first, because she found him sexually attractive and wanted to have intercourse; secondly, because he had told her, and she had believed him, that he was a doctor and that the intercourse was a part of a medical examination; or thirdly, because he had threatened to harm her child if she did not have intercourse. Each of these situations contrasts with that of intercourse where the woman is subdued by violence used by the man. And in each the woman gives her consent to the intercourse, but for quite different sorts of reasons. In the second case, the consent is based on a mistake as to the purpose of the intercourse and in the third, consent is given to intercourse as the lesser of two evils. Such cases suggest that not all cases of consent to intercourse should be treated in the same way. The first example is not a crime at all; the second is a crime, as is, even more clearly, the third. But (putting aside some overriding factor such as a protective principle), if some type of sexual conduct should be criminal even if the victim has consented, then it cannot be the absence of consent which accounts for its criminal nature.

However, we did not believe that these criticisms were fatal to all consent models. Rather, we believed that a refined model of consent can deal with the problems which those criticisms identified.

The difficulty with the some versions of consent is that it presents a model of sexual activity in which one party (usually, but not always, a woman) does not play an active role. On this approach sexual activity is something which is done *to* women by men, and women either consent to sex or they refuse consent. However, to the extent that sexual activity involves more than one person (and most forms do) it involves *interaction* between the parties. If the sexual autonomy of all of the parties is to be respected, then the focus should be on what all the parties, in their respective interactions, do to arrive at genuine consenting sexual activity.

The model of consent which we adopted was an 'active' (or positive) type as opposed to the passive model. On an active understanding of consent to sexual conduct the basic principle is that all participants in sexual activity should respect each other's sexual autonomy and all are equally active in reaching agreement on their sexual relations. In determining whether agreement has been given to a particular sexual act a court or jury should look at the whole background circumstances. The primary question should be "what did all the parties do to ensure that they participated in a fully consensual act?" The focus of enquiry would be not only on the behaviour of the victim but on the actions of the accused in the process of reaching agreement on consent.

We considered that re-interpreting consent in an active sense helps to overcome or minimise the problems thought to exist with a consent model. By emphasising the essentially interactive nature of sexual conduct, the primary focus of attention moves away from the victim and more to the accused. Problems about the vagueness and ambiguity of consent can be resolved by providing detailed accounts of what consent means rather than, as in

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

The model we adopted was two-tiered in nature: first there is a general definition of consent, and secondly there is a list of specified factors which indicate when consent cannot be established. [14]

In our view, adopting this approach to consent would bring distinct advantages to the Scots law of sexual offences, especially in relation to the criticisms we had noted of using lack of consent as a defining part of sexual offences. The first was that there would be difficulty in determining whether consent had been given in the absence of a person expressly using words such as 'I consent' or 'I agree'. However, a model which locates consent in the interaction between the parties avoids this problem. Giving consent is not simply a matter of making a particular verbal utterance. It is rather something which emerges from what the parties do and say to each other. One way of interpreting this interaction as involving the giving, or the withholding, of consent, is by appealing to social conventions. As noted earlier, some (but not necessarily all) conventions may be inappropriate ones to use (for example, where a woman wearing revealing clothing is interpreted as indicating her willingness to have sex). But the proposed model can avoid using these unappealing conventions by expressly ruling them out as interpretative guides. The model can say that certain situations are not in themselves to be taken as the giving of consent; or that other situations are indicators that no consent is given. Another advantage of the model is that it moves the focus away from the victim, and concentrates instead on what both parties did to bring about consent. In particular, it allows the law to adopt the position that if one person wants to have sex with another, and there is any doubt that the other person is consenting, then the obvious step to take is to ask.

A further problem about leaving consent undefined was that the idea is too vague and open-ended to assist in decision-making. But whereas this criticism may have force where consent is undefined, it does not necessarily extend to more detailed definitions, such as the model we are considering. A definition can aid by indicating situations where consent is present and when it is absent. By its nature such a definition would be more detailed than no definition at all but it does not follow that the term would become vague. Whether or not a definition of consent is vague depends upon what that definition says. There is no reason to suppose that all definitions of consent must have this characteristic. Much therefore depended on the detail of the consent model being proposed.

*Consent: general definition*

We took the view that consent should be given a general definition as 'free agreement'. This definition has the merit of brevity. It avoids the use of complex terminology.[15] At the same time it provides a meaningful account of what consent involves. It focuses on what for us

[14] We had examined similar models in other legal systems such as England and Wales, Canada, California and New South Wales. The law we found most useful was that of the State of Victoria.

[15] In contrast to the general definition adopted in other jurisdictions. See, for example England and Wales: "For the purpose of this Part a person consents if he agrees by choice, and has freedom and capacity to make that choice (Sexual Offences Act 2003, s 74); and California: "'consent' shall be defined to mean positive co-operation in act or attitude pursuant to an exercise of free will. The person must act freely and voluntarily and have knowledge of the nature of the act or transaction involved." (California Penal Code, s 261.6).

was often a key issue in the context of sexual activity. Clearly where a person does not agree at all to sexual conduct, consent is absent. But equally clearly a person can 'agree' to conduct without that there being a 'real' or 'full' or 'valid' agreement (as where she submits to sexual intercourse because of physical threats).

A point was raised by our consultees who favoured the general definition of consent as free agreement. This was that if this definition were to be adopted the term 'consent' should not be used in legislation and that reference to free agreement or lack of free agreement would suffice. However, we did not see the role of a general definition as simply that of providing a word or phrase which is a synonym of 'consent.' Rather the purpose of the general definition, as read with other provisions including the particular definitions, is to provide an *explanation* of the concept of consent.

*Consent: particular definitions*

The next element of the consent model was a list of particular definitions. What we had in mind was a non-exhaustive statutory list of factual situations which define when a person has not consented to sexual activity. The proposed list contained the following situations:

> (a) where the only indication of consent to sexual activity occurred at a time when the person was incapable of consenting because of the effect of alcohol or any other substance;
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> (b) where the person was unconscious or asleep and had not earlier given consent to sexual activity in these circumstances;
>
> (c) where the person agreed or submitted to the act because he or she was subject to violence, or the threat of violence, against him or her, or against another person;
>
> (d) where the person agreed or submitted to the act because at the time of the act he or she was unlawfully detained by the accused;
>
> (e) where the person agreed or submitted to the act because he or she was deceived by the accused about the nature or purpose of the activity;
>
> (f) where the person agreed to the act because the accused impersonated someone who was known to the person;
>
> (g) where the only expression of agreement to the act was made by someone other than the person.

Two points should be noted about the particular definitions.

First, they are not evidential presumptions but rules of law. The situations are not concerned with evidence used to prove lack of consent but are rather facts which constitute lack of consent. They are not so much part of the law of evidence as illustrations of the key element of the offence itself, namely lack of consent, and should be understood in that way.[16]

The second point is that the list is not to be understood as exhaustive of the situations where consent does not exist. Consent is defined in general terms as 'free agreement'. The

[16] This is in marked contrast to English law .The Sexual Offences Act 2003 contains 6 rebuttable presumptions about consent (s 75). However, the experience of that Act in practice has suggested that the presumptions have only a very limited value in proving lack of consent in the prosecution of sexual offences.

particular definitions are concerned with some factual situations where there is no free agreement. But there will be many types of factual situation, not on the statutory list, which may also involve lack of consent as free agreement. In other words, the general definition is not empty in content or devoid of application. In all cases where consent is in issue, the court or the jury must ask if the complainer gave free agreement to the sexual activity in question. If the evidence puts the case into one of the particular definitions, then the answer is that there was no consent. But even if the case does not fall within the particular definitions, the question of the presence or absence of free agreement must still be answered.[17]

Two further aspects of the consent model should be noted:

(a) Limited (specific) consent. Consent is to sexual activity may be qualified or restricted in some way (for example, where a woman consents to sexual intercourse with a man provided he wears a condom). In this situation the woman cannot be said to have consented to unprotected sex, and if the man disregards this element of the consent he would be guilty of a sexual assault. Similarly, the fact that a woman consents to one type of sexual contact does not of itself imply she consents to a different type. Kissing, for example, is not a sign of consenting to sexual intercourse. The fact that a woman engages in penetrative oral sex does not mean that she consents to penetrative vaginal sex. In other words, the law should make it clear that there is no implied escalation to consenting to different types of sexual activity.

(b) Withdrawal of consent. Someone may give consent to a sexual act and then withdraw consent either before or during the act. In our view the exercise of sexual autonomy involves the right to withdraw at any time consent previously given. It is not clear whether existing Scots law recognised the principle where a man has consensual intercourse with a woman and during the intercourse she indicates that she no longer consents to it, then if the man continues with the intercourse he is guilty of rape.[18] We accordingly proposed that this view should also represent Scots law. However consent to a sexual act cannot be withdrawn after the act is completed. In that situation the other party to the act has no way of adapting his or her behaviour to the withdrawal of consent.

## 2. Protective principle

If the law can provide a full version of a consent model and so promote sexual autonomy, a problem may exist about the protective principle which is the basis for many offences under the existing law.[19] In particular, the question arises what the protective principle adds to the

[17] Indeed we envisaged that over time case law will evolve on what constitutes lack of consent in the general sense of free agreement. In the Discussion Paper we provide two possible examples. In the first, a man, a highly placed manager at a place of work, tells a woman (a junior employee) that she will be sacked if she does not have sex with him. The man knows that the woman is in severe financial straits. They have sexual intercourse. In the second example, the situation is the same, except that the man tells the woman that if she has sex with him, he will give her a promoted post. Our view was that it would be difficult to formulate particular definitions that situations like these would always constitute lack of free agreement in all cases. Rather the presence or absence of free agreement depends on the particular facts and circumstances of each case.

[18] This is the law in other jurisdictions. See, for example, *Kaitamaki v R* [1985] AC 147 (PC) (New Zealand).

[19] Examples in Scots law are: the offence of having sexual intercourse with a girl under the age of 13 years (Criminal Law (Consolidation) (Scotland) Act 1995, s 5(1)); the offence of having sexual intercourse with a girl over the age of 13 and under the age of 16 ((Criminal Law (Consolidation) (Scotland) Act 1995, s 5(3)); the

principle that sexual activity which does not involve the consent of all the parties to it should be criminalised. Many of the existing offences were enacted when the criminal law used a loosely defined model of consent, which could give rise to a lack of certainty as to when someone could be said to consent to sexual activity. However, if a more detailed model of consent is used in defining sexual offences, then there may be no need for any special provision in respect of persons such as children or those with a mental disorder. Either such persons can and do consent to sexual activity, in which case the sexual activity is legally permissible; or they cannot or do not give consent, in which case the activity involves a breach of their sexual autonomy and hence should be criminal. Furthermore a key part of the autonomy principle is that where sexual activity is genuinely consensual, then it should not be criminalised in the absence of clear and convincing reasons. The criminal law has a role not simply in protecting sexual autonomy but in promoting it.

Nonetheless, we favoured arguments in favour of retaining offences based on a protective principle, even if a richer model of consent were to be introduced.

In the first place, some provisions involving children and other vulnerable people are fully consistent with the principle that sexual activity not involving the consent of the participants should be criminal. For example, a rule which states that a child under the age of 12 is not capable of giving consent to sexual intercourse can be interpreted as embodying a general rule that as a matter of fact most children of that age lack capacity to give such consent. The rule is then a useful mechanism for by-passing problems of proof of lack of consent in individual cases.

However, we accepted that not all rules which fall within a protective principle can be justified in this way. Although it is probably true that no child under the age of (for example) 10 could give meaningful consent to sexual intercourse, the same does not necessarily hold for children aged 14 or 15. Likewise with persons who have a mental disorder. Certain forms of mental disorder clearly preclude the giving of consent to sexual activity but not all do.

A further justification for protective offences is not simply to do with the question of consent or no consent. Rather, these provisions serve an important symbolic function of giving direct expression to the principle that vulnerable persons are protected, and are seen to be protected, by the criminal law. Sexual activity with young children or with persons with a serious mental disorder is wrong and the law should say so explicitly rather than subsuming such cases in a more general principle of consent. Protective offences are not inconsistent with the general consent model. They try to spell out in detail what is implicit in that model in respect of vulnerable persons.

There are two quite different types of wrong involved in these cases. The first involves the judgment that certain forms of sexual activity are in breach of social and moral norms. The activity in question is intrinsically wrongful. Examples are sexual activity with young children and with persons with serious mental disorder. These cases would always fall within a consent model of the kind suggested earlier but that model does not sufficiently bring out what is at the core of the wrongdoing. Consent is a key element of the law on sexual offences because it protects the sexual autonomy of a person who has capacity to give consent but who on any particular occasion chooses not to engage in the activity. There is

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offence for a person who is in a position of care over another person who suffers from a mental disorder to engage in as sexual act with that other person (Mental Health (Care and Treatment) (Scotland) Act 2003, s 313).

an *additional* wrong where the person involved lacks any capacity either to give or to withhold consent. Where a person is entirely lacking this capacity, sexual activity is *never* permissible, and the law should therefore mark out these cases as a distinct form of wrong from those where sexual activity is with a person whose capacity to consent to sex exists but is disregarded.

A second type of wrong involves persons whose capacity to consent is not fully lacking but is in some way underdeveloped. This is true of (some) children in their teens or persons with a less serious form of mental disorder, such as certain learning disorders. In these types of case, the law does not mark out conduct which is intrinsically wrong but rather aims to protect persons who, although they may be able to consent to sexual activity, are vulnerable to exploitation by others. In this situation, a person can give consent but the consent is held to be of dubious validity because of the person's immaturity or lack of full mental health. But here too the law serves an important symbolic role. By making criminal sexual activity involving (older) children or persons who are otherwise open to exploitation, the law sends a clear warning to persons that they should not be involved with this type of activity.

On this view, the protective principle has two quite separate rationales, and it is important that the law makes each of these explicit. The rationales are (1) that sex with young children and with persons with serious mental disorders is wrong and (2) that persons who are vulnerable to sexual exploitation should be protected. It is important that the difference between these two principles should be borne in mind when making proposals for formulating offences to give effect to them. Whereas the first deals with cases where there is no consent at all, the second principle is concerned with situations where consent is given but the validity of that consent is made doubtful by the circumstances of vulnerability. This important distinction exists in the present law. For example, sexual intercourse with a girl under the age of 13 is treated as a very serious offence, for which no defence as to mistake of age is permitted.[20] By contrast, sexual intercourse with a 15 year-old girl who 'consents' is regarded as a quite different form of wrong and one for which defences such as mistake of age are allowed.[21]

## 3. Legal moralism

As noted earlier we had identified three general principles which helped to explain the nature of the law of sexual offences in Scotland. Two of these, respect for sexual autonomy and the protective principle, we considered were useful also as normative principles in guiding our thinking on reform. The third such explanatory principle was different. Apart from the strategies for reform (considered below) we were not sure what, if any, other general normative principle there was in addition to the two we had adopted. Yet many existing offences appeared to be based on something other than promoting autonomy and protecting the vulnerable. We had in mind such offences as those criminalising consenting homosexual conduct, incest, sado-masochism, and bestiality. We were not inclined to accept as a proper basis for law or law reform a principle of legal moralism, that is the view that something should be criminal simply because some or many people thought it was wicked or bad. What we discovered was an important lesson in the practicalities of law reform. This is best illustrated by our proposals on the law of incest.

[20] Criminal Law (Consolidation) (Scotland) Act, 1995, s 5(1).
[21] 1995 Act, s 5(3), (5).

*Public morality offences: incest*

The existing law of incest overlaps with many other sexual offences.[22] Sexual assaults which involve the lack of consent by the victim, such as rape and indecent assaults, apply where the parties are related to each other. So also do offences based on the protective principle such as those prohibiting sexual activity with children under 16. In short, the only type of activity which incest prohibits which would not be subject to other criminal sanction is sexual intercourse between consenting adults who are of different gender and within the prohibited degrees of relationship.

What we then did was to ask the question whether incest should be retained as a separate offence. We tried to emphasise that the question was not concerned with non-consenting sexual activity between family members and was certainly not concerned with sexual contact between parents and (non-adult) children. We made it clear that such activities are wrong. They are, and should be, subject to direct and clear prohibition by the criminal law. Nor did we make any direct recommendations. We asked the questions: in addition to offences based on the lack of consent by the victim and offences based on the protective principle, should there continue to be a separate offence of incest; and if so why?

However, we should perhaps have paid more attention to other law reform projects which followed this approach.[23] Almost all consultees favoured a continuing offence of incest but it was often difficult to discern any clear ground for this view other than some form or other of legal moralism.[24] It quickly became obvious to us that continuing to explore the abolition of the crime of incest might distort the focus of the whole project. Whilst intellectually we could see no obvious principle for retaining the existing law, it was thought safer simply to retreat from this issue.

*Public morality offences: sado-masochism*

By contrast, another public morality offence where anticipated public objections did not materialise was in respect of sado-masochistic practices. Often this issue is discussed in the context of the general crime of assault rather than as a sexual offence. This approach

[22] But it should be noted that the existing law of incest in Scots is restricted to penile-vaginal penetration between a defined set of blood relatives.

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

[24] An exception to this trend was to be found in the views of several consultees who argued that incest between adults is never, or only very rarely, consenting. Incest often begins when a child is below the age of consent and continues when the child reaches that age. As the point was put in an article by Jennifer Temkin: "abuse does not cease to be abuse the moment the victim reaches a prescribed age. Many women will find it impossible to extricate themselves from such relationships." (J Temkin, "Do We Need the Crime of Incest?" 1991 *Current Legal Problems* 185 at p 187.) However counter arguments are that this situation is a ground for an offence which penalises abuse of trust and authority with any family setting, even where the victim is older than 16. If the mischief is to protect the person whose consent is open to question, it should be done other than by the crime of incest, which attaches criminal liability to all the participants (cp J R Spencer, "The Sexual Offences Act 2003: (2) Child and Family Offences" [2004] *Crim L Rev* 347 at pp 357-358.)

has the consequence that principles appropriate to reform of sexual offences, such as respect for sexual autonomy and decisions based on the free choice of the parties, get lost sight of. We took the view that a better perspective was to locate these practices as a form of sexual conduct and to ask whether there are any appropriate limiting factors on the exercise of sexual autonomy where assault on other persons is involved.[25]

As already noted an important guiding principle for the project was the idea that sexual practices involving consent should not, unless there are weighty overriding reasons, be subject to legal sanction. Difficult issues arise when applying this general principle to sexual activities which consist of the infliction or receipt of acts of violence, as most legal systems are suspicious about allowing consent as a defence to the crime of assault.

Although our project did not cover general issues about consent in the law of assault, we took the view that conduct done for purposes of sexual gratification did fall within its scope. In the Discussion Paper we stressed that the situation under consideration was one involving genuine consent given by all the parties to the specific activities in question, and we proposed that the offence of assault should not be constituted by any activity to which all of the parties have given their consent for purposes of sexual gratification.

Furthermore we accepted that this exemption from the offence of assault could not apply to all forms of violent conduct. Clearly conduct which was intended to cause death should not escape criminal liability. Accordingly in the Discussion Paper we asked whether the proposed exemption should apply to conduct which resulted in serious injury or was likely to result in serious injury.

The proposal to allow an exemption for acts done for the purpose of sexual gratification from liability from assault received considerable support from consultees, though some thought that the existing law already achieved this result. By contrast, there was a divergence of views as to the limits to any exemption. Some consultees would allow the exemption from assault to apply where there was a risk of serious injury provided that the parties had expressly agreed to this risk. Others proposed a wider scope for the proposed exemption, namely that a charge of assault should be available only if the activities resulted in permanent or disabling injury.

Accordingly we proposed that It would not be an assault for one person to attack another where: (i) the purpose of the attack was to provide sexual gratification to one or other (or both) of the parties, and the parties agreed to that purpose; (ii) the person receiving the attack consented to its being carried out; (iii) and the attack was unlikely to result in serious injury.

## 4. Clarity of the law

One important goal for any law reform project is to make the law clear.[26] The need for clarity is especially significant in the criminal law, where the consequence of infringement is the

[25] The characterisation of sado-masochistic practices as sexual rather than violent in nature is discussed in L Bibbings and P Alldridge, "Sexual Expression, Body Alteration, and the Defence of Consent" (1993) 20 *J Law and Society* 356, and N Bamforth, "Sado-Masochism and Consent" [1994] *Crim L Rev* 661.

[26] One of the duties of the Scottish Law Commission is to review Scots law with a view to "the simplification and modernisation of the law" (Law Commissions Act 1965, s 3(1)).

liability of incurring a penalty involving deprivation of liberty or property. This need is perhaps all the greater in respect of the law regulating sexual conduct. People contemplating engaging in a particular form of sexual conduct should be able to know, or find out without difficulty, whether what they are intending to do is, or is not, legal. There are two important issues in seeking clarity of the law in this context. The first is that each sexual offence must be defined in such a way that what it prohibits is directly stated. The second is that each offence must be comprehensive in scope; it prohibits certain forms of conduct but nothing more. There should not be open-ended sexual offences.[27] This value is enhanced by the role which the requirement for clarity and certainty of the criminal law plays in the European Convention on Human Rights.[28] The Convention sets out various rights which must be observed by States. A State may limit the exercise of these rights in various circumstances but must do so in accordance with 'law'. In explaining this idea the European Court of Human Rights has observed:[29]

> "a norm cannot be regarded as a 'law' unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail."

As a law reform body we would hope that all of our recommendations for reform would promote clarity and certainty but for several issues in particular this value played a significant role.

One example is whether or not consent should be defined. Under the current law lack of consent is a core element of both the actus reus and the mens rea of rape. It might therefore be thought that the law would be attentive to making clear what consent means in this context. However, that is not what Scots law has done. Indeed it has been held that a judge should not provide the jury with a definition of consent.[30] Our view was that this position was untenable and almost any definition was better than none at all. This view received strong support from all but one of our consultees.[31]

Another example of providing certainty in the law related to the law on sado-masochistic practices. We had recommended that assaults made for sexual purposes with the consent of the participants should be criminal provided that no serious injury would result. This proposal received widespread support among our consultees but some argued that it was unnecessary as it simply reflected existing police and prosecution policy. We were not convinced by this view. Our approach was that the law should make it absolutely clear,

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[27] An example in Scots law is the common law offence known as lewd, indecent or libidinous behaviour, which consists of conduct against children which tends to corrupt the innocence of the victim. In our Report we recommended that this crime should be abolished and replaced by more specific offences, such as causing a child to participate in, or be present during, a sexual activity, and causing a child to look at a sexual image.

[28] Article 7.

[29] *Silver v United Kingdom* (1983) 5 EHRR 347, para 88.

[30] In *Marr v HM Advocate* 1996 SCCR 696, a jury in a trial on a charge of indecent assault had asked for guidance on the meaning of consent. The trial judge's response was that the "definition of consent is a common, straightforward definition of consent. It's the common English word given its normal meaning. And that I am afraid is it. Consent is consent." On appeal the Court held that this direction was correct.

[31] It may be significant that the one dissent was in the response made by the senior Judges who argued that: "It is said that 'the idea of consent is inherently ambiguous'. We do not agree that consent is either an idea or ambiguous. The conclusion is that 'there are difficulties in using the concept of consent in relation to sexual offences'. Consent is not a concept. It is a matter of fact which we think can be readily understood by juries in a range of different circumstances."

especially to anyone wishing to engage in sado-masochism, what the law did, and what it did not, allow.

## 5. Distinctions based on sexual orientation

A further guiding principle is that the law on sexual offences should not involve distinctions based on sexual orientation or types of sexual practice. An allied point is that the criminal law on sexual offences should, as far as possible, not make distinctions based on gender. Again this principle is one which is recognised in the ECHR.[32] Decisions of the European Court of Human Rights indicate that a difference of treatment of homosexual men as opposed to heterosexual men and women cannot be justified, which suggests that there can be no place for specifically homosexual offences in any reforming legislation.[33] Furthermore any 'protective' legislation cannot apply to homosexual conduct without also covering heterosexual acts.[34]

In our project the most obvious point of applying this principle was in relation to homosexual offences, which in Scots law applied mainly to actings between men but not similar actings between women. The old law had been modified, but not abolished, by a statute in 1980, which allowed certain forms of consenting male homosexual conduct to be legalised. However the general framework of the old law remained. We proposed that all existing offences, including any common law crimes, which relate to homosexual conduct should be removed.

There are other odd aspects of the law on homosexual offences which we concluded should be removed. The existing provisions on homosexual acts extend the offences to acts not committed in private. Furthermore, an act is not committed in private if done "in a lavatory to which the public have, or are permitted to have, access whether on payment or otherwise." As far as we could discover, there is no such restriction on other lawful sexual acts, either in relation to heterosexual activity or even certain forms of homosexual acts. In our view what is wrong about sexual activity in a public place, including public lavatories, is that the conduct is an affront to public decency, and such acts should be punished as a form of indecent conduct, not as an illegal sexual act.[35]

A further example of the current law making distinctions based on gender was the set of statutory rules which seeks to protect children. As a matter of historical development, different rules apply to the protection of boys from those for the protection of girls, and the range of protection given to girls is different from that given to boys. We found this approach unsatisfactory. There should be no difference given to the protection of children because of their gender. Similarly, there should be equal protection of children from sexual activity whatever the gender of the perpetrator. We proposed that the law on sexual offences relating to children should not make any distinction in terms of the gender of the child, or of the perpetrator of such offences.

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[32] Article 8 (right to respect for private life).

[33] See *Sutherland v United Kingdom* (App No 25186/94, 1 July 1997) at para 36. The European Commission of Human Rights held that a minimum age of 18 for lawful sexual practices between men in the United Kingdom rather than 16 (the age limit for heterosexual and lesbian sexual activity) violated the applicant's right to respect for private life guaranteed under Article 8, taken in conjunction with Article 14 (prohibition of discrimination).

[34] *SL v Austria* (2003) 37 EHRR 39.

[35] This example also illustrates the importance of correctly categorising sexual offences, a matter is considered later in this paper.

## 6. Other types of legal and social intervention

This project is concerned with reforming a part of the criminal law. However not all legal regulation of sexual conduct needs to be done by way of the criminal law, and other types of legal process may be a more appropriate way of dealing with problematic sexual conduct. The criminal law should not cover every possible type of morally wrong sexual conduct. Matters such as adultery or sexual infidelity are not issues for the criminal law (or perhaps even for the law generally).

One particular and socially significant topic where this consideration proved crucial concerned our proposals for protecting children. We recommended two different sets of provisions. The first was related to children aged 13 or under. Here the law is to impose strict liability for any form of sexual contact with a child in this age bracket. The second concerned what we called older children, namely those aged between 13 and 16. As noted earlier, we considered that there should remain offences prohibiting sexual contact with a child of this age, even if the child consented to it (though here we did allow for defences such as reasonable mistake as to the child's age).

A particular problem arises in applying sexual offences relating to consensual sexual activity with young children to cases where the participants are themselves children. 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.[36] It seems quite inappropriate to criminalise consensual activities which in themselves involve no discernible social wrong. Professor J R Spencer has made the following comment on the provisions on sexual activity between children in the Sexual Offences Act 2003:[37]

> "The 'legislative overkill' point is that the child sex offences cover not only consensual sexual acts between children and adults, but all forms of sexual behaviour between consenting children. The result is to render criminal a range of sexual acts, some of which are usually thought to be normal and proper, and others at least not seriously wrong. … So far are these provisions of the Act out of line with the sexual behaviour of the young that, unless they provoke a sexual counter-revolution, they will eventually make indictable offenders of the whole population."

To understand the options available to the Commission it is important to bear in mind special rules in Scots law relating to prosecution of children. The background is the existence of the children's hearing systems. This is a welfare-based system, set up in 1971, which is concerned with children who are in need of care and attention. There are eight grounds for referring a child to a children's hearing, one of which is that the child has committed a

[36] Professor J R Spencer noted empirical studies about sexual behaviour: "in 1994 a widely-respected study reported that the average age of young people's first sexual experiences (kissing, cuddling, petting, etc) then stood at 14 for women and 13 for men. This also showed that 18.7 per cent of women and 27.6 per cent of men had full intercourse before they were 16 - figures which a follow-up study shows now stand at 24.8 per cent and 30.7 percent." ("The Sexual Offences Act 2003: (2) Child and Family Offences" [2004] *Crim L Rev* 347, at 354, referring to referring to K Wellings et al*, Sexual Behaviour in Britain: The National Survey of Sexual Attitudes and Lifestyles* (1994), p 40.)

[37] J R Spencer, [2004] *Crim L Rev* 347, at 354.

criminal offence. A hearing is conducted before a panel of three people recruited from a wide range of backgrounds and the purpose of the hearing is to decide on which measures of supervision, if any, are in the best interests of the child.

The general position for over 30 years or so has been that children under the age of 16 are not prosecuted in the criminal courts. The vast majority of cases involving children under 16 who commit an offence are dealt with through the children's hearings system and not in the criminal justice system.[38] In Scots law, it is (virtually) true, in respect of all types of offence, that children under 16 will not be prosecuted. Nonetheless, the system does allow for the prosecution of children, but only in rare cases raising a major issue of public interest.

In the Discussion Paper on sexual offences our preferred approach was not to exempt children under 16, as offenders, from the scope of these offences. Rather, we argued that these cases should be integrated into the general system on the prosecution of children under 16. The advantage of proceeding in this way was that the practical effect would be that criminality would not in the vast majority of cases be attached to consenting sexual activity between under 16 year-olds. Yet at the same time criminal prosecution could be brought against a child under 16 where there were compelling public interest reasons for doing so (for example, in cases involving exploitation); and, further, children under 16 who engaged in sexual activity could, where appropriate, be referred to a children's hearing on the basis of having committed an offence.

However, our final proposals were different. We adopted the more radical approach of exempting from criminal liability an 'older' child (someone between 13 and16) who had consenting sexual contact with another older child. It must be strongly emphasised that this proposal deals only with conduct involving consent. There is no question of removing criminal liability for people under 16 who participate in sexual conduct with someone who does not consent to it. 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. In making this proposal we were particularly struck by anomalies which would follow in criminalising consenting sexual activity between teenagers, which would extend to activities such as kissing each other. We were not impressed by the argument that such criminal liability would be theoretical only and in the vast majority of cases there would be no criminal prosecutions. Such an approach fails to take account of the possibility that older children might still be subject to investigation by the police, even if prosecution in the criminal courts is unlikely. More fundamentally, there is an important point of principle involved. If consenting sexual activity between young people is not to attract criminal liability, then the activity should not be criminal. It is contrary to the rule of law to enact a criminal offence and then to provide that the offence should be rarely, if ever, prosecuted.

At the same time we were not saying that children who engage in sexual activity should be immune from any form of social intervention. There will be cases where there are issues about the welfare of children who are sexually active and who should be referred to a

[38] In an earlier project on the age of criminal responsibility, we estimated that in the period we studied over 99% of children alleged to have committed a crime were dealt with in the children's hearings system, and less than 0.5% were prosecuted in the criminal courts (Report on *Age of Criminal Responsibility* (Scot Law Com No 185 (2002), para 3.10). These figures are based on data on referrals to children's hearings and on prosecution for the years 1997- 2000. Table 7 of Appendix D to the Report sets out data on the number of children proceeded against in the criminal courts from 1994 to 1999. The total number of children prosecuted over that period was 1,165, and of these the vast majority were aged 14 (143) or 15 (967). The number of children prosecuted for sexual assault was 18, for lewd and libidinous conduct 5, and for 'other indecency' 8.

children's hearing. For that reason we recommended that there should be a new and separate ground of referral to a children's hearing, namely that a child has engaged in sexual activity with someone else.

## 7. Classifying sexual offences according to the type of wrong

A final consideration in the Commission's formulations for the reform of the law was the principle that sexual offences should be categorised according to the type of wrong involved. There were several topics where this point was relevant.

*Should there be a separate category of sexual assault?*

We had noted arguments for not introducing a separate category of sexual assault. Rape and indecent assaults are essentially acts of violence and should be seen as part of the law on assault. Classifying these offences as separate from other types of assault might fail to reflect the violence involved in sexual attacks. Secondly, drawing a distinction between sexual and other forms of assault involves the difficult question of defining what is meant by sexual in this context. Furthermore, the current law of assault does allow for attention to be given to the sexual nature of certain types of assault. The law of assault does not draw rigid distinctions between different categories but instead allows for various circumstances which are recognised as aggravating an assault. On this approach, sexual assaults would not be a separate type of sexual offence but the sexual character of some assaults could be used to indicate an aggravating circumstance.

We were not convinced of the merits of this approach. Whilst it is true that many types of rape and indecent assault are violent in nature, others are not. Rape and indecent assault can involve situations which, while coercive in nature, are not violent. Indeed, many instances of rape occur between people who are acquainted with each other and involve a minimal degree of violence. We thought it right that the law should refuse to reflect the view that non-violent rape is not 'real' rape. Moreover, one of our guiding principles for reform of the law on sexual offences was that the law should promote and protect sexual autonomy. But this key principle is undermined if sexual assaults are treated as only examples of the more general offence of assault. The specific wrong of sexual assault is the infringement of sexual autonomy; the use of violence is an additional, not a central, part of the wrongdoing.[39]

*How should sexual assaults be differentiated?*

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

[39] A study of the experience of victims in New Zealand threw doubt on the value of the approach of reclassifying sexual assault within the general law of assault. It noted that: "Victims who had been beaten felt that the act of sexual intercourse rather than the assault was the primary injury. ... Any legislation highlighting the violent component of the offence at the expense of the sexual violation involved would therefore seem to be at odds with the perception of many victims." (Warren Young, *Rape Study* (1983), p 109).

We noted a distinction made in several jurisdictions between penetrative and non-penetrative sexual assaults.[40] The underlying rationale of this approach is that in the context of sexual assault, penetration is a particularly serious attack on a person's physical (and emotional) integrity and a major infringement of his or her sexual autonomy. The point is not that non-penetrative sexual assaults are necessarily of lesser seriousness; some may be, but not all are, and much depends on the circumstances and nature of the assault. Rather, sexual penetration of another person's body without that person's consent is a distinctive type of attack on that person. We accepted that not everyone might agree. A counter-argument is that to equate sex with penetration is to adopt a one-sided view of sexuality and suggest that penetrative sex is 'normal' whereas other forms are not. We found it difficult to assess the merits of this view in the present context, for what we were arguing is that non-consenting penetrative sex is a particular form of sexual wrong which the law should recognise as such. The proposed classification of sexual assaults, of which penetrative assaults form one general type, is not intended to be a strict gradating or hierarchical schema. Thus we were not saying that, for example, all rapes are more serious than all non-penile penetrative assaults which in turn are always more serious than non-penetrative sexual assaults. Often this will be the case but, depending on the circumstances, not always. Still less were we saying that because rape is a serious offence, a sexual assault by contrast is trivial. The point is not that one type of assault is always worse than another; but rather that different forms of wrong are involved in each type. Nonetheless we did see sexually penetrative assaults as a distinct type of wrong, and one which the law should reflect by way of separate legal provision.

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

Arguments in favour of making this further distinction are mainly based on the idea that as the penis is a sexual organ, penetration with a penis represents a quite different form of wrong from other forms of penetration. At one level the assault is itself sexual in nature because the attack involves the victim's vagina, anus or mouth. But an added dimension to the sexual nature of the attack is present when the penetration is made with the sexual organ of another person, which for practical purposes means the penis. Arguments against this further distinction between penile and other forms of penetration deny that there is any major difference between the type of wrong suffered by a victim who has been subject to any form of sexual penetration. Furthermore, the proposed distinction reinforces the idea mentioned earlier, that penile penetration is the paradigm, normal form of sex, a view which should be questioned. At the end of the day we favoured having a separate category of penile penetrative assaults for the reason that penetration with the sexual organ of someone was a distinct type of wrong to the victim.

A further point in considering the merits of this distinction was a separate issue, namely whether the law should continue to use the term rape to refer to a certain type of sexual assault. In some legal systems, such as Canada and New South Wales, the word rape is not used in the legislation on sexual crimes.[41] A main argument in support of this approach

[40] For example in English Law (Sexual Offences Act 2003, s 1 defines rape as penetration with a penis, and s 2 defines assault by penetration as a form of assault with a part of the body or with anything else.)
[41] J Temkin, *Rape and the Legal Process* (2nd edn, 2002), pp 177-178.

is that the term rape is seen as stigmatic as far as concerns victims of the crime.[42] A further point is that it also stigmatises persons accused of rape and as a result juries might not be prepared to attach the label of rapist to an accused in cases which do not fit into a stereotypical image of rape as involving violent assault between persons who were strangers to each other. However, we noted that there is now little support for abandoning the term rape. It is considered that, by not using the term, the seriousness of the offence became downgraded. Moreover its stigmatic effects have important functions in labelling a particular form of wrongdoing. Professor Jennifer Temkin has quoted the views of the Law Reform Commission of Victoria, who wrote that the "main argument for retention regardless of the form and substance of the law is that the term 'rape' is synonymous in our culture with a particularly heinous form of behaviour."[43] For these reasons we favoured retention of the term rape, which we consider has an important role in expressing social disapproval of a certain sort of sexual wrong.

*The wrongfulness of (consenting) sex with 'older' children*

There is without question a wrong where a person has sex without his or her consent, and this applies just as much where the victim is a child. But if an older child has capacity to consent and does in fact consent to a particular sexual act, is any wrong involved? The arguments here are, first, that because of the relative immaturity of the child, doubts remain about the validity of the consent, especially where the other party concerned is older and more experienced than the child. What the law is seeking to prevent is the exploitation of the child's vulnerability to give consent without fully appreciating what is involved. The second aim of the law is to make a symbolic statement about child protection. The Home Office Review Group whose recommendations preceded the changes in English law noted that one of the key issues to emerge from its consultation was "the need for the law to establish beyond any doubt that adults should not have sex with children."[44] Placing protection of children in general sexual offences applying to victims of any age tends to hide this statement of principle.

Nonetheless, it might be argued that children on reaching their 13th birthday do not need this type of protection. According to this view, there must be a point at which a person is thought to be mature enough to decide whether to engage in sexual activity, and that age should be lower than 16. In effect, this is an argument to lower the age of consent to 13. It should be noted that this is an argument of general principle. It is not dealing with the separate issue of children who have sex with other children, or with removing criminal liability from children who have sex. Rather it goes further and denies that there is anything wrong in a person of *any age* having sex with a child under 16 provided that the child gives his or her consent (and also that there is no relationship of trust between the parties).

We did not agree with this approach. We took the view that the provisions on consent and on abuse of trust do not by themselves provide adequate protection for children aged 13 to 16. The consent model which we proposed would widen the scope of what is meant by consent to sexual activity. What that model does is to require examination of parties'

[42] See Law Reform Commission of Canada, Report on *Sexual Offences* (LRCC No 10 (1978)), p 12: "The Commission has come to the conclusion that the very use of the word 'rape' attaches a profound moral stigma to the victim and expresses an essentially irrational folklore about them." (Quoted by Temkin, p 177.)
[43] Law Reform Commission of Victoria, Discussion Paper on *Rape and Allied Offences: Substantive Aspects* (LRCV No 2 (1986)), p 51. (Quoted by Temkin, p 178.)
[44] Home Office, *Setting the Boundaries: reforming the law on sexual offences* (2000), para 3.6.1.

interactions to determine whether consent had been given. Thus, a man having sex with a 13 year-old boy or girl would be guilty of rape or assault where the man plied the child with drink, threatened violence, where the child was asleep, and so on. But the consent model does not capture cases where consent is actually given but for questionable reasons. Thus, a woman having sexual intercourse with a man to obtain money or other material reward is not rape. The law must allow people to engage in sex for bad reasons. But this approach would apply equally to children under 16 if protective offences were abolished. It would not then be rape, or any other offence, where a boy of 13 consented to having sex with a man of 52 in exchange for money, or an iPod. Nor would there be any lack of consent where a man of 40 'chats up' a girl of 13 and persuades her to have sexual intercourse with him.

Our final view was that there should continue to be protective offences when someone over 16 has consenting sex with someone aged between 13 and 16. The aim here is to protect such 'older' children from consenting to sex for bad reasons. If it is thought that this approach is paternalistic, then our response is that paternalism is hardly out of place when dealing with children, even with children in this age category.