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The Sexual Offences (Amendment) Bill: ‘Age of consent’ and abuse of a position of trust

[Bill 10 of 1998-99]

Clause 1 of the Bill implements the promise of the Home Secretary in July 1998 that legislation would be introduced dealing with the age of consent for homosexual acts. It seeks to equalise the age at which people can lawfully consent to homosexual and heterosexual sexual activity. The Bill would make this age 16 in England, Wales and Scotland, and 17 in Northern Ireland.

The Bill also includes measures intended to protect children of both sexes aged between 16 and 18 from adults who are in position of trust in relation to them.

This paper should be read in conjunction with the Explanatory Notes published with the Bill, which set out the government's views on what the Bill will achieve. Broader coverage of the main issues concerning the age of consent for homosexuals can be found in Research Paper 98/68, from which much of the first part of this paper is drawn.

Arabella Thorp

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Summary of main points

Following the report of the European Commission of Human Rights in the case of Euan Sutherland in July 1997, the government undertook to secure a vote in Parliament 'at the earliest opportunity' on the age of consent for homosexual acts. A backbench amendment to the bill which became *Crime and Disorder Act 1998*, tabled by Ann Keen with the support of Conservative, Liberal Democrat and Labour Members, provided an opportunity for such consideration, and was agreed to on a division by 336 votes to 129. It was however rejected by the House of Lords. At that stage the Home Secretary stated that legislation aimed at equalising the age of consent would be introduced in the House of Commons in the next session (ie 1998-99).

During the debates on this amendment in both the House of Commons and the House of Lords, there was a great deal of discussion on the need for protecting vulnerable young people, both boys and girls, from abuse by those in a position of trust or authority in relation to them. The Home Office Minister Alun Michael announced that the interdepartmental working group set up to identify the additional safeguards needed to prevent those who are unsuitable to do so from working with children would also look at the measures necessary to protect 16- and 17-year-olds who may be vulnerable to abuse by those in positions of trust.

A Bill to deal with both of these issues was announced in the Queen's Speech last November, and the *Sexual Offences (Amendment) Bill* [Bill 10 of 1998-99] was introduced in the House of Commons on 16 December 1998. The Bill applies to Northern Ireland and Scotland as well as England and Wales.

Clause 1 is designed to amend various existing provisions in order to equalise the age of consent for heterosexual and homosexual acts at 16 for England, Wales and Scotland, and 17 for Northern Ireland). Clauses 2 to 4 would create a new offence of abuse of a position of trust where a person aged 18 or over has sexual intercourse or engages in any other sexual activity with or directed towards a person under that age, if the person aged 18 or over is in a position of trust in relation to the younger person in circumstances specified in the Bill. A person convicted of or cautioned for such an offence would be subject to the notification requirements of the *Sex Offenders Act 1997*.

Part I of this paper summarises the existing laws relating to sexual offences, homosexual and heterosexual, involving children and young people. It then goes on to look at recent proposals to equalise the age of consent, before discussing the both general aspects of the *Sexual Offences (Amendment) Bill* and those provisions relating to the age of consent.

Part II looks at existing provisions, criminal and non-criminal, which aim to prevent people in a position of trust or authority from taking sexual advantage of children in their care. The suggestions of various reports and working groups on the creation of a possible offence in relation to young people over the age of consent are then set out. Finally the paper discusses the remaining clauses of the Bill, which deal with abuse of a position of trust, and looks at some possible future legislation on this issue.

This paper will use the terms 'homosexual' and 'gay' interchangeably. Strong views are often held on the terms used by those on both sides of the argument. It is not proposed to use the term preferred by radical gay activists of 'queer', nor is it intended to use the term MWHWSM (men who have sex with men) used by health workers to focus on sexual behaviour rather than sexual orientation.

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I Age of consent for homosexual acts

A. The Present Law

1. Homosexuals

There are three offences which are used as the principal means through which the criminal law regulates homosexual behaviour: buggery, assault with intent to commit buggery and gross indecency between men. In addition, although much less frequently charged, are the more general common law offences of conspiracy to corrupt public morals and outraging public decency; and also the offences of insulting words or behaviour contrary to sections 4 and 5 of the *Public Order Act 1986* and indecent assault. The law does not criminalise the state of being homosexual itself.

a. *England and Wales*

The offence of buggery is contained in section 12(1) of the *Sexual Offences Act 1956*,¹ and assault with intent to commit buggery is an offence under section 16 of the *1956 Act*. The offence of gross indecency is contained in section 13 of that Act and can only be committed by a man with another man. There is no statutory definition of ‘gross indecency’ as it is a matter of fact - in other words, it is for the jury to decide in any particular case whether the behaviour concerned is ‘grossly indecent’. Case law suggests, however, that it covers such acts as mutual masturbation, and that the willing participation of two men is necessary.

Section 1 of the *1967 Act* legalised homosexual acts (buggery and gross indecency with another man) in private where both parties consent to it and have reached 21 years of age, and introduced summary trial for the offence of gross indecency. It did not, however, change the position whereby buggery of a woman was an offence punishable by life imprisonment regardless of the consent of the parties or their age.

Sections 143-5 of the *Criminal Justice and Public Order Act 1994* then lowered the age at which a man could lawfully consent to homosexual acts in private from 21 to 18, and revised the penalties for buggery and indecency between men.² The charge of rape was for the first time made available where a man has had anal intercourse with another man or a woman, whatever their age, without their consent [section 142]; and the Act also decriminalised consensual buggery in private of a woman by a man where both parties are aged 18 or over [section 143]. Either or both of the parties can be prosecuted for the offences of buggery and gross indecency, even where both are under the relevant age.

¹ as amended by the *Sexual Offences Act 1967* and the *Criminal Justice and Public Order Act 1994*

² see part I.B.1. below for further discussion of the Bill which became the *1994 Act*

There is no defence available of mistake as to age, and it is therefore for the prosecution to prove the age of the parties.³

Section 12 (1B) of the *1956 Act* provides that an act of buggery or gross indecency between two men shall not be treated as having been in private if more than two people are present, or if it takes place in a public lavatory. No such particular provision exists for heterosexual buggery, nor are there any specific privacy restrictions at all on vaginal heterosexual intercourse, although the common law offences of conspiracy to corrupt public morals and outraging public decency may be relevant.

Offences of buggery and attempted buggery are tried on indictment (ie. in the Crown Court) and the maximum punishment depends on the facts:

Facts	Maximum Punishment
With boy or girl under 16, or animal	Life
With person under 18 where defendant is 21 or over	5 years
Otherwise	2 years

[Schedule 2 paragraph 3(a), *Sexual Offences Act 1956*]

The maximum punishment for the offence of gross indecency depends on the court in which the defendant is tried. In a Crown Court the maximum punishment is five years' imprisonment where the offender was aged 21 or over and he committed the act with a man under 18. Otherwise it is two years' imprisonment. In a magistrates' court the maximum punishment is six months' imprisonment or a maximum fine of £5,000. The courts have tended not to impose sentences of imprisonment on people convicted of this offence for the first time.⁴

Under section 8 of the *Sexual Offences Act 1967*, the consent of the Director of Public Prosecutions is required before any proceedings can be instituted against any man for the offences of buggery or gross indecency with another man, or for aiding, abetting, counselling, procuring or commanding the commission of such an offence, where either of the men were under the age of 21 at the time of the commission of the offence. This provision was not amended by the *1994 Act*.

It is also an offence for a person (either a man or a woman) to commit an indecent assault on a man. However, there is an effective age of consent of 16 here, as it is a good defence to prove that both parties consented to the act in question as long as they are both over 16.⁵

³ Section 1(6), *1967 Act*

⁴ See, for example, *R v Morgan and Dockerty* [1979] Crim LR 60

⁵ *Sexual Offences Act 1956* section 15

b. Scotland

The law in Scotland was brought into line with the English law by section 80 of the *Criminal Justice (Scotland) Act 1980*. The relevant clause was introduced as a backbench amendment by Robin Cook.⁶ This provision (as amended by section 145(2) of the *Criminal Justice and Public Order Act 1994*) is now contained in section 13 of the *Criminal Law (Consolidation) (Scotland) Act 1995*. However, as mentioned below, the offence of sodomy can only be committed by two men, and not by a man and a woman.

The Scottish legislation goes further than the English provisions, by providing for a defence to charges of homosexual acts of mistake as to age. In order that the defence may apply, the defendant must himself be below the age of 24, have had no previous charges for similar offences and have reasonably believed the person was 18 or over. This is the equivalent of the defence available for persons charged with unlawful sexual intercourse with a girl aged between 13 and 16 in England and Wales as well as Scotland.

c. Northern Ireland

The law in Northern Ireland was aligned with that of the rest of the UK by the *Homosexual Offences (Northern Ireland) Order 1982*, following the judgment of the European Court of Human Rights against the UK in the case of *Dudgeon* (1981). In that case the UK was found to have breached Article 8 of the European Convention on Human Rights by refusing to legalise homosexual behaviour in Northern Ireland. Article 8 provides that everyone has the right to respect for his private life and that there shall be no interference by a public authority with the exercise of this right except such as is necessary for, amongst other things, the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

The facts giving rise to the *Dudgeon* case took place in 1976 and it was then that the Northern Ireland Secretary, Merlyn Rees, had announced that he would be reconsidering the laws on homosexuality by referring them to the Northern Ireland Standing Commission on Human Rights. Opinion in Northern Ireland was substantially divided, with great opposition in particular from religious organisations including the Roman Catholic bishops. The DUP led by Ian Paisley organised a petition to "Save Ulster from Sodomy" which collected nearly 70,000 signatures. In 1979 the Secretary of State for Northern Ireland announced that the Government did not intend to pursue the proposed reform. Following the *Dudgeon* case, however, the relevant legislation was passed.

d. Offences Abroad

Part II of the *Sex Offenders Act 1997* makes it a criminal offence to incite men to have sex with children abroad. For all the listed offences, even homosexual ones, the Act does not

⁶ HC Deb vol 989 c283, 22 July 1980

apply where the child was 16 or over at the time. According to Stonewall, the Home Office said it chose 16 'because it seems the most sensible age of all'.⁷

2. Prosecution Policy

It is interesting to note the remarks made by the European Court of Human Rights in relation to prosecution policy in the case of *Modinos v Cyprus* (7/1992/352/426). The judgment was delivered on 22 April 1993. In that case an action was brought against the Cypriot government for breach of Article 8 of the European Convention on Human Rights (the right to private life) in that Cypriot law prohibited male homosexual conduct in private between adults. The Cypriot Attorney-General defended the action on the basis that no prosecutions had been allowed or instituted in Cyprus since the ECHR ruling of 1981 in the *Dudgeon* case. Mr Modinos argued that the policy of the Attorney General not to prosecute could change at any time and a member of the public could bring a private prosecution at any time, which meant that there was no guarantee that he would not be prosecuted. The ECHR found in Mr Modinos' favour by eight votes to one.

Prosecution policy in the UK is not a statement of or an adjustment of the legal position. It is merely a statement of policy that will normally be followed, and does not bind the Crown.

a. *England and Wales*

The Crown Prosecution Service is responsible for the conduct of most prosecutions in England and Wales. Criminal proceedings brought by any other public body, private organisation or individual are effectively private prosecutions. The police take the first steps in the criminal process in that they decide whether or not to charge a person in connection in a particular case. Then Crown Prosecutors decide whether to prosecute in a case referred to them by the police. There are two stages in the decision to prosecute: the evidential test (whether there is enough evidence) and the public interest test (whether the public interest requires a prosecution). Guidance on these sets of criteria is set out in the *Code for Crown Prosecutors*.⁸ The section on the public interest test (pp 7-12) is set out below:

In 1951, Lord Shawcross, who was Attorney General, made the classic statement on public interest, which has been supported by Attorneys General ever since: "It has never been the rule in this country - I hope it never will be - that suspected criminal offences must automatically be the subject of prosecution". (House of Commons Debates, volume 483, column 681, 29 January 1951.)

⁷ 'Age of consent only 16 abroad', *Stonewall newsletter* vol. 4, no. 4, October 1996

⁸ Crown Prosecution Service, June 1994

The public interest must be considered in each case where there is enough evidence to provide a realistic prospect of conviction. In cases of any seriousness, a prosecution will usually take place unless there are public interest factors tending against prosecution which clearly outweigh those tending in favour. Although there may be public interest factors against prosecution in a particular case, often the prosecution should go ahead and those factors should be put to the court for consideration when sentence is being passed.

Crown Prosecutors must balance factors for and against prosecution carefully and fairly. Public interest factors that can affect the decision to prosecute usually depend on the seriousness of the offence or the circumstances of the offender. Some factors may increase the need to prosecute but others may suggest that another course of action would be better.

The following lists of some common public interest factors, both for and against prosecution, are not exhaustive. The factors that apply will depend on the facts in each case.

Some common public interest factors in favour of prosecution:

The more serious the offence, the more likely it is that a prosecution will be needed in the public interest. A prosecution is likely to be needed if:

- a a conviction is likely to result in a significant sentence;
- b a weapon was used or violence was threatened during the commission of the offence;
- c the offence was committed against a person serving the public (for example, a police or prison officer, or a nurse);
- d the defendant was in a position of authority or trust;
- e the evidence shows that the defendant was a ringleader or an organiser of the offence;
- f there is evidence that the offence was premeditated;
- g there is evidence that the offence was carried out by a group;
- h the victim of the offence was vulnerable, has been put in considerable fear, or suffered personal attack, damage or disturbance;
- i the offence was motivated by any form of discrimination against the victim's ethnic or national origin, sex, religious beliefs, political views or sexual preference;
- j there is a marked difference between the actual or mental ages of the defendant and the victim, or if there is any element of corruption;
- k the defendant's previous convictions or cautions are relevant to the present offence;
- l the defendant is alleged to have committed the offence whilst under an order of the court;
- m there are grounds for believing that the offence is likely to be continued or repeated, for example, by a history of recurring conduct; or
- n the offence, although not serious in itself, is widespread in the area where it was committed.

Some common public interest factors against prosecution:

A prosecution is less likely to be needed if:

- a the court is likely to impose a very small or nominal penalty;
- b the offence was committed as a result of a genuine mistake or misunderstanding (these factors must be balanced against the seriousness of the offence);
- c the loss or harm can be described as minor and was the result of a single incident, particularly if it was caused by a misjudgment;
- d there has been a long delay between the offence taking place and the date of the trial, unless:
 - ♦ the offence is serious;
 - ♦ the delay has been caused in part by the defendant;
 - ♦ the offence has only recently come to light; or
 - ♦ the complexity of the offence has meant that there has been a long investigation;
- e a prosecution is likely to have a very bad effect on the victim's physical or mental health, always bearing in mind the seriousness of the offence;
- f the defendant is elderly or is, or was at the time of the offence, suffering from significant mental or physical ill health, unless the offence is serious or there is a real possibility that it may be repeated. The Crown Prosecution Service, where necessary, applies Home Office guidelines about how to deal with mentally disordered offenders. Crown Prosecutors must balance the desirability of diverting a defendant who is suffering from significant mental or physical ill health with the need to safeguard the general public;
- g the defendant has put right the loss or harm that was caused (but defendants must not avoid prosecution simply because they can pay compensation); or
- h details may be made public that could harm sources of information, international relations or national security.

Deciding on the public interest is not simply a matter of adding up the number of factors on each side. Crown Prosecutors must decide how important each factor is in the circumstances of each case and go on to make an overall assessment.

The relationship between the victim and the public interest

The Crown Prosecution Service acts in the public interest, not just in the interests of any one individual. But Crown Prosecutors must always think very carefully about the interests of the victim, which are an important factor, when deciding where the public interest lies.

Youth offenders

Crown Prosecutors must consider the interests of a youth when deciding whether it is in the public interest to prosecute. The stigma of a conviction can cause very serious harm to the prospects of a youth offender or a young adult. Young offenders can sometimes be dealt with without going to court. But Crown

Prosecutors should not avoid prosecuting simply because of the defendant's age. The seriousness of the offence or the offender's past behaviour may make prosecution necessary.

Police cautions

The police make the decision to caution an offender in accordance with Home Office guidelines. If the defendant admits the offence, cautioning is the most common alternative to a court appearance. Crown Prosecutors, where necessary, apply the same guidelines and should look at the alternatives to prosecution when they consider the public interest. Crown Prosecutors should tell the police if they think that a caution would be more suitable than a prosecution.

The previous edition of the Code had included a specific section on sex offences, but this was omitted from the current version. The Explanatory Memorandum issued at the same time as the new Code explained that this does not mean that the Crown Prosecution Service no longer regards them as among the most serious offences that can be committed, simply that the pertinent issues were covered in the general list of relevant factors.⁹

Michael Howard said in a BBC Radio interview in February 1994 that the law on the new age of consent in England and Wales must be enforced in this matter, as it is in all other matters. Individual police officers would have discretion, based on guidance he would be issuing soon afterwards, which would include using cautions for first-time offenders. But there was speculation that the CPS would be unwilling to prosecute in consenting relationships.¹⁰

b. Scotland

On 28 November 1991 Crown Office Circular 2025 was issued to Procurators Fiscal by the Lord Advocate. The circular stated that the Lord Advocate considered that the public interest was not served by routinely prosecuting all persons who participated in those consensual homosexual acts which remain unlawful. The terms of the circular received extensive publicity and on 20 December 1991 a new Crown Office Circular No 2025/1 was issued to Procurators Fiscal. The Lord Advocate had taken the view that there was a public misapprehension that the earlier circular amounted to a unilateral change in the law. The new circular made reference to a continuing review of prosecution policy in this area and set out new directions. These directions were issued when the age of consent for homosexual acts was 21, and included the following directions:

1. Where both of the participants are over 18 years but one or both are under 21 years and the act has taken place in private and where there are circumstances pointing to exploitation, corruption, or breach of trust, prosecution would be

⁹ Crown Prosecution Service, June 1996, p. 16, para. 5.2

¹⁰ 'Scots law officers urged to prosecute under-age gays', *The Scotsman*, 23 February 1994

appropriate. Where the Procurator Fiscal receives a report involving individuals in this age group and none of these circumstances is present, but the Procurator Fiscal considers there are other circumstances which would justify proceedings, a report should be made to Crown Office for consideration by Crown Counsel.

2. Where both of the participants are over 16 years but one or both are under 18 years and the act appears to have been consensual and in private, the Procurator Fiscal should report the case to Crown Office for consideration by Crown Counsel.

4. Where it appears that one of the parties has engaged in homosexual acts *before* the occasion under consideration and has acted as a prostitute, there is little justification in pursuing the client of such an individual, while ignoring his activity as a prostitute....."

Following the 1994 vote, the Lord Advocate, Lord Roger, was put under pressure by Bill Walker to revoke this Crown Office circular.¹¹ He said he would review it once the new age of consent became law.¹² The Crown Office have confirmed that advice has now been issued stating that it is not considered in the public interest *routinely* to prosecute people who have consensual homosexual intercourse with those aged over sixteen.¹³ The Lord Advocate has directed procurators fiscal to report to the Crown Office for Crown counsel's consideration cases of consensual homosexual acts in private where both of the participants are over 16 year but one or both are under 18 years.¹⁴

3. Lesbians

There are not, and never have been, specific offences relating to lesbianism in the United Kingdom. On 4 August 1921, however, Mr Macquisten moved an amendment to the *Criminal Law Amendment Bill* which sought to criminalise lesbian behaviour.¹⁵ The amendment was later defeated in the Lords on the grounds (first given in the Commons by Lt Col Moore-Brabazon) that it would draw attention to lesbians and 'do harm by introducing into the minds of perfectly innocent people the most revolting thoughts'.¹⁶

General offences such as indecent assault could be used to convict lesbian women for sexual activities. By section 14 of the *Sexual Offences Act 1956* it is an offence for a person (male or female) to make an indecent assault on a woman. Section 14(2) states that a girl under the age of 16 cannot in law give any consent which would prevent an act being an assault for these purposes. This gives an effective age of consent of 16 (the

¹¹ HC Deb vol 238, 22 February 1994

¹² HC Deb vol 237 c180W, 8 February 1994 and vol 238 c488W, 25 February 1994

¹³ Information provided by the Policy Group of the Crown Office, 18 September 1997

¹⁴ HC Deb vol 298 c419W, 21 July 1997

¹⁵ HC Deb vol. 145 c1799-1800, 4 August 1921

¹⁶ *ibid* c1806

relevant age in Northern Ireland is 17). In 1984 the Criminal Law Revision Committee recommended that the age of consent for lesbian sexual acts should remain at 16.¹⁷

In Scotland, the protection afforded by the common law to girls under 12 from lewd, indecent or libidinous practice or behaviour by any person, male or female, has been extended by statute to girls between the ages of 12 and 16. The girl's consent does not provide a valid defence.¹⁸

4. Homosexuality in the Armed Forces¹⁹

The decriminalisation of homosexual acts undertaken in private between two consenting males over the age of 21, which was brought about by the *Sexual Offences Act 1967*, did not extend to members of the armed forces. However, section 146 of the *Criminal Justice and Public Order Act 1994* repealed those sections of the *1967 Act* which related only to members of the armed services and the merchant navy. Therefore homosexual acts committed by such people will not in themselves be offences which are not offences under civilian criminal law. Nevertheless, such acts may constitute a ground for dismissal, and in some circumstances may constitute an offence under the Service Discipline Acts.²⁰ In addition it is Ministry of Defence policy not to accept homosexuality within the armed forces and Service personnel who are found to be homosexual are administratively discharged.

The government has stated that it is starting from a position of supporting the policy of excluding homosexuals from the services, but that it will 'seek to establish the way forward in consultation with the Chiefs of Staff'.²¹ In 1995, the Labour Party stated that in power it would establish a commission to examine the question of homosexuality in the armed forces. Labour Members were given a free vote on the amendment to the *Armed Forces Bill* in 1996 which sought to introduce a new clause to stop the armed forces from discriminating on the ground of sexual orientation.²² The Leader of the Opposition himself did not vote, and the amendment failed on division.

In office, Labour defence ministers have supported a continuing ban on homosexual servicemen. The Ministry of Defence continues to fight both the homosexual ex-Service cases in the two European courts (*The Daily Telegraph* 15/7/97 and *The Guardian* 14/1/98 and see below). The Strategic Defence Review White Paper, published on 8 July 1998, dealt with personnel issues involving women and racial minorities but ignored the

¹⁷ Criminal Law Revision Committee Fifteenth Report: *Sexual Offences*, Cmnd 9213, April 1984, para 11.4

¹⁸ section 6, *Criminal Law (Consolidation) (Scotland) Act 1995*

¹⁹ Mark Oakes, International Affairs and Defence Section

²⁰ The Army Act 1955, the Air Force Act 1955 or the Navy Discipline Act 1957.

²¹ Dr John Reid, Minister of State at the Ministry of Defence, HC Deb 7 July 1997 c359W

²² HC Deb 9 May 1996 cc481-512

question of homosexuality.²³ The Government position on the treatment of homosexuals in the Services was recently outlined by Mr Doug Henderson, Minister for the Armed Forces:

The issue of homosexuality and the Armed Forces will be reviewed in this Parliament, as part of the policy reviews undertaken in preparation for the passage of the next Armed Forces Bill due in 2001. The Government will form a view on the weight of the evidence, taking into consideration EC and national law as well as the views of the Armed Forces. We will then seek to establish the way forward in consultation with the Chiefs of Staff.²⁴

Legal action against the ban by those discharged from the armed forces for their homosexuality continues in the two European Courts. Although Lustig-Prean *et al* failed in their bid to persuade the Court of Appeal to rule in their favour, their case is now being considered by the European Commission of Human Rights with a view to a possible referral to the European Court of Human Rights (ECHR). A judgment might take around two to three years. The British Government has sent in legal submissions which oppose any lifting of the ban. It has also apparently claimed that some of Lustig-Prean's co-defendants have yet to exhaust all their legal remedies in the UK relating to sex discrimination law. (All national legal remedies need to be exhausted before the ECHR is entitled to hear a case.)

However, the current ban may be overturned domestically once the *Human Rights Act 1998*, which incorporates the European Convention on Human Rights into UK law, comes into force. This would give effect in domestic UK law to the rights contained in the European Convention, and the jurisprudence of the European Court would be taken into account by any domestic court deciding an issue based on Convention rights.

It is in the above context that the Government may seek to pre-empt any court decision by lifting the ban itself. In an interview with the *Daily Telegraph*, 6 October 1998, the Defence Secretary said the ban should "in principle" be lifted and that all people should be treated equally. However, he did add that there were practical difficulties with regard to homosexuality in that there was "an issue of practice, of operational effectiveness, which has also got to be taken into account."

It remains the case that the UK is the only EU country that bans homosexuals from the armed forces. Australia, New Zealand and Canada no longer regard homosexuality as a bar to military service. In the US President Clinton has faced considerable opposition from Congress and from within the armed forces to his election promise to lift the ban on homosexuality in the US armed forces.

²³ *The Strategic Defence Review*, Cm 3999, 8 July 1998

²⁴ HC Deb 19 October 1998 c885W

5. Heterosexuals

a. *England and Wales*

It is an offence for a man (or boy) to have (vaginal) sexual intercourse with a girl under the age of 16 in England and Wales.²⁵ It is important to note that an offence is committed even if the intercourse is consensual. This offence is punishable by a maximum of two years' imprisonment if convicted by a Crown Court, or six months' imprisonment and/or a fine not exceeding £5,000 if convicted by a magistrates' court. Section 5 of the *1956 Act* makes unlawful sexual intercourse with a girl under 13 an offence carrying a maximum punishment of life imprisonment.

However, it is not an offence if a man under the age of 24 has unlawful sexual intercourse with a girl aged between 13 and 16, if he has not previously been charged with a similar offence and he believes (and has reasonable grounds for believing) that the girl was 16 or over.²⁶

Buggery of a woman is no longer an offence if both parties are over 18 and the act took place in private.²⁷ The provisions on what will not be treated as taking place in private as regards buggery between men do not apply here. However, as with buggery between men, both parties can be prosecuted for committing this offence.

The law does not provide specifically for the protection of boys who are subject to sexual advances from older women, but such behaviour could be caught by a number of more general sexual offences such as indecent assault (for the purposes of which the effective age of consent for both boys and girls is sixteen).²⁸ If the child was under 14 the *Indecency with Children Act 1960* would apply even if the behaviour does not amount to indecent assault.

The history of the age of consent for girls shows that 16 is a relatively high age compared to that which applied in previous centuries. For over 700 years the criminal law has by statute prohibited men from having unlawful sexual intercourse with girls below a certain age. Originally, in 1275, the age was 12 and it was not changed until 1875 when the *Offences Against the Person Act*²⁹ raised it to 13. In 1885, scarcely ten years later, the *Criminal Law Amendment Act*³⁰ raised the age again - this time to the present age of 16. The 1885 legislation was enacted after a campaign aimed at eliminating child prostitution and the sexual exploitation of young girls. It was also the legislation which introduced the offence of gross indecency between men.

²⁵ section 6(1), *1956 Act*

²⁶ section 6(3), *1956 Act*

²⁷ section 12 of the *1956 Act*, as amended by section 143 of the *1994 Act*

²⁸ *Sexual Offences Act 1956* sections 14 and 15

²⁹ 38 and 39 Vict c94

³⁰ 48 and 49 Vict c69

The age of consent has been seen as something of a misnomer, as section 6 of the *1956 Act* does not mention consent. It is possible that a girl under 16 could give her consent to sexual intercourse but in law the man will still be guilty of an offence. If the girl had not consented then the charge would almost certainly be rape. In the *Report on the Age of Consent in Relation to Sexual Offences*³¹ the Policy Advisory Committee on Sexual Offences (PACSO) discussed whether the legal fiction of the age of consent should be replaced with a term more accurately representing the law. This had been advocated to PACSO by the Sexual Law Reform Society but was rejected on the grounds that the expression is convenient for describing the age below which the consent of a girl is no answer to a charge of having sexual intercourse with her.³² The report rejected the expression in relation to homosexuals preferring the term 'minimum age'. It noted that the Campaign for Homosexual Equality was critical of the use of this term on the grounds that it stigmatised homosexual relations and that it failed to make any new concept apparent. PACSO took the view, however, that it would be artificial to call ages as high as 18 and 21 'ages of consent'.³³

b. Scotland

The law regarding heterosexual (vaginal) intercourse is substantially the same as for England and Wales. Under section 5(1) of the *Criminal Law (Consolidation)(Scotland) Act 1995* sexual intercourse with a girl who is not yet 13 is an offence punishable on conviction by indictment by life imprisonment. Sexual intercourse with a girl aged between 13 and 15 is an offence under section 5(3) of the *1995 Act*.

Sexual acts falling short of intercourse are also criminal if committed with a girl under the age of 16 (*1995 Act*, section 6). However, it is probably not an offence for a woman to engage in indecent practices towards a boy who has reached the age of puberty (which is taken as 14) and who consents, unless the conduct amounts to shameless indecency.

Nor is anal sexual intercourse between a man and a woman an offence in Scotland, as the offence of sodomy can only be committed by a man with or against another man.

c. Northern Ireland

The age of consent for heterosexuals in Northern Ireland is 17.³⁴ However, a person can marry at the age of 16, and so section 1 of the *Age of Marriage Act (NI) 1951* provides a defence for a husband who has sexual intercourse with his 16 year old wife.

³¹ Cmnd 8216, April 1981

³² para 6

³³ para 27

³⁴ Section 5, *Criminal Law Amendment Act 1885* (as amended by the *Children and Young Persons (Northern Ireland) Act 1950*)

6. Other European countries

Most European countries have a common age of consent for heterosexual and homosexual sex. The following table shows the age of consent for European Union countries:

	Male/Female	Female/Female	Male/Male
Austria	14	14	14/18 (#1)
Belgium	16 (#2)	16 (#2)	16 (#2)
Denmark	15	15	15
Finland	15	15	15
France	15	15	15
Germany	16	16	16
Greece	17	-	17
Ireland	17	17	17
Italy	14/16 (#3)	14/16 (#3)	14/16 (#3)
Luxembourg	16	18	18
Netherlands	16 (#4)	16 (#4)	16 (#4)
Portugal	16/18 (#5)	16/18 (#5)	16/18 (#5)
Spain	12 (#6)	12 (#6)	12 (#6)
Sweden	15	15	15
United Kingdom	16 (#7)	16 (#7)	18

#1 - it is illegal for a male over 19 to commit homosexual acts with a male between 14 and 18

#2 - heavier penalties are levied against those in authority

#3 - if one of the participants is an older family member or guardian, the age of consent is 16

#4 - if a person between the ages of 12 and 16 commits a sexual act with another person between those ages, they will not be prosecuted unless there is a complaint from the other participant, a parent or a guardian. However, if a person over 16 commits a sexual act with a person under 16, they will be liable for prosecution regardless of whether or not a complaint has been made.

#5 - it is illegal for a person aged 18 or over to commit sexual acts with a person under 18

#6 - there is no statutory age of consent. In general, consensual sexual relations are not penalised from the age of 12, although a person aged over 16 who has sex with a person aged between 12 and 16 may be liable to prosecution

#7 - 17 in Northern Ireland

B. Proposals for reform

1. The *Criminal Justice and Public Order Act 1994*

On the Second Reading of the Bill which became the *Criminal Justice and Public Order Act 1994*, Edwina Currie announced that she would be tabling amendments at Committee stage which would seek to harmonise the age of consent for heterosexuals and

homosexuals at 16.³⁵ The proposed new clause would apply only in England and Wales and Scotland. The debate on this amendment in Committee (taken on the floor of the House) on 21 February 1994³⁶ was the first time the issue had been debated in Parliament since the coming into force of the *Sexual Offences Act 1967*.

During this debate, Tony Blair, the then Shadow Home Secretary, said:

[The issue] is not at what age we wish young people to have sex. It is whether the criminal law should discriminate between heterosexual and homosexual sex. It is therefore not an issue of age, but of equality. By supporting equality, no one is advocating or urging gay sex at 16 any more than those who would maintain the age of consent for heterosexual sex advocate that girls or boys of 16 should have sex. It is simply a question of whether there are grounds for discrimination. At present, the law discriminates.

... people are entitled to think that homosexuality is wrong, but they are not entitled to use the criminal law to force that view upon others ... That is why, also, the so-called compromise of 18 is misguided. What is the rationale behind maintaining the stigma but at a different age?

... it is wrong to treat a man as inferior because his sexuality is different. A society that has learned, over time, racial and sexual equality can surely come to terms with equality of sexuality. That is the moral case for change tonight. It is our chance to welcome people - I do not care whether there are 50,000, 500,000 or five million; it matters not a damn - into full membership of our society on equal terms. It is our chance to do good, and we should take it.³⁷

Edwina Currie's amendment was defeated by 307 votes to 280. Included in those who voted for it were John Smith and Neil Kinnock, most of the senior Labour MPs, most Liberal Democrats, including Paddy Ashdown, and 43 Conservatives, including eleven Cabinet ministers and William Hague. Thirteen of the seventeen Ulster MPs, and 38 Labour MPs, including David Blunkett and Ann Taylor, voted against it.

However, this vote was followed immediately by one on Sir Anthony Durant's amendment which aimed to lower the age of consent to 18. This amendment was passed by 427 votes to 162, and supporters included Michael Howard and John Major, and most of the rest of the then Cabinet. Two of Ulster's 17 MPs also voted for it. However, it was opposed by thirteen Labour MPs (five of them in a protest vote against the failure of the first amendment) and three of the Cabinet ministers who had also opposed Edwina Currie's amendment (John Redwood, Michael Heseltine and John Gummer). Altogether 154 MPs opposed both amendments: of these, 134 were Conservative, 6 Labour, 7 Ulster

³⁵ HC Deb vol 235 cc 67-69, 11 January 1994

³⁶ HC Deb vol 238 cc74-123, 21 February 1994

³⁷ HC Deb vol 238 cc97-100, 21 February 1994

Unionists, one Ulster Popular Unionist Party, 3 Democratic Unionist Party, 2 SDLP, and 1 SNP.

The Lords accepted the amendment lowering the age of consent to 18 for homosexual acts, and it came into force on the passing of the Act on 3 November 1994.

An amendment tabled by Simon Hughes which was intended to equalise the age of consent for homosexuals and heterosexuals at 17 was not called. Nor was one tabled by Geoff Hoon which sought to place the burden of proof of whether there was consent on the older person in cases where an older person of either sex seduced a younger person.

2. The Crime and Disorder Bill 1997-98

a. Background

Following a complaint brought in June 1994 by Euan Sutherland, a young gay man, with the support of Stonewall,³⁸ the European Commission of Human Rights concluded that the United Kingdom had a case to answer for setting the homosexual age of consent at 18. The accepted ground for the complaint was breach of Articles 8 and 14 of the European Convention on Human Rights. Article 8 grants everyone the right to respect for his private and family life, his home and his correspondence, and Article 14 states that the enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

The government was asked to justify the continuing inequality in the treatment of gay men, and, in particular, the criminalisation of the young gay men involved. It replied that it was using the discretion allowed to it (under the doctrine of 'margin of appreciation' developed by the European Court of Human Rights) to allow young men time to consider their sexuality, and to prevent young gay men from setting themselves apart from society at too young an age.³⁹

After hearing the arguments for both sides, the Commission ruled (by 14 votes to 4) that there had been a violation of Article 8 taken in conjunction with Article 14, and that the case was admissible.⁴⁰ Following this report, the Government announced, in a formal document lodged with the European Court on 21 October 1997, that it and the applicants had agreed to apply to the Court for this case and the parallel case of Morris to be deferred pending a vote in Parliament 'at the earliest opportunity'; and that if a majority of the House of Commons voted in favour of equalising the age of consent, the government

³⁸ Application no 25186/94

³⁹ 'Government argues in Europe to keep gay sex at 18', *Gay Times*, August 1995

⁴⁰ adopted on 1 July 1997

would bring forward legislation to implement this before the end of the following Parliamentary session [ie. 1998-99].⁴¹

In the summer of 1997, the Government had rejected the suggestion that measures to lower the age of consent be contained in the forthcoming *Crime and Disorder Bill* which was first introduced in the Lords. In a written answer to a Parliamentary Question on 18 July 1997, Alun Michael, Minister for Criminal Policy, stated:

The Government have long held the view that setting the age of consent for homosexual acts is a matter for Parliament to decide, and that it should be the subject for a free vote at a suitable opportunity. It seems unlikely that the scope of the Crime and Disorder Bill will be wide enough to provide that opportunity.⁴²

However, various back-bench amendments relating to homosexual offences were tabled in time for the report stage in the House of Commons. The principal amendment was tabled by Ann Keen:

New Clause 1

- (1) In subsections (1A) and (1C) of section 12 of the Sexual Offences Act 1956 (buggery), for the word “eighteen” there shall be substituted the word “sixteen”.

(2) In subsections (1) and (6) of section 1 of the Sexual Offences Act 1967 (amendment of law relating to homosexual acts in private), for the word “eighteen” there shall be substituted the word “sixteen”.

(3) In section 13 of the Criminal Law (Consolidation) (Scotland) Act 1995 (homosexual offences) -

- (a) in subsections (1) and (5)(c), for the word “eighteen”; and
- (b) in subsection (8), for the word “18”, there shall be substituted the word “sixteen”.

(4) In paragraphs (1) and (5) of Article 3 of the Homosexual Offences (Northern Ireland) Order 1982 (homosexual acts in private), for the word “18” there shall be substituted the word “17”.

This new clause was intended to lower the age of consent for buggery (both homosexual and heterosexual), as well as for acts of gross indecency between men, from 18 to 16 in England and Wales, and in Scotland. The proposed new age of consent for such acts in Northern Ireland was 17, which would have brought it into line with the heterosexual age of consent there and with the law in the Republic of Ireland. Other amendments sought

⁴¹ 'Statement on age of consent following report by European Commission on Human Rights', *Home Office press notice 033/97*, 7 October 1997

⁴² HC Deb vol 298 c347w, 18 July 1997

variously to increase the protection for 16- and 17-year-olds from those who abuse their position of trust or to increase the age of consent if one of the parties is more than 21 [for a discussion of which see part II.D below], and to amend the definition of ‘in private’ for the purposes of homosexual activity.

b. The debate in the House of Commons⁴³

When introducing the amendment, Ann Keen stressed that its aim was to make everyone equal under the law. She referred to the experiences of a number of organisations, including the trust set up in the wake of the death of 16-year-old Albert Kennedy in 1989 as well as the National Society for the Prevention of Cruelty to Children, in support of her desire to remove the threat of criminal prosecution from 16- to 18-year-old actively homosexual boys. [cc756-61]

Gerald Kaufman pointed out that:

Paedophiles prey on young people today under the present state of the law, with an age of consent of 18. They preyed on them when there was an age of consent of 21, and they preyed on them when male homosexual acts were completely illegal. [c773]

Alun Michael, who was then Minister of State in the Home Office, was sympathetic to Dr Evan Harris’ proposed new clause seeking to remove the restriction that a homosexual act is not considered to be ‘in private’ where there are more than two men present. However, he felt that this was a matter which should be discussed in the context of sexual offences as a whole, and referred to his announcement on the government’s intention to review the law relating to all sexual offences. [c791]

The government’s review of sexual offences legislation [for which see part I.C below] was also mentioned by Stephen Twigg, who asked for consideration of the facts that the penalties for consensual under-age sex would remain different as between homosexuals and heterosexuals, and that under-age gay men would continue to be criminalised whereas under-age girls are not, even if the amendment under consideration were passed. [c780]

Richard Allan drew attention to the support given to equalising the age of consent at Liberal Democrat party conferences as evidence of his party’s clear policy agenda that seeks to promote fairness for all people before the law. [c775]

Eleanor Laing thought that the new clause would not challenge Christian teaching or family life based on Christian marriage. She gave as one of her reasons for supporting the equalisation of the age of consent her concern that young people should be protected,

⁴³ HC Deb vol. 314 cc754-811, 22 June 1998

saying that ‘young people need protection, but they are not protected by being turned into criminals.’ [c771]

The perceived threat of AIDS was cited during the debate as a reason both for upholding the present age of consent and for lowering it.⁴⁴

Sir Patrick Cormack said that he had no wish to persecute or prosecute any man or woman for his or her personal behaviour, but referred to the duty that is laid on each an every Member of Parliament to protect the vulnerable in support of his opposition to the amendment. In this context he supported Joe Ashton’s amendments which sought to criminalise those in authority or a position of trust who take advantage of young men or women [see part II.D below for a more detailed discussion of this and related amendments], but he signalled his intention to vote against the main amendment as he did not feel homosexual practices should be regarded as ‘equal or equivalent’ to heterosexual ones. He said that in his view, many of those seeking to protect homosexuals are also trying to further and promote homosexuality. [cc762-4]

The views of the Church of England were put forward by Stuart Bell in his capacity as Second Church Estates Commissioner. He stated that the Archbishop of Canterbury and the majority of the House of Bishops opposed the new clause to lower the age of consent for homosexual relationships because they believed that this would be morally wrong. He added that in his own view the amendment would soon lead to proposals to lower the age of consent to 14, or to give homosexual couples the right to marry and adopt children, thus undermining family life. [cc795-6]

It was pointed out by several Members during the debate that the age of consent for buggery is already the same [18] for both men and women.⁴⁵

Sir Norman Fowler first expressed the view that the discussion of such an amendment at such a late stage in the passage of the Bill meant that it was not getting the consideration it might otherwise have had [c783]. Edward Leigh later complained that the Speaker had not called enough Members who were opposed to equalising the age of consent. [c802]

When a division was called on Ann Keen’s amendment, it was passed by a majority of 207 (336 votes to 129). Thirteen Labour Members, including the deputy chief whip, voted against the new clause, and seventeen Tory Members (including two shadow ministers) voted in favour of it. The Prime Minister and nine other Cabinet Ministers voted for the amendment, but both Paddy Ashdown and William Hague were absent from the

⁴⁴ for example at cc769 and 774 respectively

⁴⁵ see for example c786, *ibid* [John Butterfill]. This applies to Northern Ireland as well as England and Wales, but Scotland is in a different position as sodomy can only be committed by two men, not by a man and a woman, so there is no age of consent for an equivalent heterosexual act.

Chamber.⁴⁶ Ann Taylor and David Blunkett (who had both voted against 16 in 1994) and eight other members of the Cabinet did not vote.

The *Catholic Herald* on 26 June 1998 named 26 Catholic and practising Christian Members who had voted for Ann Keen's amendment, describing them as 'those who voted to allow your child to have gay sex' and accusing them of betraying the people's trust.⁴⁷ It described the 'bewilderment' of the Catholic community at the fact that not one Catholic Labour MP voted against the amendment.⁴⁸

c. The debate in the House of Lords

The Archbishop of Canterbury, who was not present during the debate, said in an article published on the day of the debate in *The Times* that he had made it clear to ministers that he would have preferred the question of the age of consent to have been addressed in the context of the broader review of sexual offences legislation.⁴⁹ He also expressed his regret at the 'timetable which has produced so unbalanced a package' - a feeling echoed by a number of crossbench peers in a letter to *The Times* published on the same day. Lords Northbourne, Ackner, Brightman, Weatherill and Wilberforce were particularly concerned that it left them with no time to re-table Joe Ashton's amendment on abuse of a position of trust, and called on the government instead to bring forward a bill in the next session to debate these issues at more length.⁵⁰

Baroness Young tabled a motion in the Lords designed to overturn the amendment passed by the Commons, which was debated on 22 June 1998.⁵¹ Her first concern also related to the timing of the amendment - she stated that 'the Government have accepted an amendment ... to lower the age of consent to 16, and have at the same time immediately recognised that it is seriously flawed and that it is necessary to set up a working party to deal with those young people most at risk.' She feared that agreeing to the Commons amendment as it stood whilst waiting for any legislation recommended by the working party to be put before Parliament, would leave young men at risk in the meantime. [cc936-9]

Baroness Young then set out her substantive arguments against lowering the age of consent. She cited polls showing public opinion to be against such a measure, and presented it as the thin end of the wedge, which would lead to demands for lowering the age of consent to 14, for homosexual couples to marry and adopt children, and for schools to promote homosexuality. She also stated that 'we know perfectly well that homosexual

⁴⁶ According to the press, Mr Ashdown was on the Kosovo border and Mr Hague had flu - 'MPs back gay sex at 16', *The Guardian*, 23 June 1998

⁴⁷ 'Catholic MPs use free vote to back school-age gay sex', *Catholic Herald* 26 June 1998

⁴⁸ The following week it apologised, stating that Geraldine Smith MP did in fact vote against the amendment.

⁴⁹ 'We can't endorse this error', *The Times*, 22 July 1998

⁵⁰ Letter to the Editor, *The Times*, 22 July 1998

practices carry great health risks to young people' [cc939-40]. This view was shared by several of the peers who spoke in the debate.⁵² A slightly different point was made by the Earl of Longford who regards homosexuality as a 'sickness' in itself, and stated that 'a girl is not ruined for life by being seduced. A young fellow is.' [cc 954-5]

Contributions were also made by a number of bishops and other peers setting out their position from a religious point of view. The Bishop of Winchester felt that 'Parliament should be very wary indeed about deserting the wisdom in these matters not only of the Christian faith but of the other major faiths too' [c943]. Lord Jakobovits, a former chief rabbi, went even further in declaring that the *Sexual Offences Act 1956* was a violation of the laws of God and nature [c950]. The Bishop of Bath and Wells identified a serious moral difficulty in deciding on an amendment which sought to reduce the age of consent for anal intercourse, which he felt was quite unacceptable, but which at the same time offered an important, overdue and much-needed opportunity to reduce threatening and unjust discrimination against gay people [c952]. An unpublished report produced by the Church of England before that of the Wolfenden Committee which recommended that homosexuality between consenting adults should no longer be a criminal offence was referred to by Lord Habgood, the former Archbishop of York. [c955]

Lord Mishcon, who had served on the Wolfenden Committee inquiring into the law relating to homosexual offences and prostitution in the 1950s, was of the opinion that, then as now, the age of consent for homosexual relations should be set at the age at which an adult can enter into contractual relationships (ie. 18) [cc947-8]. Lord Stoddart of Swindon agreed with this view. [c964]

Baroness Young's mention of public opinion was countered by Lord Dholakia, who suggested that parliament should in this instance lead public opinion rather than follow it, as had happened (he suggested) with race relations, sexual equality and abortion legislation [c945]. Likewise, Lord Lester of Herne Hill said that he did not believe that basic rights and freedoms should be decided on the basis of majoritarianism or the outcome of opinion polls. He also pointed out that the government is bound by the European Convention on Human Rights and that this had been interpreted by the European Commission of Human Rights in the case of Euan Sutherland as prohibiting a higher age of consent for homosexual than for heterosexual acts. [cc950-51]

Baroness Mallalieu was of the opinion that the present law does not protect young people, and that 'there is no law which can stop consensual acts carried out in private'. She found it extraordinary that the law says to young people 'You are sufficiently mature to take a sexual partner of one sex, but not of the other'. [cc940-41]

Lord Annan asked the House not to confuse paedophilia with the age of consent, stating that 'the monsters who abuse their trust as wardens of children's homes have done so, whatever the age of consent may have been'. [c960]

⁵¹ HL Deb vol. 592 cc936-76, 22 July 1998

⁵² see for example c942 [Lord Quirk]; c943 [the Bishop of Winchester];

On the division, Baroness Young's motion was agreed to by 290 votes to 122, and the matter therefore had to be referred back to the House of Commons.

d. Government response

The government was concerned that if the Commons rejected the Lords' position on this issue and sent the Bill back to the Lords, the Lords would reject it again which would mean that the Bill could not receive Royal Assent until the 'spill-over' session in October. Even then, there was not any guarantee that the amendment would be agreed to by the Lords; and the provisions of the Parliament Act could not be invoked as the Bill began in the Lords.

In a letter to Ann Keen, the sponsor of the original amendment, on 27 July 1998, Jack Straw set out the approach that he had agreed with her and some of her colleagues. He said that it was imperative that the Crime and Disorder Bill receive Royal Assent by the end of July 1998 as it implemented twelve key manifesto commitments and had wide support in both Houses and in the country. Therefore he would reluctantly recommend the Commons to accept the Lords' decision. However, he stated that the Government would abide by its formal undertaking in the cases of Sutherland and Morris to bring forward legislation on this matter in the next session (1998-99) and to allow a free vote on the age of consent. Ann Keen, Stephen Twigg and the pressure group Stonewall were all reported as being satisfied with this agreement.⁵³

In the debate to discuss the Lords' reasons for disagreeing with the Commons amendments on the age of consent,⁵⁴ the Home Secretary repeated these arguments and asked the House not to insist on the amendment to which the Lords had disagreed. He announced to the House that legislation dealing with the age of consent would be introduced in the 1998-99 session in order to give effect to 'both the letter and the spirit' of the undertakings given the previous October. In order to allow the Parliament Act to be invoked if necessary, such a Bill would be introduced first in the House of Commons. [cc182-3]

Sir Norman Fowler said in reply that he would support the Home Secretary's proposals, not because he agreed with lowering the age of consent, but because the proposal seemed to him to be the right and proper way to proceed. [c187]

The House of Commons agreed to Mr Straw's motion without a division. The amendment was therefore dropped from the Bill, which went on to receive Royal Assent on 31 July 1998.

⁵³ 'Lords win delay over lowering gay age of consent as measure dropped from crime bill', *The Guardian*, 28 July 1998

⁵⁴ HC Deb vol. 317 cc176-211, 28 July 1998

C. *The Sexual Offences (Amendment) Bill* [Bill 10 of 1998-99]

1. General

The government's promise to introduce legislation on the age of consent, as well as on abuse of a position of trust [see below, part II.D.] was confirmed in the Queen's Speech on Tuesday 24 November 1998:

Parliament will be given an opportunity to vote on the age of consent. The Bill will strengthen the protection of young people from abuse of trust.

The *Sexual Offences (Amendment) Bill* was presented to the House of Commons on 16 December 1998, and contains provisions on both of these matters. This part of the paper will discuss the general matters relating to the whole of the Bill, as well as Clause 1 of the Bill which relates to the age of consent; analysis of the remaining clauses is contained in part II.E below.

The Bill is intended to apply to Northern Ireland and Scotland as well as England and Wales [Clause 5]. Clause 5(2) provides that for the purposes of the *Scotland Act 1998*, the Bill should be treated as a 'pre-commencement enactment'. Section 53(3) of the *Scotland Act 1998* states that the definition of pre-commencement enactment includes:

- (a) an Act passed before or in the same session as this Act and any other enactment made before the passing of this Act, [and]
- (b) an enactment made, before the commencement of this section, under such an Act or such other enactment [...]

Section 53(2) of the *1998 Act* provides that functions conferred on a Minister of the Crown by any pre-commencement enactment shall be exercisable by the Scottish Ministers instead of by a Minister of the Crown. Therefore the power given to the Secretary of State in the present Bill to bring the Act into force would be carried out by Scottish Ministers in relation to Scotland. This raises the theoretical possibility of different commencement dates north and south of the border.

The government's assessment of the financial effects of the Bill are set out in the *Explanatory Notes* [paras 20-22], which also notes that the Bill is not expected to have any effects on public service manpower and only a negligible impact on business, charities or voluntary bodies [paras 23-24]. The working party on abuse of trust had estimated that prosecutions under the new offence might result in costs to the criminal justice system of around £77,000 to £115,000 a year,⁵⁵ but the *Explanatory Notes* suggested that this might be approximately offset by savings from no longer taking action

⁵⁵ Interim report, 25 November 1998, Dep 98/1325, para. 33

through the criminal justice system against those males engaged in homosexual activity with 16- and 17-year-olds, including 16- and 17-year-olds themselves.

The fact that provisions on both the age of consent and abuse of a position of trust are contained in one Bill has led to comments on a link between the two issues. The working group whose recommendations led to the proposals on breach of a position of trust had been asked by the government to give priority to this part of its work, in the light of the debates in Parliament linking the need to provide protection from abuse of trust with the equalisation of the age of consent, because the government was committed to giving Parliament the opportunity to consider equalising the age of consent in the 1998-99 session.⁵⁶ The proposals for a new offence were reported in the press as being intended to allay fears that lowering the age of consent for homosexuals would leave teenagers vulnerable to exploitation.⁵⁷

However, concern has been voiced in the gay press about linking these two issues, as it is felt that this sends a ‘homophobic’ message and that relationships between men will be the prime target of the new offence.⁵⁸ The pressure group Stonewall, amongst others, has however decided to back the current Bill, as it feels it embodies the principles of equal treatment and equal protection for all young people. This follows a meeting with the Home Office Minister Paul Boateng, who is reported as having denied that the proposed new law is simply a way of defusing opposition to an equal age of consent. He apparently promised that he will make absolutely certain that the two issues of age of consent and abuse of trust are treated as being entirely separate.⁵⁹

2. Age of consent

The intended effect of **Clause 1** is to reduce the minimum age at which a person may lawfully consent to buggery/sodomy and certain homosexual acts, so that the age of consent for sexual activity would be the same for male homosexuals as for heterosexuals (ie. 16 in England, Wales and Scotland, and 17 in Northern Ireland). Consensual heterosexual buggery as well as homosexual buggery would be legal when both parties reach 16 (or 17 in Northern Ireland).⁶⁰ The *Explanatory Notes* to the Bill explain the proposed effects of Clause 1 in more detail (pp. 2-3), and set out the relevant extracts from existing legislation showing the changes which it would make (pp. 8-11).

⁵⁶ *ibid* para. 1

⁵⁷ for example ‘Teacher-pupil love affairs to be outlawed’, *The Times*, 22 June 1998

⁵⁸ see for example “‘Abuse of trust’ law coming soon”, *Gay Times*, November 1998

⁵⁹ ‘Gay groups will not oppose “abuse of trust” law’, *Gay Times*, January 1999. During the third reading debate on the Bill which became the *Crime and Disorder Act 1998*, Alun Michael (Paul Boateng predecessor as Home Office Minister) had said that he saw these as two separate issues - HC Deb vol 314 c790, 22 June 1998.

⁶⁰ Anal intercourse between a man and a woman is not a specific offence under Scots law, as sodomy can only be carried out by two men.

The wording of clause 1 is very close to that of Ann Keen's main amendment to the *Crime and Disorder Bill* [see part I.B.2.a. above]. However, two further provisions would also be amended under clause 1 which are ancillary to the main issue. **Clause 1(1)(b)** seeks to amend the sentencing provisions contained in Schedule 2 to the *Sexual Offences Act 1956*, which state that a maximum penalty of five years' imprisonment (rather than two) is available where a man aged 21 or over is convicted on indictment of indecency offences with a man aged 18 or under.⁶¹ The Bill seeks to change this so that the increased penalty would apply only where the younger man is aged 16 or under. However, it does not make any corresponding amendments to the sentencing of those convicted of buggery or attempted buggery although the age of 18 is also relevant in such cases.⁶²

In addition, section 8 of the *Sexual Offences Act 1967* states that the consent of the Director of Public Prosecutions is required for prosecuting homosexual acts⁶³ where either of the men involved was under 21. This section was not amended when the age of consent was reduced to 18 by the *Criminal Justice and Public Order Act 1994*; **Clause 1(2)(b)** of the present Bill seeks to have the age of 16 substituted for that of 21.⁶⁴

At Business Questions on 14 January 1999, the Leader of the House was asked by Sir George Young to 'confirm that the key issues of conscience on the age of consent will be taken on the Floor of the house, and on a free vote'. She replied that

That matter can be discussed through the usual channels, but the Government at least intend to recognise the fact that it is in some ways a matter of conscience. I anticipate that that recognition will underlie our decision, but we shall discuss the matter through the usual channels.⁶⁵

The Bill does not address a number of criminal law issues which have been seen as discriminating between homosexual and heterosexual activity. For instance, the criminalisation of the younger party in under-age consensual homosexual offences is not reflected in the equivalent laws regulating heterosexual behaviour, but Clause 1 does not amend this. Nor does the Bill seek to alter the position that homosexual acts, including buggery, are not considered to be in private if more than two people are present, whereas no such provision applies for heterosexual buggery.

⁶¹ *Sexual Offences Act 1956*, Schedule 2 para. 16(a) and (b)

⁶² *Sexual Offences Act 1956*, Schedule 2 para. 3(a) and (b). See part I.A.1.a. above

⁶³ buggery with another male; gross indecency with another male; or aiding, abetting, counselling, procuring or commanding the commission of these offences

⁶⁴ This was the subject of a separate amendment to the *Crime and Disorder Bill* tabled by Ann Keen, consequential to her main amendment, which was also withdrawn following defeat in the House of Lords.

⁶⁵ HC Deb vol.323 c442, 14 January 1999. On 28 July 1998 the Home Secretary had stated that there would be a free vote on the age of consent in the new legislation to be introduced in 1998-99 - HC Deb vol 317 c183.

It does not affect the situation of people who are currently subject to the registration requirements of the *Sex Offenders Act 1997* as a result of having committed consensual homosexual acts where one of the parties was under 18. Some Members would have liked to see this changed at the same time as the age of consent, so that people would not be required to continue registering in respect of acts which would no longer be offences.⁶⁶ The Home Secretary had stated in July that ‘further consideration’ of this problem was necessary, and that ‘we need to have discussed and resolved that issue before any Bill is brought forward’.⁶⁷

It is possible that such issues will be addressed by the ongoing **review of sexual offences legislation**. This review was announced on 15 June 1998 by Alun Michael, who was Minister of State in the Home Department at the time.⁶⁸ He stated that this area of law was ripe for reform, and that the review would ensure that the framework of sexual offences and penalties is coherent and effective. He explained that the review would complement the work of the interdepartmental working group set up to review the rules and practices preventing unsuitable people from working with children and looking at abuse of trust by people in positions of authority [for which see below, part II.D.].⁶⁹

When asked by Dr Evan Harris on 30 July 1998 when he expected the review of discriminatory provisions of existing sexual offences laws to be complete; with whom the review group is consulting; and when it commenced its deliberations, Mr. Michael replied that ‘We are considering how best this review can be undertaken. Its membership and terms of reference will be published in due course’.⁷⁰ An announcement about the review group is expected imminently.

Helen Jones later asked what plans the government had to review the issues of (a) valid legal consent and (b) informed consent as they relate to children subjected to sexual abuse. Mr Michael’s successor at the Home Office, Paul Boateng, replied that:

We are committed to undertaking a wide ranging review of the sexual offences and penalties, with a view to reforming them and bringing them up to date. However, the Government will not consider reducing the age of consent below 16 - indeed, one of the principal aims of the review will be to ensure that the legal framework, as far as possible, protects children and deals effectively with those who use and abuse them.⁷¹

The pressure group Stonewall is not generally in favour of provisions which would simply replace ‘18’ with ‘16’ in the relevant legislation. Instead, in its pamphlet *The Case*

⁶⁶ This was the subject of another proposed amendment to the *Crime and Disorder Bill* by Dr Evan Harris, and was mentioned again by Alan Beith - HC Deb vol. 317 c190, 28 July 1998

⁶⁷ HC Deb vol. 317 c209, 28 July 1998

⁶⁸ HC Deb vol 314 c10, 15 June 1998

⁶⁹ see ‘Sex offence laws to be reformed’, *Home Office press notice 222/98*, 15 June 1998

⁷⁰ HC Deb vol 317 c401w, 30 July 1998

⁷¹ HC Deb vol 319 c50w, 9 November 1998

for equality: Arguments for an equal age of consent [January 1998] it called for the repeal of the offences of gross indecency and buggery. It wanted to see two universal offences which applied regardless of sex or sexual orientation: one offence of having sex with a young person under the age of consent, and one of having sex in public and causing offence. (This proposal is similar to one recommended by the Criminal Law Revision Committee in 1984⁷² which was never implemented.) Stonewall has nevertheless decided to back the current Bill, as it feels it embodies the principles of equal treatment and equal protection for all young people. Liberty, the civil liberties pressure group, has some reservations about the Bill which will be set out in its forthcoming response.

⁷² Fifteenth report on Sexual Offences, Cmnd 9213, April 1984, para 10.15

II Abuse of a position of trust

A. Existing criminal offences

A summary of the existing criminal offences involving young people is set out above [part I.A.]. However, a few points are worth noting in relation to offences where the difference in age between the parties or their relationship to each other is relevant.

It is not an offence in England and Wales if a man under the age of 24 has unlawful sexual intercourse with a girl under the age of 16, if he has not previously been charged with a similar offence and he believes (and has reasonable grounds for believing) that the girl was 16 or over.⁷³ By contrast, there is no such defence for homosexual acts in England and Wales (although there is in Scotland); and indeed where one of the parties to a homosexual act is under 18 he can be prosecuted as well as or instead of the older party.

There is no specific protection for boys who are subject to the sexual advances of older women, but in certain circumstances this may amount to indecent assault. In addition the provisions of the *Indecency with Children Act 1960*⁷⁴ give protection for children under 14 of both sexes from both men and women who commit a ‘grossly indecent’ act (which does not necessarily amount to indecent assault) against them. The possibility of a change to these provisions was suggested in the following PQ:

Children (Sex Abuse)

Helen Jones: To ask the Secretary of State for the Home Department what plans he has to extend the Indecency with Children Act 1960 to protect those between the ages of 14 and 16 years.

Mr. Boateng: The Government are concerned to ensure that children are protected from all kinds of sexual abuse. The law provides protection against sexual abuse of all kind. The Indecency with Children Act 1960 relates to gross indecency with or towards a child under the age of 14, or inciting a child to commit such an act; the maximum penalty for this offence has recently been increased to ten years.

We recognise that the law on sexual offences contains many anomalies, and the differing ages at which children are protected from various kinds of unacceptable behaviour is one such anomaly. That is why we have said that we will be conducting a review of sex offences to consider all such offences, and this will be one issue we will consider. One of the principal aims of the review will be to

⁷³ section 6(3), *1956 Act*

⁷⁴ or the equivalent provisions in Northern Ireland

ensure that the legal framework, as far as possible, protects children and deals effectively with those who use and abuse them.⁷⁵

Section 7 of the *Sexual Offences Act 1956* makes it an offence for a man to have unlawful sexual intercourse with a woman who is a defective. However, it is a defence for a man prosecuted for such an offence to prove that he did not know and had no reason to suspect that the woman was a defective. 'Defective' is defined by section 45 of the Act [as amended] to mean a person suffering from a state of arrested or incomplete development of mind which includes severe impairment of intelligence and social functioning. Similar acts committed by the male staff of hospitals etc. against females who are mentally disordered patients are offences under section 128 of the *Mental Health Act 1959*.

By virtue of section 1(3) of the *Sexual Offences Act 1967*, a man who is suffering from severe mental handicap cannot in law give any consent which would prevent a homosexual act from being an offence. The definition of 'severe mental handicap' is the same as that used for 'defective' in the *1956 Act*, and the equivalent defence applies.

Various offences can apply to people who use children for prostitution, in addition to those offences which relate to prostitution generally. However, in some circumstances the child will also be committing an offence. The Home Office has recently issued draft guidance for consultation relating to children involved in prostitution. Its principal aim is to establish that the primary law enforcement effort must be against those who abuse children and coerce them into prostitution and that the child should be treated primarily as a victim of abuse. For the purposes of this guidance, a child is a girl or boy under the age of 18.⁷⁶

According to the *Code for Crown Prosecutors*,⁷⁷ prosecution for any offence is more likely if, for example, the defendant was in a position of authority or trust, the victim of the offence was vulnerable, or there is a marked difference between the actual or mental ages of the defendant and the victim. However, this is merely prosecution policy, and not a matter of law.

In Scotland, the common law offence of indecency towards a child below the age of puberty (12 for girls, 14 for boys) may be aggravated by being committed by a parent or teacher or other person who stands in a position of trust towards the child. This also applies by statute in relation to girls aged between 12 and 16.⁷⁸ In addition, any person over the age of 16 who has sexual (ie. vaginal) intercourse with a child under the age of 16, and who is a member of the same household as that child and is in a position of trust

⁷⁵ HC Deb vol 319 cc49-50w, 9 November 1998. See Part I.C. above for further discussion of this review.

⁷⁶ 'Child prostitutes to be treated as victims', *Home Office press notice 508/98*, 29 December 1998

⁷⁷ Crown Prosecution Service, June 1994

⁷⁸ section 6, *Criminal Law (Consolidation) (Scotland) Act 1995*

or authority in relation to that child, commits an offence punishable on indictment with a maximum sentence of life imprisonment.⁷⁹

Many European countries have criminal laws which seek to protect children from sexual advances from people older than themselves or those who are in a position of trust in relation to them, for example:

Austria	It is illegal for a male over 19 to commit homosexual acts with a male between 14 and 18
Belgium	Heavier penalties are levied against those in authority
Italy	The age of consent is raised from 14 to 16 if one of the participants is an older family member or guardian
Netherlands	If a person between the ages of 12 and 16 commits a sexual act with another person between those ages, they will not be prosecuted unless there is a complaint from the other participant, a parent or a guardian. However, if a person over 16 commits a sexual act with a person under 16, they will be liable for prosecution regardless of whether or not a complaint has been made.
Portugal	It is illegal for a person aged 18 or over to commit sexual acts with a person under 18.
Spain	If a person between the ages of 12 and 16 has committed a sexual act with a person over 16, the older person may be liable to prosecution if the younger person's parents complained
Switzerland	The Swiss Penal Code provides special protection for persons in situations of dependency

In addition, the example of Canada has been cited as a jurisdiction in which sexual exploitation of a young person by one who is in a position of trust is a specific offence. Article 153 of the Canadian Criminal Code describes the acts which shall be considered to be sexual exploitation when committed against a person between 14 and 17 years old by a person who is in a position of trust or authority towards, or in a relationship of dependency with, the young person.⁸⁰

⁷⁹ section 3, *Criminal Law (Consolidation) (Scotland) Act 1995*

⁸⁰ See *Unlawful Sex* (the report of the working party of the Howard League for Penal Reform), 1985, para. 8.28; and the Interim Report of the Working Group on preventing unsuitable people from working with children and abuse of trust - Dep 98/1325, 25 November 1998

B. Existing non-criminal controls

1. Notification requirements for sex offenders

The Sex Offenders Act 1997 imposes a requirement on those convicted or cautioned for sex offences against children and other serious sex offences to notify the police of their name and address and any changes to these. This allows the police to monitor sex offenders in the community and to take action where appropriate to warn relevant groups, such as local authorities, schools, or potential employers, of any risk they might present. The Government have made it clear that such information must not just sit on a computer or gather dust on a file, and has said that the police and probation services have responded positively and responsibly, using this information for the protection of children and vulnerable adults.⁸¹

Agencies are increasingly co-operating to pool the information they hold so that they can assess the risk presented by any individual sex offender and devise plans to monitor the offender's behaviour and reduce risk to the public. The Government are encouraging this multi-agency approach to both assessment and management in the community.⁸²

2. Sex Offender Orders

Sex Offender Orders under the *Crime and Disorder Act 1998* have been available since 1 December 1998. They allow specific prohibitions to be placed on anyone with a previous conviction or caution for a sex offence in the UK or overseas, where it can be shown that an order is necessary to prevent the public (or a section of it) from serious harm from the defendant. Breach of an order is a criminal offence, even where the behaviour in question would not otherwise have been criminal.

3. Criminal records checks

Criminal record checks are available on people working in the statutory sector where they have substantial unsupervised access to children. They are also available on teachers in the private and voluntary sectors. The government has recently announced its intention to implement Part V of the *Police Act 1997*.⁸³ This contains provisions which will widen access to criminal record checks, by allowing employers in England and Wales to ask prospective employees or volunteers to apply for a criminal record check and obtain their own certificates. Some employers would also be able to register with a new Criminal

⁸¹ HC Deb vol. 313 c304-5W, 4 June 1998

⁸² *ibid*

⁸³ 'Criminal records bureau to strengthen child protection safeguards', *Home Office press notice 494/98*, 14 December 1998

Records Bureau, set up to carry out criminal records checks and issue certificates for employment purposes, which would enable them to obtain certificates relating to an applicant (but only with his or her consent).⁸⁴ The Criminal Records Bureau would work alongside the Department of Health's Consultancy List and the Department for Education and Employment's 'List 99', both of which are discussed below.

It will be some time before the new system is fully operational, but the government has stated that top priority will be given to the issue of certificates for those seeking positions which involve regularly caring for, training, supervising or being in sole charge of under-18s.

4. Social Services⁸⁵

At the moment, it is largely up to individual local authorities/employers to decide what action, if any to take where someone abuses a position of trust. There are three sets of legislation relating to the accommodation of children, one for England and Wales, one for Scotland and one for Northern Ireland. Separate national guidance relating to the legislation is issued in relation to each of the countries of the UK, including guidance issued by the Welsh Office to the Welsh local authorities. At the moment none of these appears to cover or discuss abuse of trust.

The Department of Health maintains a Consultancy Index for England and Wales, which includes people that employers consider to be unsuitable to work with children. This might include someone who had abused a position of trust as defined in this Bill but only if the local authority/employer had considered that this rendered the person unsuitable to work with children. The List has no statutory basis and inclusion on the list does not necessarily rule out future employment with children. Employers are not required to consult it although there is evidence that it is "well used".⁸⁶ Non-statutory lists are also maintained in Scotland and Northern Ireland although there are slight differences between each of these.

The British Association of Social Workers and the Social Care Association both have codes of ethics that they publish. The former says that it is the responsibility of a social worker not to engage in sexual relationships with clients or the family members of clients. The latter does not explicitly mention abuse of trust as defined in the Bill but such abuse of trust might be considered to be a breach of one of the more general principles contained in the codes. However, it is not normally a job requirement for someone to be a member of either of these associations and being refused or membership or struck off would not necessarily have any job implications.

⁸⁴ for further detail see RP 97/23 which was prepared for the second reading in the House of Commons of the Bill which became the *Police Act 1997*

⁸⁵ Jo Roll, Social Policy Section

⁸⁶ *People Like Us, the Report of the Review of the Safeguards for Children Living Away From Home*, Sir William Utting, The Department of Health, The Welsh Office,

The Government says that number of children looked after by local authorities is small compared with the numbers in education although their vulnerability may be more extreme.⁸⁷ Latest figures for England, for example, show that there were only 9,400 16 and 17 year olds looked after by local authorities in 1998, that is only about one fifth of the total looked after.⁸⁸ However their numbers might increase as a result of the government's commitment to extend the council's duties towards those aged 16-18.⁸⁹

A number of measures currently proposed would have an indirect bearing on abuse of trust, or might have done if it was not to become an offence. In particular, as the result of a series of scandals relating to sexual abuse in children's homes and a more general concern for the position of children in public care, the Government has announced a wide range of new measures to improve the situation of such children.⁹⁰ For England, Wales and Scotland many of these were announced in November 1998 as part of the Government's response to the reviews published as the Utting Report and Kent Reports.⁹¹ In Northern Ireland there was not an exactly parallel review, but reports by its Social Services Inspectorate over a number of years have also made recommendations for improving the position of children in the public care, many of which resemble those of the Utting and Kent Reports.

The Government's response to Kent and Utting includes the proposal to create a statutory version of the Consultancy Index. A number of other measures, proposed as part of other programmes, such as the establishment of a General Social Care Council and codes of practice for social care staff, could also be relevant.⁹²

5. Hospitals, nursing homes and mental nursing homes⁹³

Under current provisions, consensual sexual relations between health professionals and patients aged between 16 and 18 would be dealt with by the relevant profession's code of conduct. The General Medical Council (GMC), for example, which regulates doctors throughout the UK, states categorically that 'you must not use your position to establish

⁸⁷ *Sexual Offences (Amendment) Bill Explanatory Notes.*

⁸⁸ *Children looked after in England: 1997/98*, Department of Health Statistical Bulletin, 1998/33

⁸⁹ HC Deb 5.11.98 1998 and Statement on it by Frank Dobson, Secretary of State for Health, HC Deb 5.11.98 c1011-1023

⁹⁰ Department of Health, *The Government's Response to the Children's Safeguards Review*, Cm 4105, November; The Scottish Office *Response to the Children's Safeguards Review*, November 1998, available from the Scottish Office and on the internet: <http://www.scotland.gov.uk/library/documents7/kent>

⁹¹ *People Like Us, the Report of the Review of the Safeguards for Children Living Away From Home*, Sir William Utting, The Department of Health, The Welsh Office, 1997; The Scottish Office, *Children's Safeguards Review*, by Roger Kent, 1997

⁹² See, for example, *Modernising Social Services: Promoting independence, Improving Protection: Raising Standards*, Cm 4169

⁹³ Katharine Wright, Social Policy Section

improper personal relationships with patients or their close relatives',⁹⁴ and a doctor who did establish such 'improper relationship' would run the risk of being found guilty of serious professional misconduct. It should be noted that the GMC's concerns relate to *all* patients, not just those under the age of 18, but it seems likely that the GMC would regard allegations about relationships with patients under 18 particularly seriously. If a doctor is found guilty of serious professional misconduct, it is then open to the General Medical Council to remove their name from the medical Register, thus preventing them from practising as a doctor in the UK, either in the NHS or privately. Similar regulatory structures apply to the other health professions, such as nurses and professions supplementary to medicine. Individual employers, such as NHS trusts or private hospitals, would also be able to take any disciplinary steps they felt to be appropriate in the circumstances.

Guidance has also been issued on a number of occasions on precautions to be taken to prevent the abuse by staff members of children in hospitals or other health-related institutions. For example, the Department of Health document, *Welfare of children and young people in hospital*, recommends that there should be at least two registered children's nurses on duty in hospital children's departments and wards at all times;⁹⁵ and this guidance was reinforced after the enquiry into how the nurse Beverley Allitt had been able to kill and injure children in hospital.⁹⁶ Much more recently, the Welsh Office has just issued guidance on the treatment of children in residential psychiatric institutions, stating that 'staffing arrangements must be appropriate to safeguarding young patients during the day and at night'.⁹⁷

6. Education⁹⁸

a. *England and Wales*

Section 218 of the *Education Reform Act 1988*⁹⁹ empowers the Secretary of State for Education to make regulations to restrict or prohibit, on medical grounds, in cases of misconduct, and on educational grounds (for teachers), a person's employment as a teacher or in other work that brings a person regularly into contact with those under the age of 19 years.¹⁰⁰

⁹⁴ GMC, *Good medical practice*, 1998

⁹⁵ Dept of Health, 1991, para 6.3

⁹⁶ Dept of Health circular EL(94)16

⁹⁷ Welsh Office circular WHC (99) 2, issued in response to the report by the Health Advisory Service 2000, *Child and adolescent mental health services residential units in Wales: a review of safeguards and standards of care*, 1999

⁹⁸ Christine Gillie, Social Policy Section

⁹⁹ as amended; section 49 of the *Education Act 1997* extended the scope of the provisions

¹⁰⁰ *Education Reform Act 1988*, section 218 (6)

Under the *Education (Teachers) Regulations 1993*,¹⁰¹ as amended, the Secretary of State may make a direction to:

- require an employer to suspend or terminate a person's employment;
- make continued employment subject to specified conditions;
- prohibit a person's subsequent appointment or employment in relevant employment, or impose specified conditions on a person's appointment or employment.¹⁰²

Relevant employment is defined as follows:

7.(1) Any reference in this Part to relevant employment is [subject to paragraphs (2) and (3)], a reference to employment-

(a) by a local education authority, as teachers (whether or not at a school or further education institution) or as workers with children or young persons;

(b) by any other body, as teachers at a school or further education institution; or

(c) by the governing body of a school or further education institution as workers with children or young persons.

(2) In [regulations 10 and 10A], any reference to relevant employment also includes employment-

(a) by the proprietor of an independent school, as teachers or workers with children or young persons; and

(b) at an independent school, as teachers or as workers with children or young persons.]

[(3)For the purposes of this Part, employment includes the engagement of a person to provide his services as a teacher otherwise than under a contract of employment and references to employment or relevant employment shall be construed accordingly.]

Amendment Regulation 7 was substituted by the Education (Teachers) (Amendment) Regulations 1994, SI 1994/222, with effect from 1 March 1994. The words within square brackets in paras (1) and (2) were substituted, and para (3) was added, by SI 1998/1584 with effect from 1 August 1998.¹⁰³

Governing bodies of schools or further education institutions and the proprietors of independent schools must take such steps as are reasonably practical to prevent a person who is not employed by them but who has been barred by the Secretary of State, from providing services in relation to the school or institution. The restriction applies to services provided under contract or otherwise.¹⁰⁴

¹⁰¹ SI 1993/543

¹⁰² Regulation 10

¹⁰³ Regulation 7

¹⁰⁴ Regulation 10A

Misconduct is not defined but the Regulations state that a direction will be made automatically in the case of any person who is found guilty or pleads guilty to a sexual offence which involves a child under 16 years of age. The specific offences are listed in the Regulations.¹⁰⁵ DfEE Circular 11/95¹⁰⁶ provides guidance on the Secretary of State's powers to bar people from teaching and other employment. The offences that lead to automatic barring include:

- rape
- buggery
- incest
- unlawful sexual intercourse
- indecent assault
- gross indecency
- taking or distributing indecent photographs¹⁰⁷

In other cases, the power is discretionary. However, DfEE Circular 11/95 lists other kinds of misconduct, which are likely to lead to a bar or restriction, including a sexual, or otherwise inappropriate, relationship with a pupil regardless of whether the pupil is over the legal age of consent:

- Violent behaviour towards children or young people;
- A sexual, or otherwise inappropriate, relationship with a pupil (regardless of whether the pupil is over the legal age of consent);
- a sexual offence against someone over the age of 16;
- any offence involving serious violence;
- drug trafficking and other drug related offences;
- stealing school property or monies;
- deception in relation to employment as a teacher or at a school, for example false claims about qualifications, or failure to disclose past convictions;
- any conviction which results in a sentence of more than 12 months imprisonment;
- repeated misconduct or multiple convictions unless of a very minor nature.¹⁰⁸

The Circular emphasises that it is not possible to specify in detail everything that might constitute misconduct for the purpose of the Regulations. Some behaviour that an employer might legitimately regard as misconduct for disciplinary purposes might not be regarded as misconduct requiring consideration by the Secretary of State. The Circular identified in very broad terms the kind of behaviour that is regarded as misconduct requiring consideration by the Secretary of State:

¹⁰⁵ Regulation 10 (9) and Schedule 4

¹⁰⁶ DfEE Circular 11/95, *Misconduct of Teachers and Workers with Children and Young Persons*, October 1995

¹⁰⁷ paragraph 7

¹⁰⁸ paragraph 9

- committing a criminal offence resulting in conviction;
- behaviour which could lead to prosecution for a criminal offence;
- behaviour which involves an abuse of a teacher's position of trust or a breach of the standards of propriety expected of the profession.¹⁰⁹ The Circular stated that a sexual relationship with a pupil over the age of consent would be behaviour that would be likely to be regarded as coming within this category.¹¹⁰

List 99 contains the details of people whose employment is barred or restricted. Copies are held by LEAs, further education corporations and associations representing independent schools. Teachers who are barred from teaching in Scotland and Northern Ireland are included in Annexes to the List. Action under the barring regulations could be taken by the Secretary of State for Education if any of them apply for a post in England and Wales.

DfEE Circular 10/95 provides guidance to the education service on its role in helping to protect children from abuse. It includes guidance on the procedures that schools should have in place for handling allegations of abuse.¹¹¹

The *Teaching and Higher Education Act 1998* gives the new General Teaching Councils (GTCs) for England and Wales the power to take disciplinary action against teachers on grounds of unacceptable professional conduct or serious professional incompetence but cases involving misconduct continue to be decided by the Secretary of State. Provision is made for the GTC to issue a code of practice for teachers laying down standards of professional conduct and practice expected of teachers.

b. Northern Ireland

The Department of Education for Northern Ireland (DENI) exercises similar powers as the Secretary of State for Education to prohibit or restrict a person's employment or further employment as a teacher. The relevant powers are contained in the *Teachers' (Eligibility) Regulations (Northern Ireland) 1997*.¹¹²

c. Scotland

The General Teaching Council (GTC) for Scotland, rather than the Secretary of State for Scotland, is responsible for considering alleged cases of misconduct and for determining under its powers whether a teacher should be removed from the Register of Teachers. The GTC for Scotland was established by the *Teaching Council (Scotland) Act 1965*. The main functions of the Council include establishing and keeping a Register of

¹⁰⁹ paragraph 13

¹¹⁰ paragraph 15

¹¹¹ DfEE Circular 10/95, *Protecting Children from Abuse: The Role of the Education Service*, October 1995

¹¹² Statutory Rules of Northern Ireland 1997 No. 312

Teachers, and determining whether in any particular case registration should be refused or withdrawn. Cases of convictions or allegations of misconduct are dealt with by the Council's Investigating and Disciplinary Committees. Registration with the GTC for Scotland is a requirement for employment as a teacher in state schools but not in independent schools in Scotland, although independent schools may decide only to employ registered teachers.

C. Proposals for reform

1. Background

Most of the calls in this country for increased protection for older children from sexual advances by adults have focused on protecting boys from homosexual men. This has sometimes been because of the view that homosexual seduction at a young age might turn boys towards homosexual behaviour and prevent them from developing as a heterosexual.

In 1954 the Home Secretary set up a committee chaired by Sir John Wolfenden to examine the criminal law relating to homosexual offences and prostitution. The Committee published its Report in 1957¹¹³, which suggested that the age of consent for homosexual acts might be lowered if legislation providing protection for children were extended to cover all those below that age :

... whereas it would be difficult to regard a young man of nearly twenty-one charged with a homosexual offence as a suitable subject for "care or protection" under the provisions of the Children and Young Persons Acts, it would not be entirely inappropriate so to regard a youth under eighteen. If the age of adulthood for the purposes of our amendment were fixed at eighteen, and if the "care or protection" provisions were extended to cover young persons up to that age, there would be a means of dealing with homosexual behaviour by those under that age without invoking the penal sanctions of the criminal law. [p26]

However, it concluded that 21 should be the age of consent for homosexuals:

not because we think that to fix the age at eighteen would result in any greater readiness on the part of young men between eighteen and twenty-one to lend themselves to homosexual practices than exists at present, but because to fix it at 18 would lay them open to attentions and pressures of an undesirable kind from which the adoption of a later age would help to protect them, and from which they ought, in view of their special vulnerability, to be protected. [p27]

¹¹³ Cmnd 247, September 1957

In 1979, the Home Office Policy Advisory Committee's Working Party report *Age of Consent in relation to Sexual Offences*¹¹⁴ considered the issue of the need to protect boys and young men:

50. In short, the age of majority is a most important factor to be taken into account in deciding what the minimum age for homosexual relations should be. Nevertheless, it is our task to make a recommendation on the merits, and this calls for us to consider to what extent young men need protection from consensual buggery and gross indecency, how effective criminal legislation is against such conduct in private and the attitude of society towards it.

The working party said that 'in this connection it is of the utmost importance to decide if possible the age by which a young man's sexual orientation usually becomes fixed, because of the risk that a homosexual seduction before that age might turn him towards heterosexual behaviour and prevent him from developing as a heterosexual'. [para. 51] The Wolfenden Committee had found, following unanimous medical evidence, that the main sexual pattern is laid down in the early years of life and was usually fixed, in the main outline, by the age of 16. The working party was, however, concerned about the minority of young men who have not achieved a settled orientation by the age of 16. Accordingly it recommended that the minimum age for homosexual relations should be 18. [para. 52]

A minority of the working party had been in favour of a reduction to 16 with the compromise that between the ages of 16-18 a young man should be protected by the criminal law against the advances of a man who was in a position of authority over him. The Criminal Law Revision Committee, when asked for its advice as to the practicability of introducing such a concept into English law, replied that any such offence would have to cover two categories - firstly where a man's status gives him an advantage over a young man (for example as his employer or teacher), and secondly where a man gains advantage over a young man by gifts or other material inducements. They pointed out that it would be impossible to produce a complete list of cases which should be covered by such an offence, and that the differences between the English legal system and those of other European countries meant that it would not be practicable to introduce special relationship laws comparable to theirs. As a result of this advice, both members of the working party who had been in favour of the introduction of such an offence decided instead to support a minimum age of 18 for homosexual relations. [para. 63-4]

The working party had earlier concluded that there should not be any extension of the criminal law to protect girls over 16 from certain men in positions of advantage over them. In its view, which it said accorded with that of the teaching associations, where a teacher has consensual sexual relations with his girl pupil above the age of consent this should be dealt with as a matter of professional discipline only; and similar considerations apply to the other 'special relationships' such as employers, foster parents and doctors.

¹¹⁴ HMSO, June 1979

[para. 33] In 1981 the final Report of the Committee¹¹⁵ reaffirmed that it considered the current criminal law in this area to be satisfactory, and that 'the threat of disciplinary proceedings should be sufficient to deter most [professional] men from abusing their position to take unfair advantage of girls aged 16 and 17'. [para. 23]

The fifteenth report of the Criminal Law Revision Committee, on sexual offences, was published in 1984.¹¹⁶ It did not look specifically at the age of consent as this had been considered in the Home Office Policy Advisory Committee report [see above], but considered the issue of abuse of trust or authority in relation to incest-like offences. It recommended that children under the age of 21 should have the protection of a separate offence, analogous to incest, covering sexual intercourse with a step-parent. However, it did not think that this offence should be extended to foster children, *de facto* adopted children or other children in respect of whom a person is in a position of trust or authority. Some of the members of the Committee believed that English criminal law would find words such as 'trust' and 'authority inappropriate as being too vague. [paras 8.25-8.35]

The Howard League for Penal Reform published its working party report on *Unlawful Sex* in 1985, in which it sought to make recommendations for reform of the law on sexual offences to make the system 'more discriminating, more humane and, above all, more effective in protecting the public'. [para. 1.3] The report concluded that there seems to be no support for the theory that boys can be easily 'converted' to homosexuality if they do not already have an inclination for it anyway:

The possibility of homosexual seduction in childhood bringing about an adult homosexual orientation has been greatly exaggerated. Most adult males with an exclusively homosexual orientation who have had such experiences in childhood report that their homosexual interests and fantasies developed before they had any overt contact with an adult (Bell *et al*, 1981). In other words, a homosexual tendency is more likely a cause than an effect of the paedophilic incident. Moreover, heterosexual males very frequently recall having had sex contact with an older male when they were young without this having made any lasting impression upon their sexual preferences (Schofield, 1965, p. 58). Furthermore, studies of young males who have worked as homosexual prostitutes (Freund, 1974), and follow-up studies of boys known to have been at some time involved with older males (Doshay, 1943; Tindail, 1978; Toisma, 1957) show that these experiences do not suppress a basic heterosexual orientation. On the other hand, imprisoned homosexual paedophiles often claim to have been seduced as boys, but such testimony is suspect of being motivated by a need for self-exculpation.

In October 1969 the Dutch Parliament, acting on the advice of a committee headed by a professor of social psychiatry (Speijer, 1969), abolished the law criminalising consensual behaviour with persons of the same sex aged between

¹¹⁵ Cmnd 8216, April 1981

¹¹⁶ Cmnd 9213, April 1984

sixteen and twenty-one. The committee cited, among others, surveys by Giese (1964) and Gebhard *et al* (1965), showing that up to half of adult homosexuals questioned reported having had their first contacts by the age of fifteen, usually initiated by mutual agreement, often after a period of waiting for the opportunity. They concluded that by the sixteenth year the sexual propensity is developed to such an extent that a youngster who is heterosexual cannot be diverted by "seduction" into permanent homosexuality. [para. 4.17]

This Working Party did, however, acknowledge that the involvement of older homosexual men with young men could lead to some sort of other corruption of the younger person:

A more realistic concern about homosexual liaisons between youths and more privileged older men is that they may be corrupting in a non-sexual way because they often involve financial and social patronage. The effect can be to seduce a young man away from regular work, to stimulate unrealistic material ambitions and to undermine his ability or determination to pursue a disciplined career of work and training. When the liaison comes to an end he may turn to frank prostitution or to crime. Girls who have been temporarily 'kept' by wealthier older men are in a somewhat similar position, but they have the possibility of solving their problem by marriage. [para. 4.18]

Although it accepted these problems, the Howard League finally recommended that the rules for heterosexual and homosexual behaviour should be the same. In making this recommendation it relied mainly on the evidence put to it that exposure to homosexuality would not 'convert' inherently heterosexual young men and that the criminal law did not succeed in its attempt to enforce chastity on homosexual men under the age of 21. Its recommendation was not, however, that the age of consent for all should be 16, but rather that a whole new system be introduced. This would involve legal protection from sexual exploitation for both boys and girls under the age of 18, by introducing offences of unlawful indecency and unlawful sexual intercourse with young children under the age of 14 by a person over 14, or with young persons between 14 and 18 if the age gap between the participants was greater than two years and some trust has been abused or some undue influence has been exerted. [para. 10.14] It was suggested that

the law might usefully here provide a presumption, in the absence of evidence to the contrary, that undue influence applies in the case of teachers, employers, youth workers, hostel wardens and so forth, or if the accused is 7 or more years older than the young person, or if the young person has been offered some material inducement, or has been kept away from home against the wishes of parents or guardians. [para. 8.27]

2. *The Crime and Disorder Bill 1997-98*

Joe Ashton and Crispin Blunt both tabled amendments to Ann Keen's proposed new clause at the report stage,¹¹⁷ which aimed to introduce protections similar to those which exist in some continental countries [for which see part II.C. above]. Crispin Blunt's amendments sought to prohibit homosexual acts where one of the parties is over twenty-one and the other is between sixteen and eighteen, whereas Joe Ashton wanted to see the age of consent being kept at eighteen for buggery and gross indecency where one party is in a position of authority, influence or trust in relation to the other. Mr Ashton also proposed that it should be an offence for a person to have sexual intercourse with a girl under the age of eighteen where that person is in a position of authority, influence or trust in relation to the girl [New Clause 8]. However, no definition of a 'position of authority, influence or trust' was given.

Crispin Blunt acknowledged during the debate on report that his amendments would discriminate between homosexual and heterosexual behaviour, but justified this by reference to a similar law in Austria and to his belief that there is a much greater strand of homosexuality than of heterosexuality which depends for its gratification on the exploitation of youth. [cc792-5]. Dr Evan Harris pointed out that Mr Blunt's amendments would make a legal relationship between a 17-year-old and a 20-year-old suddenly illegal and criminal on the older person's 21st birthday.

Joe Ashton said that his amendments were inspired by reading the Utting report on safeguards for children living away from home,¹¹⁸ which showed that the current system is not working to protect children. [cc764-9] Although a new offence along these lines was not suggested in the Utting report, Mr Ashton said that Sir William Utting was very much in favour of his amendments. [c783]

Sir Norman Fowler's sympathy for the Ashton amendments was inspired by his concern that, if the age of consent for homosexual acts were to be lowered to 16, the House should be convinced that a group of young people between the ages of 16 and 18 would not be put at risk. [c782]

Richard Allan agreed with the purpose behind Joe Ashton's amendments, although he felt that they were not worded correctly, and added that he was himself concerned about girls of 16 and 17 who are involved in prostitution and exploited by pimps.¹¹⁹ [c778]

The government's intention to look at the measures necessary to protect 16- and 17-year-olds who may be vulnerable to abuse by those in positions of trust was referred to by Alun Michael, who was then Minister of State in the Home Office with responsibility for

¹¹⁷ HC Deb vol. 314 cc754-811, 22 June 1998

¹¹⁸ 'People Like Us', Sir William Utting *et al*, November 1997

¹¹⁹ The government has now issued draft guidance for consultation on treating prostitutes who are under 18 primarily as the victims of abuse - see part II.A. above

such issues. He said that the government considered the protection of the vulnerable an absolute priority, but that he could not accept Mr Ashton's amendments because they would create a new set of difficulties and anomalies. [cc786-91]

Joe Ashton's main amendment was rejected by the House of Commons on a division, by 234 to 194 votes.

The House of Lords did not have any particular proposals on abuse of trust before it during its debate on the age of consent, but the general topic was nevertheless raised several times.¹²⁰ Earl Russell felt that such protection was necessary to prevent the abuse of power both where one of the parties is *in loco parentis* and where a person uses fear or favour derived from an official position to obtain sexual favours [c963]. Baroness Young said that the government's acceptance that it was necessary to set up a working party to deal with those young people most at risk illustrated the problems with lowering the age of consent to 16 [c972].

When the debate returned to the Commons on 28 July 1998,¹²¹ Jack Straw said that although the equalisation of the age of consent was a simple, non-technical issue, abuse of trust was not:

There are complexities in the definition of abuse of trust, in the behaviour which is dealt with, in the interlocking with non-statutory safeguards that are already in place, such as professional codes, and in the relationship with the current criminal law, under which any coercive sexual activity is already against the law and carries criminal sanctions. [c183]

At this stage Joe Ashton also recognised that his amendment would not have dealt with the difficulty that even those who commit sexual offences against children under the existing law and are caught are not prosecuted. [c194]

3. Interdepartmental working group on abuse of trust

On 4 June 1998 it was announced that the inter-departmental working group of officials being set up to investigate how to prevent sex offenders working with children would also look at further possible measures to protect 16 and 17 year olds who may be vulnerable to abuse by those in a position of trust such as carers, teachers and leaders of organised residential activities.¹²² Following the debate on the age of consent on 22 June, this matter

¹²⁰ HL Deb vol 592 cc936-76, 22 July 1998

¹²¹ HC Deb vol 317 cc176-211, 28 July 1998

¹²² HC Deb vol 313 cc304-5, 4 June 1998

was described as a 'key issue' for the group, which would look at a possible new criminal offence in this area.¹²³ More details of the group's work were given in the following PQ:

Mrs. Brinton: To ask the Secretary of State for the Home Department what further plans he has to tackle the issue of preventing unsuitable people from working with children and to protect young people from abuse by those in positions of trust following the debate on lowering the age of consent from 18 to 16 years on 22 June; and if he will make a statement.

Mr. Michael: During the debate on 22 June 1998, Official Report, columns 709-811, I referred to the interdepartmental working group set up to look as a matter of priority at further safeguards needed to prevent those unsuitable from working with children and to protect young people from abuse by those in positions of trust. The group is due to meet on 30 July.

The need to protect vulnerable 16 and 17 year olds from abuse of trust was discussed at length in the debate on 22 June. The working group will look carefully at the concerns expressed. Issues to be considered will include: the definition of a position of trust; the scope of occupations to be covered; the definition of those to be protected; the kind of behaviour to be prohibited; existing safeguards and possible new mechanisms for prohibiting such behaviour, including a possible new criminal offence. Any proposals will relate to the need to protect both boys and girls and will take account of issues such as avoiding the criminalisation of the younger partner in a relationship based on abuse of trust.

On the issue of preventing those unsuitable from working with children, the working group's programme of work will include: how working with children can be defined; how to define those unsuitable to work with children; existing and potential safeguards to prevent unsuitable people working with children; a possible new offence to support the safeguards; and the possible establishment of a central register of those unsuitable to work with children, including questions of quality assurance, access, scope and cost.

The working group will also take into account the report of Sir William Utting's review of safeguards for children living away from home and the Government's response to this review which is expected to be published by the Ministerial Task Force later this year. In particular, consideration will be given to those recommendations dealing with choosing the right staff.

The working group, which will be led by the Home Office, will hold regular meetings during the autumn and is tasked to make recommendations by the end of December. Other Departments involved include: the Department for Education and Employment; the Department of Health; the Welsh Office; the Charity Commission; the Crown Prosecution Service; and the Lord Chancellor's Department. This group will also look at how best to involve outside

¹²³ 'Government action to protect vulnerable teenagers from abuse of trust', *Home Office press notice* 276/98, 17 July 1998

organisations in the work. The group's recommendations will relate to England and Wales, but representatives from the Scottish and Northern Ireland Offices will also be involved.¹²⁴

This inter-departmental working group published its Interim Report in November 1998.¹²⁵ It stated that much of the concern which had been expressed in Parliament and elsewhere stemmed from the need to deal more effectively with abusive behaviour which was already illegal but where the safeguards were felt to be inadequate, or enforcement and prosecution problematic. The large majority of organisations who responded to the consultation exercise carried out by the group in August and September 1998¹²⁶ believed that conduct amounting to abuse of a position of trust in relation to those over the age of consent was better regulated by professional codes than by a criminal offence, but that these codes needed to be made more effective and comprehensive. The kind of concerns expressed by consultees over an offence included:

- its inflexibility
- the potential for malicious accusation
- difficulties of proof and definition
- the damaging effects of a trial on the young person
- the lack of any widespread evidence of abuse of trust as opposed to abuse against children and young people generally which is already covered by the criminal law
- the position of a younger party who, if homosexual, would be 'outed' by any criminal prosecution or indeed might be at risk of prosecution himself if under the age of consent
- the danger that it would lead organisations to think that nothing else need be done by them

Nevertheless, the working group concluded that in certain strictly limited circumstances of particular vulnerability where the position of trust is strong and well-established, a new criminal offence would be justified to protect young people from behaviour which would otherwise be lawful but which is not acceptable because of the relationship of trust involved. The working group also recommended a major initiative to strengthen codes of conduct generally to protect young people from those in positions of authority over them, and set out its belief that work on abuse of trust as a whole should be seen in the context of ongoing work aimed at preventing unsuitable people from working with children.

The principal concern of the working group was to protect children under 18, as it felt there was less concern for the vulnerability of children over the age of majority. However,

¹²⁴ HC Deb vol316 cc348-9w, 17 July 1998

¹²⁵ Dep 98/1325, 25 November 1998

¹²⁶ The consultation letter, which asked for responses on both aspects of the group's remit, is annexed to the Interim Report. It was sent to a number of intermediary and umbrella organisations in the voluntary sector; professional bodies, particularly in the areas of education and social services; the Association of Chief Police Officers; various employment organisations; and a selection of Members and Peers.

as there are many existing offences relating to sexual behaviour with certain categories of under-18-year-olds, additional safeguards were needed only to protect children over 16,¹²⁷ as well as those aged 14 and 15 with whom any sexual intercourse is already illegal but who do not have the protection of the *Indecency with Children Act 1960* [para. 11]. It has yet to make a recommendation in relation to vulnerable adults.

The group recommended that 18 should be the minimum age at which a person could be prosecuted for such an offence. It had discussed the possibility of setting it at a higher age, but agreed with Ministers that 18 was the logical age to set and any other approach would be anomalous. It did not wish the younger party to be liable to prosecution, as happens with the existing offences of buggery (with a male or a female) and gross indecency between males. [paras 13-15]

It was not in favour of listing those activities which would be unlawful, but instead recommended that the offence should cover 'sexual intercourse, whether vaginal or anal, and other sexual activity.' This would cover heterosexual, homosexual and lesbian sexual behaviour, and the protection should apply equally to boys and girls. The test should be whether a reasonable person would see the behaviour as sexual even without knowing of the context of the activity or the intentions of the parties engaged in it. [para. 10]

However, the working group did want to limit the circumstances in which the offence could be committed, and suggested a list of the situations which would be covered. This included children who are in detention under any enactment; looked after by a local authority; resident in an institution regulated to provide health and/or social care; or in full time education. It did not cover various other situations suggested by the respondents to its consultation exercise,¹²⁸ as the group felt that there was not the direct relationship of trust seen as integral to the offence. However, the group recommended that the Secretary of State be given the power to amend such a list by affirmative resolution. Only adults who are involved in 'regularly caring for, training, supervising or being in sole charge of person aged under 18' in such situations should be caught by the offence. [paras 16-19]

The group recognised that full-time education is a very wide category, but stressed that the pupil/teacher relationship is one where the position of trust is particularly strong. It saw as a priority the need to protect those with learning difficulties who may attend any school or further education establishment, as well as those in boarding schools that may also have day pupils. It considered that any attempt to distinguish between pupils would be anomalous, and therefore recommended that all full-time education should be covered.

A leading article in *The Scotsman* last June suggested that:

¹²⁷ The working party emphasised that its proposals would not discriminate on grounds of sex and sexual orientation and must protect both boys and girls equally. However, until the age of consent is lowered, boys under 18 are already considered to have some protection through the current prohibition on homosexual acts where one of the participants is under 18.

¹²⁸ See Annex B to the Interim Report

very few teachers or social workers seek to take sexual advantage of the children in their care ... Much more common is the false accusation made by a spiteful adolescent against a resented figure of authority. For every teacher found guilty of seducing a pupil, there are many more cases in which innocent professionals are damaged by malicious falsehoods. That already fraught situation would deteriorate still further were an unnecessary new criminal offence to be created.¹²⁹

The National Association for Head Teachers (NAHT), in its response to the working group on abuse of trust, stated that it did not see any difference in a relationship between a young person and a teacher or a caretaker. Teaching organisations, such as the Association of Teachers and Lecturers (ATL) and the NAHT, stated that the introduction of a new offence could result in criminalising acceptable behaviour. They felt that cases needed to be treated on an individual basis. The National Association of Teachers (NUT) raised the issue of false allegations and the effect any new measure might have on teacher recruitment.

The problems of relationships which pre-exist a relationship of trust, and of marriage between a young person and one in a position of trust, were discussed by the working group. It recommended that a defence be allowed in the latter case (to ensure compliance with the European Convention on Human Rights which protects the right to marry and the right to respect for private and family life) but not in the former. A limited exception for those cases where there are existing relationships before the new offence comes into force was also recommended as a transitional provision. [paras 20-24] Finally another defence was recommended where the accused did not know and could not reasonably be expected to have known that the younger party was under 18 and/or that he or she was in a specified relationship of trust with the accused. [para. 26]

A final report from the interdepartmental working group is said to be expected within the next few weeks.

Although the Scottish Office was represented on the interdepartmental working group whose recommendations were reflected in the present Bill, the group's interim report did not discuss Scots law. Scots criminal law is a matter which will be devolved to the Scottish Parliament when it comes into being, and although for the meanwhile it is still possible under the *Scotland Act 1998* for the Westminster Parliament to legislate on matters relating to devolved matters, the government has stated that it will do so 'only on essential issues, and when it is clear that such changes would have the full consent of the Scottish people'.¹³⁰ A separate consultation document was sent out to a variety of organisations in October 1998, and of the 23 consultees who have responded so far more were in favour of a new offence than were against it. However, some of the opponents of the offence carry particular weight.

¹²⁹ 'Ambiguous sexual politics', *The Scotsman*, 23 June 1998

¹³⁰ HC Deb vol 317 c207, 28 July 1998

Various bodies in Northern Ireland (where the existing criminal law is directly comparable in this area to that in England and Wales although the age of consent for heterosexuals is 17) were sent the same consultation letter by the interdepartmental working group on abuse of trust as went to interested groups in England and Wales. The range of responses was broadly in line with that of those groups.

In response to the interim report, the Home Office Minister Paul Boateng announced that the government accepted the recommendation of the working group to create a limited criminal offence to protect boys and girls of 16 and 17 from sexual advances by those in authority over them in specific circumstances. As announced in the Queen's Speech on 24 November 1998, the government would bring forward proposals to implement this recommendation at the same time as it gives Parliament an opportunity to vote on equalising the age of consent for boys and girls this session.¹³¹

D. The *Sexual Offences (Amendment) Bill* [Bill 10 of 1998-99]

General issues relating to the whole of the *Sexual Offence (Amendment) Bill*, as well as Clause 1 of the Bill dealing with the equalisation of the age of consent, are considered above [part I.C.]. The clauses of the Bill to be discussed in this section are those which aim to create a new offence of abuse of trust. This would apply where a person aged 18 or over, in specified circumstances, has sexual intercourse or engages in any other sexual activity with or towards a person under 18, if the older person is in a position of trust in relation to the younger person. Various situations in which children under 18 are considered to be potentially vulnerable to such abuse are set out, which include detention or residential care as well as schools and colleges. These provisions are intended to apply to England and Wales, Northern Ireland and Scotland [see part I.C. above]. The *Explanatory Notes* published with the Bill set out the government's view on what these clauses will achieve.

Under **Clause 2(1)** it would be an offence for a person aged 18 or over to have sexual intercourse or engage in other sexual activity with a person under that age if he¹³² is in a position of trust in relation to the younger person. No reference is made to a lower age limit for the younger person below which only the existing sexual offences would apply. There would therefore be a number of circumstances in which several alternative charges would be possible, and it is not clear on the face of the Bill how the new offence would interact with existing sexual offences relating to children.

Existing offences cover non-consensual sexual acts and so it is likely that the new offence would only be used where the younger party had given (or purported to give) their

¹³¹ HL Deb vol. 595 c2WA, 25 November 1998

¹³² the term 'he' would include 'she' - *Interpretation Act 1978*, section 6

consent. However, it should be noted that a conviction for any offence is only possible where there is sufficient evidence, either from a complainant or from other sources. Where the alleged victim is unwilling to co-operate with the police it is considerably less likely that a conviction will result. The *Explanatory Notes* to the Bill do state that the government expects the offence of abuse of trust to act more as a deterrent than to result in a large number of actual prosecutions, which it suggested might only be 10-15 a year. [para. 21]

‘Sexual intercourse’ for the purposes of the new offence would include both vaginal and anal intercourse [**Clause 2(1)(a)**], and ‘sexual activity’ is further defined by **Clause 2(5)**. This definition, as suggested by the interim report of the working group on abuse of trust,¹³³ is intended to be objective, as it refers to any activity which a reasonable person would regard as sexual in all the circumstances; but any activity which a reasonable person would only regard as sexual activity if he was aware of the parties’ intentions, motives or feelings is specifically excluded. The *Explanatory Notes* [para. 13] give the example of a sports trainer tackling a pupil on a rugby pitch and suggest that this restriction would mean that such actions could not be challenged because of alleged hidden motives.

The factual circumstances which will fulfil the definition of a ‘position of trust’ for the purposes of the Bill are set out in **Clause 3**. The Bill does not simply create a presumption that in these circumstances a position of trust exists between the parties, as was suggested by the Howard League Working Party report. [see above, part II. D.1.]

The offence will only apply where the older person is regularly involved in caring for, training, supervising or being in sole charge of¹³⁴ young people under 18 in the particular institutions or circumstances listed in **subsections (2) to (5)** of Clause 3. These closely follow the list given by the working group on abuse of trust,¹³⁵ and were chosen as it was felt that this limited the definition to those circumstances where the young person is particularly vulnerable or the relationship of trust particularly strong. [*Explanatory Notes*, para. 12].

Clause 3(3) is intended to cover the full range of settings in which young people might be accommodated by a local authority (or equivalent body in Northern Ireland), including foster care; residential care (local authority, private or voluntary, including secure accommodation); and semi-independent accommodation. It would include young people who are being looked after by the local authority as the result of a court order and young people who are being looked after on a voluntary basis. It also covers young people in small children’s homes in England and Wales that are not currently regulated under the Children Act 1989.

¹³³ Interim report, 25 November 1998, Dep 98/1325, para. 10 - see part II.D.3 above

¹³⁴ This is almost identical to the definition contained in Part V of the *Police Act 1997* for the purposes of obtaining enhanced criminal record checks.

¹³⁵ Interim report, 25 November 1998, Dep 98/1325, para. 16

Clause 3(5) relates to persons under 18 who are receiving education in an institution, but the Bill does not define “institution” in the context of education, and part-time education is not mentioned. The Bill extends to Scotland where many students go to university at the age of 17.

The Secretary of State is given the power to add to this list by affirmative order. [**Clause 3(1) and (6)**].

Clause 2(2)(a) provides a defence of mistake as to age, for a person charged with the new offence. It would also be a defence if he could show that he did not know, and could not reasonably be expected to have known, that he was in a position of trust in relation to the younger person. [**Clause 2(2)(b)**] A further defence is provided where the parties are lawfully married [**Clause 2(2)(c)**], and a transitional provision relating to sexual relationships which started before the provision comes into force is also included, as recommended by the working group on abuse of trust.¹³⁶ [**Clause 2(3)**]. However, the Bill does not propose that a defence would be available to a defendant who wished to plead that the sexual relationship with the younger person began before they entered into a relationship of trust.¹³⁷

The new offence would be triable either way, with a penalty of a maximum of six months imprisonment and/or a fine of up to £5000 following summary conviction, or two years and/or an unlimited fine on indictment. [**Clause 2(4)**] Other sexual offences which attract a maximum sentence of two years’ imprisonment on indictment include unlawful sexual intercourse with a girl under 16, consensual homosexual acts in private where both parties are over 21, and administering drugs to obtain or facilitate sexual intercourse with a woman. By contrast, gross indecency with a child under the *Indecency with Children Act 1960* attracts a maximum sentence of 10 years’ imprisonment, and buggery with a person under 16 can be punished with life imprisonment, as can rape.

Clause 4 would add the new offence of abuse of position of trust to the list of offences in England and Wales, Scotland and Northern Ireland which are subject to the notification requirements of the *Sex Offenders Act 1997* [see part II.B.1 above].

E. Possible future legislation

The Working Group on preventing unsuitable people from working with children and abuse of trust recommended in its interim report that there was a need to complement such an offence of abuse of trust with a government initiative on codes of conduct. It was intending to work with voluntary organisations and others to consider whether some

¹³⁶ *ibid* para. 24

¹³⁷ This approach was recommended by the interim report of the working group - *ibid* para. 22

standard guidelines or model paragraphs should be provided as a basis for such codes; how to ensure that all organisations involved with children adopt such codes; and enforcement mechanisms. It is also considering if there is any need for legislation in this area and if so, what would be feasible.¹³⁸

The group suggested that the offence of abuse of trust could be considered as a reason for inclusion on the Department of Health's Consultancy Index or List 99 by the Department for Education and Employment; or even on a possible new list of offences which would trigger a ban on working with children. It is likely that this will be discussed in the group's final report, which is due to be issued shortly.

Meanwhile, Debra Shipley has introduced a *Protection of Children Bill* which is due to have its second reading in the House of Commons on 26 February 1999. This Bill is likely to aim to increase the statutory safeguards which prevent people who are considered unsuitable from working with children, but it has not been published yet.

¹³⁸ *ibid* para. 5

Appendix: Court proceedings and cautions

Tables 1 to 4 show court proceedings and cautions of males for a range of sexual offences in England and Wales, from 1993 to 1996. This covers the two years before and after the *1994 Criminal Justice and Public Order Act* came into force. 1997 figures will not be available until shortly after this paper is printed.

When the 1994 Act amended the *Sexual Offences Act 1956* it not only lowered the age of consent for homosexual men but altered the definitions of a number of sexual offences, so interpretation of the figures and comparison across years is difficult. Even with the offences broken down into the detail shown in the tables, it is impossible to produce a total figure for all homosexual offences. For example, the large number of prosecutions for buggery with a boy under 16 or a woman or an animal includes an unknown number of homosexual or consensual acts.

According to the Secretary of State for Northern Ireland, information is not available about the ages of persons convicted of, or involved in, homosexual offences in Northern Ireland.¹³⁹

In Scotland, less detailed data are available. The numbers of persons proceeded against, and with a charge proved, where the main offence was a homosexual act under s.80(7) of the *Criminal Justice (Scotland) Act 1980*, s.13(5) of the *Criminal Law Consolidation Act 1995* or under the Common Law in Scotland are shown below. The figures for 1990 to 1995 are revised.

	1990	1991	1992	1993	1994	1995	1996
Proceeded against							
16-20	13	9	4	7	1	4	4
21 and over	76	105	77	71	91	60	44
Total ¹	89	114	81	78	93	64	49
Charge proved							
16-20	13	9	4	6	1	4	0
21 and over	73	99	75	70	85	54	44
Total ¹	86	108	79	76	87	58	45

¹ Totals include 8-15 year olds

Source: *Scottish Office*

¹³⁹ HC Deb vol 298 c741-2, 24 July 1997

Table 1

Court proceedings and cautions of males for certain sexual offences, England and Wales 1993
before the Criminal Justice and Public Order Act 1994 - 'age of consent' 21

	Prosecutions				Cautions				Convictions				Immediate custody			
	10-17	18-20	21+	Total	10-17	18-20	21+	Total	10-17	18-20	21+	Total	10-17	18-20	21+	Total
Buggery																
With a boy under 16 or woman or animal	18	18	257	293	19	-	8	27	4	5	126	135	-	5	101	106
With male over 16 without consent	-	2	33	35	-	2	2	4	-	3	14	17	-	1	11	12
By male over 21 with male under 21 with consent	1	-	7	8	-	1	1	2	-	-	4	4	-	-	4	4
By male with male other than above	-	3	5	8	6	6	3	15	-	1	4	5	-	-	2	2
Attempted buggery																
With boy under 16 or woman or animal	5	1	9	15	5	-	2	7	5	1	14	20	1	-	9	10
With male over 16 without consent	-	-	2	2	-	-	1	1	-	-	2	2	-	-	2	2
By male over 21 with male under 21 with consent	-	-	1	1	-	-	-	-	-	-	-	-	-	-	-	-
By male with male other than above	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
Assault with attempt to commit buggery	1	-	5	6	-	-	-	-	-	-	2	2	-	-	2	2
Indecency between males																
By male over 21 with male under 21	1	3	88	92	1	2	49	52	-	1	51	52	-	-	4	4
By male with other male other than above	1	8	439	448	12	20	389	421	-	5	332	337	-	-	2	2
Procuration																
Male over 21 procuring male under 21 to gross indecency	-	-	11	11	-	-	7	7	-	-	7	7	-	-	-	-
Male procuring male over 21 to gross indecency (a)	1	-	26	27	1	-	32	33	-	-	22	22	-	-	-	-
Soliciting by male	1	8	199	208	6	14	185	205	-	6	118	124	-	-	-	-

(a) other than cases of procuring acts of buggery which are not offences

Source: Home Office

Table 2

**Court proceedings and cautions of males for certain sexual offences, England and Wales 1994
before the Criminal Justice and Public Order Act 1994 - 'age of consent' 21**

	Prosecutions				Cautions				Convictions				Immediate custody			
	10-17	18-20	21+	Total	10-17	18-20	21+	Total	10-17	18-20	21+	Total	10-17	18-20	21+	Total
Buggery																
With a boy under 16 or woman or animal	37	14	291	342	25	-	16	41	17	6	110	133	1	4	88	93
With male over 16 without consent	-	-	23	23	2	-	2	4	-	1	22	23	-	-	15	15
By male over 21 with male under 21 with consent	1	1	4	6	1	-	-	1	-	1	6	7	-	-	4	4
By male with male other than above	-	-	5	5	3	1	1	5	-	-	1	1	-	-	-	-
Attempted buggery																
With boy under 16 or woman or animal	2	2	17	21	4	1	1	6	2	3	11	16	-	3	9	12
With male over 16 without consent	-	-	1	1	-	-	1	1	-	-	1	1	-	-	1	1
By male over 21 with male under 21 with consent	-	-	-	-	-	-	-	-	-	-	2	2	-	-	2	2
By male with male other than above	-	-	1	1	-	-	-	-	-	-	1	1	-	-	1	1
Assault with attempt to commit buggery	1	-	6	7	3	-	-	3	-	-	2	2	-	-	-	-
Indecency between males																
By male over 21 with male under 21	3	2	71	76	2	3	37	42	2	2	57	61	-	-	8	8
By male with other male other than above	3	9	520	532	8	5	382	395	2	6	411	419	-	-	-	-
Procuration																
Male over 21 procuring male under 21 to gross indecency	-	-	13	13	-	-	18	18	-	-	8	8	-	-	-	-
Male procuring male over 21 to gross indecency (a)	1	-	23	24	-	-	72	72	1	-	18	19	-	-	-	-
Soliciting by male																
	-	8	116	124	4	5	245	254	-	6	76	62	-	-	1	1

(a) other than cases of procuring acts of buggery which are not offences

Source: Home Office

Table 3

Court proceedings and cautions of males for certain sexual offences, England and Wales 1995, 'age of consent' 18

	Prosecutions				Cautions				Convictions				Immediate custody			
	10-17	18-20	21+	Total	10-17	18-20	21+	Total	10-17	18-20	21+	Total	10-17	18-20	21+	Total
Buggery																
With a boy under 16 or a woman or animal	11	3	110	124	4	-	4	8	4	2	80	86	2	1	72	75
With male over 16 without consent	-	-	3	3	1	-	1	2	-	1	7	8	-	-	4	4
By male over 21 with male under 21 with consent	-	-	1	1	-	-	-	-	-	-	1	1	-	-	1	1
By male with male other than above	-	-	-	-	-	-	-	-	1	-	1	2	1	-	-	1
By male of a male under 16	5	2	41	48	2	-	-	2	1	2	26	29	-	2	26	29
Other	-	-	8	8	1	-	2	3	-	1	8	9	-	1	6	7
Attempted buggery																
With boy under 16 or woman or animal	-	-	6	6	1	-	-	1	-	-	14	14	-	-	11	11
With male over 16 without consent	-	-	-	-	-	-	-	-	-	-	2	2	-	-	2	2
By male over 21 with male under 21 with consent	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
Assault with attempt to commit buggery	-	1	4	5	2	-	-	2	1	-	-	1	-	-	-	-
Indecency between males																
By male over 21 with a male under 21	2	2	47	51	4	2	41	47	-	2	51	53	-	-	9	9
By male with other male other than above	2	6	274	282	2	-	126	128	1	1	237	239	-	-	4	4
Gross indecency by a male aged 21 or over with a male under 18	-	-	10	10	-	-	4	4	-	-	11	11	-	-	4	4
Gross indecency by a male aged under 18 with another male	2	-	-	2	3	-	-	3	2	-	-	2	-	-	-	-
Gross indecency by a male aged 18 or over with another male aged 18 or over	-	-	149	149	-	6	159	165	-	-	105	105	-	-	1	1
Procuration																
Male over 21 procuring male under 21 to gross indecency	-	-	8	8	-	-	14	14	-	-	8	8	-	-	-	-
Male procuring male over 21 to gross indecency	1	-	7	8	-	-	16	16	-	-	9	9	-	-	-	-
Male living off earnings of male prostitute	-	-	1	1	-	-	-	-	-	-	1	1	-	-	1	1
Male over 21 procuring or attempting to procure male under 21 to gross indecency with another male	-	-	1	1	-	-	-	-	-	-	2	2	-	-	1	1
Procuring or attempting to procure male to gross indecency with male other than above	-	-	6	6	1	1	19	21	-	-	1	1	-	-	-	-
Soliciting by male	1	1	109	111	1	6	119	126	1	2	69	72	-	-	-	-

some definitions of offence with very few known offenders have been omitted

Source: Home Office

Table 4

Court proceedings and cautions of males for certain sexual offences, England and Wales 1996, 'age of consent' 18

	Prosecutions				Cautions				Convictions				Immediate custody			
	10-17	18-20	21+	Total	10-17	18-20	21+	Total	10-17	18-20	21+	Total	10-17	18-20	21+	Total
Buggery																
With a boy under 16 or a woman or animal	-	-	16	16	2	-	3	5	-	-	5	5	-	-	5	5
With male over 16 without consent	1	-	2	3	-	-	-	-	-	-	2	2	-	-	2	2
By male over 21 with male under 21 with consent	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
By male with male other than above	-	-	-	-	-	-	1	1	-	-	-	-	-	-	-	-
By male of a male under 16	9	-	57	66	5	-	-	5	2	3	61	66	-	1	61	62
Other	-	-	10	10	2	-	1	3	-	-	5	5	-	-	3	3
Attempted buggery																
With boy under 16 or woman or animal	-	-	3	3	1	-	-	1	-	-	2	2	-	-	2	2
With male over 16 without consent	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
By male over 21 with male under 21 with consent	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
Assault with attempt to commit buggery	-	-	3	3	-	-	-	-	-	-	-	-	-	-	-	-
Indecency between males																
By male over 21 with a male under 21	-	-	10	10	-	2	25	27	-	-	4	4	-	-	-	-
By male with other male other than above	1	2	129	132	2	1	56	59	1	2	90	93	-	-	-	-
Gross indecency by a male aged 21 or over with a male under 18	-	-	9	9	-	-	4	4	-	-	11	11	-	-	4	4
Gross indecency by a male aged under 18 with another male	-	-	-	-	11	-	-	11	1	-	-	1	-	-	-	-
Gross indecency by a male aged 18 or over with another male aged 18 or over	-	4	126	130	-	3	200	203	-	2	108	110	-	-	-	-
Procuration																
Male over 21 procuring male under 21 to gross indecency	-	-	1	1	-	-	5	5	-	-	1	1	-	-	-	-
Male procuring male over 21 to gross indecency	-	-	-	-	1	-	8	9	-	-	-	-	-	-	-	-
Male living off earnings of male prostitute	-	-	2	2	-	-	-	-	-	-	3	3	-	-	3	3
Male over 21 procuring or attempting to procure male under 21 to gross indecency with another male	-	-	-	-	-	-	3	3	-	-	3	3	-	-	2	2
Procuring or attempting to procure male to gross indecency with male other than above	-	-	6	6	1	-	22	23	-	-	5	5	-	-	1	1
Soliciting by male	-	4	99	103	4	2	54	60	-	2	66	68	-	-	-	-

some definitions of offence with very few known offenders have been omitted

Source: Home Office