

SEXUAL OFFENCES (SCOTLAND) BILL

FRAZER MCCALLUM

The Scottish Government introduced the Sexual Offences (Scotland) Bill in the Parliament on 17 June 2008. The Parliament's Justice Committee has been designated as lead committee for parliamentary consideration of the Bill.

At present, sexual offending is prosecuted under a wide range of common law and statutory offences. The Bill seeks to provide a statutory framework for sexual offences, so that most offending of a sexual nature would in future be prosecuted under one of the offences in the Bill. As well as consolidating much of the existing law on sexual offences, the Bill seeks to reform and clarify the law in a number of important areas.

Most, although not all, of the provisions contained in the Bill are the same as, or very similar to, proposals published by the Scottish Law Commission in 2007.

This briefing considers the main provisions of the Bill. In doing so, it compares those provisions with both existing law and the proposals for change put forward by the Scottish Law Commission.

Scottish Parliament Information Centre (SPICe) Briefings are compiled for the benefit of the Members of the Parliament and their personal staff. Authors are available to discuss the contents of these papers with MSPs and their staff who should contact Frazer McCallum on extension 85189 or email frazer.mccallum@scottish.parliament.uk. Members of the public or external organisations may comment on this briefing by emailing us at spice@scottish.parliament.uk. However, researchers are unable to enter into personal discussion in relation to SPICe Briefing Papers. If you have any general questions about the work of the Parliament you can email the Parliament's Public Information Service at sp.info@scottish.parliament.uk.

Every effort is made to ensure that the information contained in SPICe briefings is correct at the time of publication. Readers should be aware however that briefings are not necessarily updated or otherwise amended to reflect subsequent changes.

www.scottish.parliament.uk



The Scottish
Parliament

CONTENTS

KEY POINTS OF THIS BRIEFING	3
INTRODUCTION	4
PART 1: SEXUAL OFFENCES BASED ON A LACK OF CONSENT	6
RAPE	6
SEXUAL ASSAULT	7
SEXUAL COERCION	8
OTHER COERCION OFFENCES	8
COMMUNICATING INDECENTLY	9
SEXUAL EXPOSURE	9
ADMINISTERING A SUBSTANCE FOR SEXUAL PURPOSES	10
PART 2: CONSENT AND REASONABLE BELIEF	11
CONSENT	11
<i>Background</i>	11
<i>General Definition</i>	12
<i>Examples of Situations where Consent is Held to be Absent</i>	13
REASONABLE BELIEF	14
PART 3: MENTALLY DISORDERED PERSONS	14
PART 4: CHILDREN	15
CURRENT LAW.....	15
PROPOSALS FOR REFORM.....	16
<i>General Principles</i>	16
<i>Overview of Proposals</i>	16
<i>Young Children</i>	18
<i>Older Children</i>	18
<i>Sexual Activity between Older Children</i>	19
<i>Defences Applying to Older Child Offences</i>	21
PART 5: ABUSE OF POSITION OF TRUST	22
CURRENT LAW.....	22
PROPOSALS FOR REFORM.....	22
<i>Children</i>	22
<i>Mentally Disordered Persons</i>	23
PART 6: PENALTIES	24
PART 7: MISCELLANEOUS AND GENERAL	24
OFFENCES COMMITTED OUTSIDE THE UNITED KINGDOM	25
SADOMASOCHISTIC PRACTICES	25
<i>Scottish Law Commission Proposals</i>	25
<i>Approach of the Scottish Government</i>	27
<i>An Alternative Approach</i>	28
SOURCES	29

KEY POINTS OF THIS BRIEFING

- At present, sexual offending is prosecuted under a wide range of common law and statutory offences. The Bill seeks to provide a statutory framework for sexual offences, so that most offending of a sexual nature would in future be prosecuted under one of the offences in the Bill
- As well as consolidating much of the existing law on sexual offences in a single statute, the Bill seeks to reform and clarify the law in a number of important areas
- The Bill is divided into seven parts:
 - Part 1 sets out a range of sexual offences in which the lack of consent of the victim is generally a central element in the definition of the offence. An accused may be prosecuted for one of these offences irrespective of the age of the victim and whether or not the accused is in a position of trust in relation to the victim
 - Part 2 deals with the concept of consent and the related issue of reasonable belief in consent
 - Part 3 deals with the capacity of mentally disordered persons to consent to sexual activity
 - Part 4 sets out a range of sexual offences relating to sexual activity involving children (under the age of 16). The offences reflect the view that children should have additional protection because their capacity to consent to sexual activity is either absent or not fully-formed as a result of their age. A conviction for any of these offences does not require proof that the child victim did not consent
 - Part 5 sets out a range of sexual offences dealing with situations where the accused may be said to hold a position of trust in relation to the victim. The Bill provides that a position of trust exists in various situations where the victim is a child (under the age of 18) or a mentally disordered person. The offences reflect the view that the existence of a trust relationship: (a) makes the validity of any apparent consent on the part of a victim problematic; and (b) imposes duties on the person in the position of trust which are inconsistent with any sexual activity between the two. A conviction for any of these offences does not require proof that the victim did not consent
 - Part 6 deals with the penalties for the offences set out in the Bill
 - Part 7 contains miscellaneous and general provisions (including a number of provisions relating to offences committed outside the United Kingdom)
- Most of the provisions contained in the Bill are the same as, or very similar to, proposals put forward in a Scottish Law Commission ('SLC') report. The main differences are:
 - the SLC report and the Bill contain significantly different proposals on how the law should deal with consensual sexual activities between older children
 - the SLC Report recommended that the law should include a clear statement that, within certain limits, consensual sadomasochistic practices do not give rise to criminal liability under the law of assault – the Scottish Government decided not to follow this recommendation and the Bill contains no provision on the topic
 - the Bill includes a number of provisions relating to offences committed outside the United Kingdom – the SLC Report did not deal with this topic

INTRODUCTION

The [Sexual Offences \(Scotland\) Bill](#) ('the Bill') was, together with [Explanatory Notes](#) (and other accompanying documents) and a [Policy Memorandum](#), introduced in the Parliament on 17 June 2008.

At present, sexual offending is prosecuted under a wide range of common law and statutory offences. The Bill seeks to provide a statutory framework for sexual offences, so that most offending of a sexual nature would in future be prosecuted under one of the offences in the Bill. In light of this, the Bill would abolish or repeal a number of existing common law and statutory offences. As well as consolidating much of the existing law on sexual offences in a single statute, the Bill seeks to reform and clarify the law in a number of important areas.

Most, although not all, of the provisions contained in the Bill are the same as, or very similar to, proposals put forward by the Scottish Law Commission ('SLC'). In 2004 the then Scottish Executive asked the SLC to examine the law relating to rape and other sexual offences, and the evidential requirements for proving such offences. The SLC's final report (including a draft bill) was published in December 2007 – '[Report on Rape and Other Sexual Offences](#)' (SLC 2007a) (hereafter referred to as 'the SLC Report'). Following this, the Scottish Government published a [consultation paper](#) (2007) on the SLC Report. In the main, the consultation paper simply sought views on the SLC recommendations. The period for responding to the consultation ended in March 2008.

The main differences between the proposals in the SLC Report and those in the Bill are:

- the SLC Report and the Bill contain significantly different proposals on how the law should deal with consensual sexual activities between older children (aged 13, 14 or 15)
- the SLC Report recommended that the law should include a clear statement that, within certain limits, consensual sadomasochistic practices do not give rise to criminal liability under the law of assault – the Scottish Government decided not to follow this recommendation and the Bill contains no provision on the topic
- the Bill includes a number of provisions relating to offences committed outside the United Kingdom – the SLC Report did not deal with this topic

As noted above, the SLC was tasked with examining the evidential requirements for proving sexual offences, as well as the scope and definition of those sexual offences. However, the SLC Report did not, for various reasons, include any recommendations for reforming the law of evidence. For example, in relation to rules requiring the corroboration of evidence,¹ it was argued that any changes should be considered in relation to criminal offences and the criminal justice system generally; not just within the context of sexual offences. Following on from the approach in the SLC Report, the Bill focuses on the offences themselves rather than how the law of evidence applies to sexual offences.

Although it is intended that most offending of a sexual nature should in future be prosecuted under one of the offences in the Bill, some offending of a sexual nature would still be prosecuted under current provisions.² For example:

¹ In Scots law, the general position is that all of the essential elements of an offence must be supported by corroborated evidence (ie evidence from two different sources).

² Section 40(b) of the Bill provides that where offending behaviour is covered by a provision of the Bill and also by existing common law or statutory offences, that behaviour must be prosecuted under the provision of the Bill.

- common law offence of indecent assault – although most of the offending behaviour currently prosecuted using this offence is covered by offences in the Bill (eg provisions on sexual assault in section 2 of the Bill) the common law offence is not abolished and could still be used where a person is accused of an assault accompanied by circumstances of indecency which do not bring it within the scope of the Bill's provisions
- Protection of Children and Prevention of Sexual Offences (Scotland) Act 2005 – the statutory offences set out in this Act (eg the 'grooming' offence in section 1 which seeks to prevent a person sexually abusing a child following some earlier communication between the two aimed at gaining the child's trust) could still be used where the behaviour of the accused is not covered by offences in the Bill

The Bill is divided into seven parts:

- Part 1 sets out a range of sexual offences in which the lack of consent of the victim is generally a central element in the definition of the offence. An accused may be prosecuted for one of these offences irrespective of the age of the victim and whether or not the accused is in a position of trust in relation to the victim
- Part 2 deals with the concept of consent and the related issue of reasonable belief in consent
- Part 3 deals with the capacity of mentally disordered persons to consent to sexual activity
- Part 4 sets out a range of sexual offences relating to sexual activity involving children (under the age of 16). The offences reflect the view that children should have additional protection because their capacity to consent to sexual activity is either absent or not fully-formed as a result of their age. A conviction for any of these offences does not require proof that the child victim did not consent
- Part 5 sets out a range of sexual offences dealing with situations where the accused may be said to hold a position of trust in relation to the victim. The Bill provides that a position of trust exists in various situations where the victim is a child (under the age of 18) or a mentally disordered person. The offences reflect the view that the existence of a trust relationship: (a) makes the validity of any apparent consent on the part of a victim problematic; and (b) imposes duties on the person in the position of trust which are inconsistent with any sexual activity between the two. A conviction for any of these offences does not require proof that the victim did not consent
- Part 6 (along with schedule 1) deals with the penalties for the offences set out in the Bill
- Part 7 contains miscellaneous and general provisions (including a number of provisions relating to offences committed outside the United Kingdom)

The rest of this briefing considers the main provisions of the Bill. In doing so, it compares those provisions with both existing law and the proposals for change put forward by the SLC.

Further information on issues affecting the investigation and prosecution of sexual offences is set out in the following SPICe briefings:

- ['Rape'](#) (McCallum and Ross 2008) – provides information on the legal definition of rape (both the current definition and the SLC proposals for change); the investigation and prosecution of rape; and statistics relating to rape

Thus, it is only where behaviour is not covered by a provision of the Bill that it might be prosecuted under those existing offences which are not abolished or repealed by the Bill.

- [‘Sexual History and Character Evidence’](#) (McCallum 2008) – considers existing rules restricting the circumstances in which evidence can be led regarding the sexual history and character of complainers in sexual offence trials

PART 1: SEXUAL OFFENCES BASED ON A LACK OF CONSENT

The offences in Part 1 of the Bill replicate the proposals set out in the SLC Report.

The lack of consent of the victim, in relation to the activities covered by the offence, is a central element in the definition of the majority of offences in this Part – those in sections 1 to 6 of the Bill. A conviction for one of these offences requires proof of the fact that: (a) the victim did not consent; and (b) the perpetrator did not hold a reasonable (albeit mistaken) belief that the victim consented. Part 2 of the Bill seeks to define the meaning of ‘consent’ for the purposes of offences in Part 1.

The remaining offences in Part 1 (sections 7 and 8 of the Bill) do not expressly require a lack of consent on the part of the victim. The offence in section 8 (administering a substance for sexual purposes) can only be committed if the prohibited conduct takes place without the victim’s knowledge. Thus, that offence would not be committed if the alleged victim had in fact consented (given that consent implies knowledge). However, the offence in section 7 (sexual exposure) makes no reference to the state of mind of the victim. This leaves open the possibility that a person could be successfully prosecuted despite the fact that the victim may have consented to the exposure (eg if a vulnerable victim had consented to the perpetrator exposing him/herself without fully appreciating the alarm or distress the perpetrator intended to cause).

Individual offences are considered below. It may be noted that there will often be a degree of overlap in the types of conduct covered by different offences. Further information about the offences in the Bill is set out in the SLC Report, and in the Explanatory Notes and Policy Memorandum published along with the Bill.

RAPE

Section 1 of the Bill replaces the existing common law offence of rape, which would be abolished by section 40 of the Bill, with a new statutory offence.³ The current common law offence of rape involves the following key elements:

- a male having sexual intercourse with a female victim without her consent – this must involve penile penetration of the victim’s vagina⁴
- the offender must have intended that sexual intercourse should take place, or have been reckless in this regard

³ More information about the current definition of rape and the SLC proposals for reform in this area is included in the SPICe briefing ‘Rape’ (McCallum and Ross 2008).

⁴ Under the existing common law dealing with sexual offences, the term ‘sexual intercourse’ is generally construed as being limited to penile-vaginal intercourse. Unless stated otherwise, this narrow interpretation of the term is used in this briefing.

- the offender must have known that the victim was not consenting to sexual intercourse, or have been reckless as to whether or not she was consenting (ie not holding a reasonable belief that she was consenting)

Significant reforms set out in the Bill include:

- broadening the definition of rape to include penile penetration of the anus or mouth of a victim of either sex (under the current law, penile penetration of the anus or mouth of a victim could be covered by other offences such as indecent assault)
- a clear statement that where a victim does not consent, any unreasonable belief on the part of the perpetrator that there was consent does not prevent a conviction (it is generally thought that current law allows a mistaken and unreasonable belief that a woman consented to sexual intercourse, provided the accused honestly held that belief, as a defence to a charge of rape)

SEXUAL ASSAULT

Section 2 of the Bill creates an offence of sexual assault. The offence covers various types of conduct which a reasonable person would, in all the circumstances of the case, consider to be sexual.⁵ The types of conduct covered may all be characterised as sexual attacks. The prosecution must prove that:

- the perpetrator intentionally or recklessly carried out the prohibited conduct (ie the actions covered by the offence)
- the victim did not consent
- the perpetrator did not hold a reasonable belief that the victim had consented

Although some particular types of conduct are expressly highlighted as constituting the offence (ie sexual penetration and sexual touching), the section goes on to state that other forms of sexual conduct are also covered. The main limitation on the range of conduct covered is a requirement that a sexual assault involves the perpetrator having physical contact with the victim. There is one exception to this, the provision that the ejaculation of semen onto the victim can amount to sexual assault.

The conduct falling within the scope of the new offence of sexual assault is generally covered by existing offences, in particular the common law offence of indecent assault. The current offence of indecent assault is simply a form of the wider offence of assault – one accompanied by circumstances of indecency. The Bill does not seek to abolish the offence of indecent assault, but does provide that any conduct which could be charged under one of the offences in the Bill (including the new offence of sexual assault) cannot be charged under existing offences (including the existing offence of indecent assault).⁶ One example of where a person might still be prosecuted for indecent assault, rather than sexual assault, is highlighted in the SLC Report – where the perpetrator urinates on a victim (without the victim’s consent).⁷ Such conduct would not be covered by the new offence of sexual assault due to the general requirement that there is physical contact between the perpetrator and the victim.

⁵ Section 2(3) of the Bill refers to the views of the ‘reasonable person’.

⁶ See section 40(b) of the Bill.

⁷ See para 3.46 of the SLC Report.

In addition to setting out the law in this area in a more structured manner, the new statutory offence of sexual assault makes it clear that:

- where a victim does not consent, any unreasonable belief on the part of the perpetrator that there was consent does not prevent a conviction (ie the same position as discussed above in relation to rape)
- the conduct (eg the touching) involved in the sexual assault may be intentional or reckless – this is in contrast to the current common law offence of assault (including indecent assault) which can only be carried out intentionally

SEXUAL COERCION

Section 3 of the Bill creates an offence of sexual coercion. The offence covers situations where the perpetrator intentionally causes the victim to participate in an activity which a reasonable person would, in all the circumstances of the case, consider to be sexual. The prosecution must prove that:

- the perpetrator intentionally carried out the prohibited conduct⁸
- the victim did not consent
- the perpetrator did not hold a reasonable belief that the victim had consented

The SLC Report (para 3.48) noted that this offence could be used to cover situations where the perpetrator does not have any contact with the victim (thus taking it outwith the scope of sexual assault) but still coerces the victim into some form of sexual conduct (eg sex with a third party).

The SLC Report (para 3.49) stated that it is not clear how the current law deals with some forms of coerced sexual activity. In some instances, undesirable conduct might be covered by current common law provisions dealing with the uttering of threats (eg under principles dealing with threats to achieve an unlawful purpose).⁹ However, it may be argued that the offence proposed in the Bill provides a clearer labelling of coercion as a sexual offence.

OTHER COERCION OFFENCES

Sections 4 and 5 of the Bill create offences of:

- coercing a person into being present during a sexual activity
- coercing a person into looking at an image of a sexual activity

The offences cover situations where the perpetrator intentionally causes the victim to be present during, or look at an image of, an activity which a reasonable person would in all the circumstances of the case consider to be sexual. It may be noted that it is only the name of the offence which includes any form of the word 'coercion'. The actual description of the offence is based on the concept of the perpetrator causing something to happen.

⁸ This requirement is different from some of the other offences in the Bill (eg sexual assault) where the perpetrator may intentionally or recklessly carry out the prohibited conduct.

⁹ See Gordon 2001, paras 29.62 to 29.63.

The prosecution must prove that: (a) the perpetrator intentionally carried out the prohibited conduct; (b) the victim did not consent; and (c) the perpetrator did not hold a reasonable belief that the victim had consented. In addition, the motivation of the perpetrator must involve: the obtaining of sexual gratification; or humiliating, distressing or alarming the victim. This requirement is intended to ensure that reasonable activities (eg where a biology teacher shows a class of uncooperative pupils an image of a sexual activity) are not criminalised (provided there is no evidence of inappropriate motivation).

It would appear that the proposed offences would extend the criminal law to cover some forms of conduct which may not be clearly covered by current provisions. For example, where the victim is an adult (thus lewd, indecent or libidinous practices is not applicable),¹⁰ and the coercion involved does not amount to an attack (thus indecent assault is not applicable) or bring the conduct within more general criminal provisions dealing with the uttering of threats.

COMMUNICATING INDECENTLY

Section 6 of the Bill creates offences of communicating indecently and causing a person to hear or see an indecent communication. The offences cover both written and verbal forms of communication where a reasonable person would, in all the circumstances of the case, consider the communication to be sexual.

The prosecution must prove that: (a) the perpetrator intentionally carried out the prohibited conduct; (b) the victim did not consent; and (c) the perpetrator did not hold a reasonable belief that the victim had consented. In addition, the motivation of the perpetrator must involve: the obtaining of sexual gratification; or humiliating, distressing or alarming the victim.

The sending of sexually explicit images would be dealt with under section 5 of the Bill rather than section 6.

It would appear that the offences set out in section 6 of the Bill would extend the criminal law to cover some forms of conduct which are not clearly covered by current sexual offences.

SEXUAL EXPOSURE

Section 7 of the Bill creates an offence of sexual exposure. The offence covers situations where the perpetrator intentionally exposes his/her genitals to another person in a manner which a reasonable person would, in all the circumstances of the case, consider to be sexual. In addition, the perpetrator must have intended that the victim would be alarmed or distressed by the exposure, or have been reckless in this regard. As noted earlier, the offence contains no reference to the actual state of mind of the victim.

The SLC Report (paras 5.11 to 5.18) sought to draw a distinction between: (a) exposure which is aimed at specific victims and should be treated as a sexual offence (eg 'flashing'); and (b) exposure which may cause offence but is properly treated as a public order offence rather than a sexual offence (eg 'streaking' or nude sunbathing). Section 7 of the Bill is aimed at the

¹⁰ The offence of lewd, indecent or libidinous practices is considered below in relation to current sexual offences relating to child victims.

former. Neither the SLC Report, nor the Bill itself, contains provisions dealing with the latter. Such conduct is left to existing common law provisions dealing with public indecency.

The type of behaviour covered by section 7 of the Bill may already be caught by existing offences (eg breach of the peace). However, the SLC in proposing a new offence sought to clarify the law in this area and clearly label such behaviour as a sexual offence.

ADMINISTERING A SUBSTANCE FOR SEXUAL PURPOSES

Section 8 of the Bill creates an offence of administering a substance for sexual purposes. The offence covers situations where the perpetrator intentionally administers a substance (eg a drug or alcoholic drink) to another person for the purpose of stupefying or overpowering that other person and thereby enabling the perpetrator to engage in a sexual activity involving that other person.

The substance must have been administered without the victim's knowledge and without the perpetrator holding a reasonable (albeit mistaken) belief that the victim knew.

The proposed offence is wider than a similar statutory offence set out in section 7(2)(c) of the Criminal Law (Consolidation) (Scotland) Act 1995 (eg it applies to male as well as female victims). The provisions in section 7(2)(c) of the 1995 Act would be repealed by schedule 5 to the Bill.

It may be noted that the offence in section 7(2)(c) of the Criminal Law (Consolidation) (Scotland) Act 1995 refers to administering a substance so as to enable "any person" to have unlawful sexual intercourse with the victim, whilst the offence in the Bill only refers to administering a substance so as to enable the person who administered that substance to engage in a sexual activity involving the victim. It may, therefore, be asked – how would the offence in the Bill be used to deal with a situation where a person ('A') administers a substance to another ('B') so as to enable a third party ('C') to engage in a sexual activity with B? In general the question is likely to be answered by reference to existing rules of criminal liability dealing with:

- criminals acting in concert – referred to as 'art and part guilt', this is based on the principle that where two or more people engage together in committing a crime, each individual is guilty of the whole crime irrespective of the particular role played by each
- criminal conspiracies – dealing with situations where there is an agreement between two or more people to further or achieve a criminal purpose

Thus, for example, if both A and C (in the above situation) are involved in administering the substance to B, the principles of art and part guilt would allow both A and C to be prosecuted for the offence set out in section 8 of the Bill.¹¹

Rules of criminal liability dealing with art and part guilt and criminal conspiracies are also relevant when considering the scope of some of the other offences in the Bill. For example, in relation to the application of section 4 of the Bill to a person who coerces another into being present during a sexual activity for the purpose of providing sexual gratification to a third party.

¹¹ For further information on art and part guilt and criminal conspiracies see Gordon 2000, paras 5.01 and 6.57.
providing research and information services to the Scottish Parliament

PART 2: CONSENT AND REASONABLE BELIEF

CONSENT

Background

Scots law does not currently seek to provide a definition of consent, for the purposes of rape and other relevant sexual offences (such as indecent assault), beyond what might be considered as the normal meaning of the word. The SLC Report noted that:

“under current Scots law there is no specific definition of consent. Indeed it has been held that a judge should not provide the jury with a definition. In *Marr v HM Advocate*, a jury in a trial involving a charge of indecent assault had asked for guidance on the meaning of consent. The sheriff’s response was that the ‘definition of consent is a common, straightforward definition of consent. It’s the common English word given its normal meaning. And that I am afraid is it. Consent is consent.’ On appeal the High Court of Justiciary commented: ‘We recognise that the sheriff might have decided in the face of this request to use some synonym for consent and, for example, tell the jury that they must look for agreement, but we are not persuaded that it was necessary for her to do so. What was important was that she made it plain to the jury that the word consent had no special meaning in law but required to be given its normal meaning’.” (para 2.4)

The SLC Report noted a number of concerns that have been raised about the use of consent in defining sexual offences (especially where there is no specific definition of what is meant by consent). These include concerns about:

- the circumstances where consent may be implied
- whether a person should be held to have consented in circumstances where it may be argued that any expression of consent was not freely given (eg where allowing sexual intercourse may be seen as the lesser of two evils)
- the use of improper stereotypes about victims when considering evidence relating to consent

In a [discussion paper](#) (SLC 2006) preceding its final report, the SLC stated that it saw no merit in leaving consent undefined. It argued that a more clearly defined model of consent could deal with some of the problems which currently arise in relation to what is meant by consent. The SLC Report noted that the proposal for a statutory definition received strong support from respondents to its consultation, although one response (from Judges of the High Court of Justiciary) did argue that it would be better to leave consent with its ‘normal’ undefined meaning which was already quite clear. The SLC, however, was not persuaded that it should be left undefined. At the time of launching the SLC Report, Professor Maher (lead SLC commissioner on the project) stated that:

“No one should have to be involved in sexual activity unless they consent to it. Yet the present law does not say what consent means. We have recommended a detailed definition so that people can know what consent is and what it is not.” (SLC 2007b, p 3)

In response to the Scottish Government consultation on the SLC Report, Rape Crisis Scotland stated that it:¹²

“strongly supports the development of a statutory definition of consent: given the myths and prejudices which surround female sexuality and rape, it is essential that the law provides as clear a framework as possible as to what is meant by consent.”
(p 3)

The SLC Report put forward a proposal for a statutory definition of ‘consent’ consisting of a general definition of consent as meaning ‘free agreement’, coupled with a non-exhaustive list of factual situations where consent is held to be absent. The SLC proposals on consent are taken forward in sections 9 to 11 of the Bill.

General Definition

The first element of the statutory definition of consent, set out in section 9 of the Bill, is intended to be a broad definition capturing the core meaning of consent. The SLC consultation paper set out some examples of general definitions of consent used in other legal systems (SLC 2006, para 3.45):

- England & Wales – “a person consents if he agrees by choice, and has freedom and capacity to make that choice”
- California (USA) – “consent shall be defined to mean positive co-operation in act or attitude pursuant to an exercise of free will. The person must act freely and voluntarily and have knowledge of the nature of the act or transaction involved”
- Canada “consent means (...) the voluntary agreement of the complainant to engage in the sexual activity in question”
- Victoria (Australia) – “consent means free agreement”

The SLC noted that these examples suggest two different approaches: (a) a short definition setting out the core elements of the concept; or (b) a longer definition which expressly refers to the element of co-operative agreement which a positive model of consent is intended to promote. The SLC Report noted that the views of those responding to its consultation were divided, with a slight majority favouring a shorter definition referring to consent as ‘free agreement’. The SLC Report went on to state that:

“We now take the view that consent should be defined as ‘free agreement’. This definition has the merit of brevity. It avoids the use of complex terminology. At the same time it provides a meaningful account of what consent involves. It focuses on what for us is often a key issue in the context of sexual activity. Clearly where a person does not agree at all to sexual conduct, consent is absent. But equally clearly a person can ‘agree’ to conduct without that (...) being a ‘real’ or ‘full’ or ‘valid’ agreement (as where she submits to sexual intercourse because of physical threats).” (SLC 2007a, para 2.38)

¹² Responses to Scottish Government consultations are available for viewing in the Government’s library in Edinburgh. Enquiries regarding viewing can be directed to individual departments or to the library on (0131) 244 4565.

Thus, the SLC recommended that consent (in the context of rape and other sexual offences) be defined in general terms as ‘free agreement’. This approach is adopted in the Bill.

Examples of Situations where Consent is Held to be Absent

The SLC also proposed that statute should set out a non-exhaustive list of factual situations where consent is by law held to be absent. The SLC Report (para 2.59) stated that these should include situations in which the victim of the alleged offence:¹³

- had taken or been given alcohol or other substances and as a result lacked the capacity to consent at the time of indicating consent (unless consent had earlier been given to engaging in the activity in that condition)
- was unconscious or asleep and had not earlier given consent to sexual activity in that state
- agreed or submitted to the act because he or she was subjected to violence, or the threat of violence, against him or her, or against another person
- agreed or submitted to the act because at the time of the act he or she was unlawfully detained by the accused
- agreed or submitted to the act because he or she was deceived by the accused about the nature or the purpose of the activity
- agreed to the act because the accused impersonated someone who was known to the person
- did not personally provide any indication of agreement, with the only expression of agreement coming from someone other than the victim of the alleged offence

The above examples of situations where consent is by law held to be absent would be given statutory effect by section 10 of the Bill.

The response from Rape Crisis Scotland to the Scottish Government consultation on the SLC Report, whilst supporting the inclusion within the definition of consent of a list of situations where consent is not present, expressed serious reservations about the inclusion of the idea of advance consent in the first two of the above bullet points. Rape Crisis Scotland felt that such an approach contradicts the general thrust of the proposals in this area – that consent is not a contract and can be withdrawn at any time. In support of the SLC and Scottish Government proposals on this point, it might be argued:

- without the possibility of consent being given in advance, the law would, for example, criminalise people who engage in fully consensual sexual activities whilst in a state of intoxication which invalidates any expression of consent at the time the sexual activities takes place
- the giving of consent in advance does not prevent its withdrawal at any point in time¹⁴

In relation to the point about people engaging in consensual activities whilst intoxicated, it may be noted that the Bill does not seek to provide any guidance on how intoxicated a person must be before he or she loses the capacity to consent to sexual activities.

¹³ The suggested examples are considered in detail in the SLC Report (paras 2.60 to 2.81).

¹⁴ See section 11 of the Bill.

It should be remembered that the above situations only deal with some examples of where consent is held to be absent. The SLC emphasised that whilst the proposed list sets out a number of factual situations where there is no free agreement, there will be many types of situation which do not appear within the list which may also lack free agreement:

“In all cases where consent is in issue, the court or jury must ask if the complainer gave free agreement to the sexual activity in question. If the evidence puts the case into one of the particular definitions, then the answer is that there was no consent. But even if the case does not fall within the particular definitions, the question of the presence or absence of free agreement must still be answered. Indeed we envisage that over time case law will evolve on what constitutes lack of consent in the general sense of free agreement.” (SLC Report, para 2.54)

REASONABLE BELIEF

Many of the offences in Part 1 of the Bill refer to the concept of ‘reasonable belief’. For example, a conviction for rape under section 1 of the Bill would require proof that the victim did not consent and that the perpetrator did not have a reasonable belief that the victim consented. As noted earlier, inclusion of a clear statement that such a belief must be reasonable represents a reform of the existing law.

Section 12 of the Bill provides some guidance on how the reasonableness of any belief is to be judged. For example, regard is to be had to any steps taken by the accused to ascertain if there was consent. The Bill does not, however, require an accused to provide evidence of steps taken to ascertain consent. The proposals in the Bill are the same as those set out in the SLC Report.

PART 3: MENTALLY DISORDERED PERSONS

Section 13 of the Bill deals with the capacity of those with a mental disorder to consent to sexual activity. The proposals in the Bill are the same as those set out in the SLC Report.

The proposals follow the approach currently used in section 311(4) of the Mental Health (Care and Treatment) (Scotland) Act 2003 for determining when a mentally disordered person is incapable of consenting to sexual activities.

As well as setting out the approach to determining when a mentally disordered person is incapable of consenting to sexual activities, the current section 311 of the Mental Health (Care and Treatment) (Scotland) Act 2003 includes provisions on: (a) a specific offence of engaging in sexual intercourse or any other sexual act with a mentally disordered person who does not consent or is incapable of consenting; and (b) various factors which may invalidate any apparent consent. Despite the fact that the Bill would repeal section 311 of the 2003 Act in its entirety,¹⁵ the Bill does not seek to reproduce these additional elements. The reasoning advanced for this in the SLC Report (paras 4.88 to 4.96) was that the need for such provisions would be removed by the more general proposals in the report (eg those setting out a statutory definition of consent in relation to sexual offences committed against all victims).

¹⁵ Section 311 of the Mental Health (Care and Treatment) (Scotland) Act 2003 (together with a number of related sections) would be repealed by schedule 5 to the Bill.

PART 4: CHILDREN

CURRENT LAW

Scots criminal law currently includes a number of sexual offences specifically related to children where proof that the child did not consent to the sexual activity involved in the offence is not required for a conviction. The main offences falling within this category are outlined below.¹⁶

- Common law offences:
 - a male who has sexual intercourse with a female under the age of 12 is guilty of rape
 - a person who engages in sexual conduct with a child under the age of puberty (12 for a girl and 14 for a boy) is guilty of lewd, indecent or libidinous practice or behaviour¹⁷
- Statutory offences:
 - section 5(1) of the Criminal Law (Consolidation) (Scotland) Act 1995 ('the 1995 Act') makes it an offence for a male to have sexual intercourse with a female under the age of 13
 - section 5(3) of the 1995 Act makes it an offence for a male to have sexual intercourse with a female aged 13 or more but less than 16 (various defences apply in relation to the offence in section 5(3) which do not apply to that in section 5(1) of the 1995 Act)
 - section 6 of the 1995 Act extends the common law offence of lewd, indecent or libidinous practice or behaviour to persons engaging in sexual conduct with a girl under the age of 16
 - section 13 of the 1995 Act makes it an offence for a male to commit a 'homosexual act' (sodomy or an act of gross indecency)¹⁸ with another male who is under the age of 16

It may be noted that it is not currently a sexual offence in itself for a female over 16 to have consensual sexual intercourse (or to engage in other forms of sexual activity) with a boy aged 14 or older.

The above offences apply in relation to all child victims. A number of other offences may be relevant depending upon the nature of any relationship between the perpetrator and the child. These are considered later in this briefing in relation to abuse of position of trust.

¹⁶ For more information see the SLC Report (paras 4.11 to 4.16).

¹⁷ Although the SLC Report (para 4.13) suggests that at common law it is not clear whether the offence of lewd, indecent or libidinous practice or behaviour applies to conduct with consenting children who are close to the age of puberty.

¹⁸ In relation to the meaning of 'gross indecency' in this context, it has been stated that, whilst the term has not been judicially defined, that in practice "the most common form which it takes is the handling by one male of the private member of another" (Gordon 2001, para 36.17).

PROPOSALS FOR REFORM

General Principles

The SLC Report sought to draw a distinction between ‘young children’ aged less than 13 and ‘older children’ aged 13, 14 or 15. Various existing sexual offences already recognise such a distinction. In relation to sexual activities involving young children, the SLC Report stated that there is a clear legal principle that such children do not have the capacity to consent to such activities and thus engaging in a sexual activity with a young child is always wrong (and should be covered by the criminal law). In relation to sexual activities involving older children, it stated that some children of that age do have the capacity to consent to sexual activity but that they are still likely to be more vulnerable to sexual exploitation. On this basis, the SLC proposals sought to criminalise sexual activities between adults and older children but did not seek to criminalise consensual sexual activities between older children (although still allowing for intervention by way of the children’s hearings system in appropriate cases).

The Bill, whilst adopting a distinction between young children and older children provides for a wider role for the criminal law – by seeking to criminalise some (but not all) consensual sexual activities between older children. The Scottish Government’s stated aim, in extending the scope of the criminal law beyond that proposed by the SLC, is to discourage children under 16 from engaging in sexual intercourse and/or to help such children resist any pressures to engage in sexual intercourse.¹⁹ In relation to consensual sexual activities between older children, the main concerns highlighted by the Government in the Policy Memorandum published along with the Bill relate to the risks posed to their welfare and health by early sexual activity (eg unwanted teenage pregnancies and sexually transmitted infections). The Government has sought to reflect these concerns in setting out in the Bill the types of sexual activities between older children which are (or are not) criminal.

Overview of Proposals

Part 4 of the Bill sets out a range of sexual offences relating to sexual activity involving children under the age of 16. Different offences apply depending upon whether the victim is a ‘young child’ (aged less than 13) or an ‘older child’ (aged 13, 14 or 15). The existence of specific offences relating to sexual activity involving children does not, even though the victim was a child, prevent a person being prosecuted for one of the offences in Part 1 of the Bill. The most appropriate charge will depend on all the circumstances of the case.

To a large extent, the offences set out in Part 4 cover similar activities to those offences set out in Part 1 of the Bill. The main differences between the two sets of offences relate to the fact that a conviction for an offence in Part 4:

- requires proof that the victim was (at the time of the offence) a child of the relevant age
- does not rely on a lack of consent (sexual activity with a child is an offence regardless of whether the child apparently consented to the activity)

Apart from the age of the victim, the main differences between the offences in Part 4 of the Bill relating to young child victims and those relating to older child victims are:

¹⁹ See the Government’s Policy Memorandum at paras 110 to 122.

- most of the older child offences only apply to perpetrators aged 16 or over²⁰
- various defences exist in relation to the older child offences which do not apply in relation to the young child offences
- the older child offences generally attract lower maximum sentences when prosecuted on indictment

Table 1 below indicates which offences in Parts 1 and 4 of the Bill cover similar activities – with such offences appearing on the same row of the table.

Table 1: Offences in Parts 1 and 4 of the Bill Covering Similar Activities (section/name of offence)

Part 1	Part 4 Young Children	Part 4 Older Children
1: Rape	14: Rape of a young child	21: Having intercourse with an older child
2: Sexual assault	15: Sexual assault on a young child	22: Engaging in sexual activity with or towards an older child
3: Sexual coercion	16: Causing a young child to participate in a sexual activity	23: Causing an older child to participate in a sexual activity
4: Coercing a person into being present during a sexual activity	17: Causing a young child to be present during a sexual activity	24: Causing an older child to be present during a sexual activity
5: Coercing a person into looking at an image of a sexual activity	18: Causing a young child to look at an image of a sexual activity	25: Causing an older child to look at an image of a sexual activity
6: Communicating indecently etc	19: Communicating indecently with a young child etc	26: Communicating indecently with an older child etc

Part 4 of the Bill does not include any child specific offences equivalent to the more general offences in section 7 (sexual exposure) and section 8 (administering a substance for sexual purposes) of Part 1.²¹

As already noted, most of the older child offences in Part 4 of the Bill only apply to perpetrators aged 16 or over. This is the case for all of the older child offences set out in Table 1 above (ie those in sections 21 to 26 of the Bill). However, section 27 of the Bill (older children engaging in penetrative sexual conduct with each other) sets out two sexual offences applying to certain sexual activities between older children, where an offence may be committed even if the activities involved were consensual.

Further information on offences in the Bill relating specifically to young child and older child victims is set out below.

²⁰ Unless stated otherwise, any person who has reached the general age of criminal responsibility may be convicted of a criminal offence. This allows (in exceptional circumstances) for the possibility of a child as young as eight being prosecuted in the criminal courts. For more information, see the SPICe subject map 'Children and the Scottish Criminal Justice System' (McCallum, Ross and Oag 2004).

²¹ Of course, a person may be prosecuted for the offences in sections 7 and 8 of the Bill irrespective of the age of the victim.

Young Children

Sections 14 to 20 of the Bill provide for offences relating specifically to young child victims (aged less than 13). The proposals are, in all important respects, the same as those put forward in the SLC Report.

The conduct which amounts to an offence under these provisions is the same as the equivalent offences in Part 1 of the Bill (see Table 1 above) with, of course, the crucial difference that a conviction for one of the young child offences: (a) requires proof that the victim was a child under the age of 13; and (b) does not require proof that the child victim did not consent to the activity.

As noted above, Scots criminal law already includes a number of sexual offences specifically related to children. Many of these would be replaced by provisions in the Bill. For example:

- rape of a young child (section 14) – replaces the current common law rule in relation to rape of a female under the age of 12 and the statutory offence set out in section 5(1) of the Criminal Law (Consolidation) (Scotland) Act 1995 ('the 1995 Act').²² The scope of the offence is broader than current provisions in that the definition of rape is widened to include penile penetration of the anus or mouth of a child of either sex (this mirrors changes to the more general provisions on rape set out in section 1 of the Bill)
- sexual assault on a young child (section 15) – replaces much of what would currently be covered by the common law offence of lewd, indecent or libidinous practice or behaviour, although the common law offence is wider in that it does not necessarily require physical contact between the perpetrator and the victim (eg performing sexual acts in the presence of a child could be covered).²³ Other elements of the current common law offence are covered by other offences in the Bill.

The offences set out in section 19 of the Bill (communicating indecently with a young child etc) might be used to tackle some cases of sexual grooming of a young child, where it would not be possible to use the grooming offence set out in section 1 of the Protection of Children and Prevention of Sexual Offences (Scotland) Act 2005. The offence in the Bill is wider in scope in that there is no need to prove that the perpetrator met (or intended to meet) the child. However, unlike the 2005 Act, the Bill does require that the communication is sexual in nature.

Older Children

Sections 21 to 29 of the Bill provide for offences relating specifically to older child victims (aged 13, 14 or 15).

The offences set out in sections 21 to 26 of the Bill are the same as those put forward in the SLC Report. The conduct which amounts to an offence under these provisions is the same as the equivalent offences in Part 1 of the Bill (see Table 1 above) with the following important differences in relation to the older child offences:

- they require proof that the victim was a child aged 13, 14 or 15

²² The common law offence of rape would be abolished by section 40 of the Bill and the statutory offence in section 5(1) of the 1995 Act repealed by schedule 5 to the Bill.

²³ The common law offence of lewd, indecent or libidinous practice or behaviour would be abolished by section 40 of the Bill.

- they do not require proof that the child victim did not consent to the activity
- they only apply to perpetrators aged 16 or over
- various defences exist which are not relevant to the offences set out in Part 1 of the Bill (and do not apply in relation to the young child offences)²⁴
- they attract lower maximum sentences when prosecuted on indictment

The offences set out in sections 21 to 26 of the Bill would replace some of the existing sexual offences specifically related to children. For example:

- having intercourse with an older child (section 21) – replaces, in relation to perpetrators aged 16 or over, the statutory offence set out in section 5(3) of the Criminal Law (Consolidation) (Scotland) Act 1995 ('the 1995 Act').²⁵ The scope of the offence is broader than the provisions of the 1995 Act in that it includes penile penetration of the anus or mouth of a child of either sex (mirroring changes to the provisions on rape set out in section 1 of the Bill). Under the current law, penile penetration of the anus or mouth of an older child would be covered by other offences (eg section 6 of the 1995 Act in relation to female victims and section 13(5) of the 1995 Act in relation to male victims)
- engaging in sexual activity with or towards an older child (section 22) – covers, in relation to perpetrators aged 16 or over, some of the conduct currently covered by the statutory offences of: (a) indecent behaviour towards a girl between 12 and 16 (section 6 of the 1995 Act); and (b) homosexual offences involving a boy under the age of 16 (section 13(5) of the 1995 Act).²⁶ The scope of the offence is broader than existing criminal law provisions in that it covers consensual sexual activity between female perpetrators aged 16 or over and male victims aged 14 or 15. The scope of the offence is also narrower than existing criminal law provisions in some respects, including the fact that current offences do not necessarily require physical contact between the perpetrator and the victim (eg performing sexual acts in the presence of a girl aged under 16 could be covered by section 6 of the 1995 Act). However other elements of current criminal offences are covered by other offences in the Bill (eg section 24 of the Bill)

Sections 27 and 28 of the Bill allow older children (aged 13, 14, or 15) to be prosecuted for engaging in consensual sexual activities with other older children. The provisions represent a major departure from the approach proposed in the SLC Report. The matter is considered below.

Sexual Activity between Older Children

The offences set out in sections 21 to 26 of the Bill seek to protect older children (aged 13, 14 or 15) from adults (aged 16 or more) seeking to involve them in sexual activity. Sections 27 and 28 of the Bill would allow older children themselves to be prosecuted for engaging in certain sexual activities with other older children. Various forms of penetrative sexual conduct are covered by sections 27 and 28 of the Bill (see below). As for other offences in Part 4 of the Bill, a person may be prosecuted even if all of those involved consented.

The offences set out in sections 27 and 28 of the Bill cover sexual activities involving penetration of the vagina or anus by anything other than the mouth (eg penetration by a penis,

²⁴ See section 29 of the Bill (discussed below under the heading of 'Defences Applying to Older Child Offences').

²⁵ The statutory offence in section 5(3) of the 1995 Act would be repealed by schedule 5 to the Bill.

²⁶ The statutory offence in sections 6 and 13(5) of the 1995 Act would be repealed by schedule 5 to the Bill.

finger or sex toy would be covered whilst penetration by a tongue would not be covered). Oral sex would not be covered by the offences, either because the mouth is used to penetrate or because it is the mouth that is penetrated.

Separate offences are set out in relation to the child doing the penetrating (section 27(1)) and the child being penetrated (section 27(4)). In relation to the latter, but not the former, it is expressly provided that the child only commits an offence where that child (ie the one being penetrated) consented to the activities in question. It does, however, seem very unlikely that the child doing the penetrating would be prosecuted if there was credible evidence that he/she had been forced to do so.

The scope of the proposed offences is broader than existing criminal law provisions in that they allow for the prosecution of girls engaging in relevant sexual activities with boys. At present girls/women engaging in sexual activities with boys aged 14 or 15 are not generally covered by the law on sexual offences.²⁷

The SLC Report had recommended that consensual sexual activities between older children should not give rise to the possibility of the children involved being prosecuted (see paras 4.52 to 4.55). Instead of potential criminal liability, the SLC Report proposed that the fact that a child has engaged in a sexual activity with another person should be a ground for referring that child to a children's hearing – thus making it clear that intervention (including compulsory measures of supervision) is possible where consensual sexual activities between older children give rise to concerns (see paras 4.56 to 4.58 of the SLC Report).

The SLC's proposals on this topic were rejected by the Scottish Government (see paras 110 to 122 of the Policy Memorandum). In taking a different approach, the Government hopes to more effectively discourage children under the age of 16 from engaging in sexual intercourse and/or help such children resist pressures to engage in sexual intercourse. The Policy Memorandum notes that the issue of underage sexual activity produced a high level of responses from individuals to the Government's consultation paper. Following introduction of the Bill, the Justice Secretary stated that:

“having considered the [SLC] proposal to decriminalise sexual intercourse between 13-15 year olds, and the various consultation responses, we have decided against such a change. The law must continue to make clear that society does not encourage sex between children, as it can be cause for concern for a child's welfare, even where apparently consensual. Our sexual health strategy places particular emphasis on respectful relationships and encouraging young people to delay engaging in sexual intercourse, which can lead to unintended pregnancy, as well as sexually transmitted infections”. (Scottish Government 2008)

In relation to the types of sexual conduct which are (or are not) covered by the offences provided for in sections 27 and 28 of the Bill:

- it may be noted that the SLC proposals relating to the children's hearings system would have allowed intervention in relation to a wider range of sexual activities than the Scottish Government proposals on criminal prosecution (ie they were not restricted to a limited range of penetrative sexual conduct)

²⁷ Criminal offences may currently apply where, for example, the woman is in a position of trust in relation to the boy.

- it is difficult to discern the precise basis for the dividing line in the Bill between types of sexual conduct which are or are not covered (eg digital penetration of the vagina would be covered whilst oral sex would not – despite the risks of contracting a sexually transmitted infection associated with the latter)

Defences Applying to Older Child Offences

As noted above, various defences apply to the older child offences which are not relevant to the offences set out in Part 1 of the Bill and do not apply in relation to the young child offences. These defences are set out in section 29 of the Bill:

- reasonable mistake as to age defence – it is a defence to all of the older child offences that the accused reasonably (albeit mistakenly) believed that the child had attained the age of 16 years at the time of the alleged offence
- proximity of age defence – it is a defence to some of the older child offences that, at the time when the alleged offence took place, the difference in age between the accused and the child did not exceed two years

The proximity of age defence applies to many of the offences covered by sections 21 to 26 of the Bill (dealing with perpetrators aged 16 or more and older child victims), but not to those offences involving penetration of the victim's vagina or anus (the defence does apply where such penetration is by the mouth of the accused). This limitation on the application of the defence mirrors the line drawn in section 27 of the Bill (considered above) in relation to sexual activities which are/are not criminal when all of those involved are consenting older children.

The two defences are similar to proposals set out in the SLC Report. There are, however, a number of differences. For example:

- the reasonable mistake as to age defence in the Bill is not available where the accused has previously been charged by the police with a relevant offence. (Scottish Ministers are given the power to specify 'relevant offences' by way of statutory instrument and are likely to use this power in relation to various sexual offences.) The SLC proposals did not include this limitation on the availability of the defence (see paras 4.60 to 4.62 of the SLC Report) but the Scottish Government decided not to follow the SLC approach on this point (see paras 130 to 135 of the Policy Memorandum)
- although the SLC Report included a proximity of age defence based on a two year difference in age, the SLC proposals would in certain circumstances have allowed its use where the age gap was somewhat greater (the views of the SLC are set out at paras 4.75 to 4.78 of the SLC Report and those of the Scottish Government at paras 124 to 129 of the Policy Memorandum)

The reasonable mistake as to age defence in the Bill is similar to a defence currently set out in section 5(5)(b) of the Criminal Law (Consolidation) (Scotland) Act 1995. However, the current defence is more restricted in that: (a) it only applies to a man charged with an offence under section 5(3) of the 1995 Act (sexual intercourse with a girl aged 13, 14 or 15); and (b) is only available to a man under the age of 24 years.

There is currently no equivalent of the proposed proximity of age defence in Scots law.

The SLC also proposed that an accused should have a defence in relation to the older children offences where the alleged victim was the spouse or civil partner of the accused as a result of a foreign marriage or foreign civil partnership which is recognised as valid under Scots law (see paras 4.65 to 4.70 of the SLC Report). However, the Scottish Government decided not to include such a defence in the Bill (see paras 136 to 137 of the Policy Memorandum). The approach taken in the Bill means that certain defences currently available in this area will no longer be available.

PART 5: ABUSE OF POSITION OF TRUST

CURRENT LAW

Scots criminal law currently includes a number of sexual offences dealing with situations where there has been an abuse of a position of trust. Proof that the victim did not consent to the activity involved in the offence is not required for a conviction. Offences include:²⁸

- section 3 of the Criminal Law (Consolidation) (Scotland) Act 1995 makes it an offence for a person aged 16 or over to have sexual intercourse with a child under the age of 16, where the person is a member of the same household as the child and is in a position of trust in relation to the child – ‘position of trust’ is not defined
- section 3 of the Sexual Offences (Amendment) Act 2000 makes it an offence for a person aged 18 or over to engage in any sexual activity with a child under the age of 18 where the person is in a position of trust in relation to the child – ‘position of trust’ is defined in section 4 (for the purposes of this offence) to cover various situations where a person looks after children in residential or institutional situations (eg in a school, hospital or children’s home)
- section 313 of the Mental Health (Care and Treatment) (Scotland) Act 2003 makes it an offence for a person to engage in any sexual activity with a mentally disordered person where he/she is providing care services to the mentally disordered person

PROPOSALS FOR REFORM

Children

Sections 31 to 33 of the Bill provide for an offence of sexual abuse of trust in relation to child victims under the age of 18. Proof that the victim did not consent to the activity involved in the offence is not required for a conviction. Section 34 sets out a number of defences which are specific to this offence. The proposals are generally the same as those put forward in the SLC Report.

The Bill makes it an offence for a person aged 18 or more to intentionally engage in any sexual activity with a child aged less than 18, where the perpetrator of the offence is in a position of trust in relation to the victim. In broad terms, the offence is aimed at positions of trust which may exist in a family setting or in various situations where a person looks after children in residential or institutional situations (eg in a school, hospital or children’s home).

²⁸ For more information see the SLC Report (paras 4.101 to 4.106).

The Bill also provides for the repeal of certain existing offences dealing with sexual abuse of trust in relation to child victims:

- section 3 of the Criminal Law (Consolidation) (Scotland) Act 1995 (which deals with abuse of trust in family settings) would be repealed by schedule 5 to the Bill – the SLC Report stated that, given the existence of other offences which criminalise sexual activity with children below the age of 16, there would be little scope for application of this offence
- section 3 of the Sexual Offences (Amendment) Act 2000 (which deals with abuse of trust in various situations where a person looks after children in residential or institutional situations) would (in relation to Scotland) be replaced by the offence set out in sections 31 to 34 of the Bill²⁹

In relation to positions of trust existing in a family situation (provided for in section 32(6) of the Bill), a position of trust only exists where perpetrator and victim are members of the same household. It may be argued that this requirement could mean that some sexual conduct would, despite the fact that the relationship between the parties allows one to exert influence over the other, not be covered by the abuse of trust provisions. For example, if the parties are not (at the time of the sexual conduct) members of the same household, it would not be a sexual offence for:

- a man to have consensual sex with the 16 year old daughter of his partner,³⁰ even if the man sometimes stands in for his partner in relation to fulfilling parental responsibilities
- a man to have consensual sex with his own 16 year old son

In response:

- it should be emphasised that such behaviour may be covered by the offence in the Bill where the parties are members of the same household – a matter for the courts to determine on a case by case basis
- it might be argued that the relationship existing in the first of the above situations is (where they are not members of the same household) insufficient to justify the criminalisation of sexual behaviour between consenting adults
- in relation to the second example, it might be argued that any concerns in this area would be best addressed by considering whether or not the current scope of laws dealing with incest are adequate (neither the SLC Report nor the Bill contain proposals for reforming the law on incest)

Mentally Disordered Persons

Section 35 of the Bill provides for an offence of sexual abuse of trust of a mentally disordered person. Proof that the victim did not consent to the activity involved in the offence is not required for a conviction. Section 36 sets out a number of defences which are specific to this offence. The proposals are generally the same as those put forward in the SLC Report.

The Bill makes it an offence for a person to intentionally engage in any sexual activity with a mentally disordered person, where the perpetrator of the offence is in a position of trust in

²⁹ In relation to Scotland, the whole of the Sexual Offences (Amendment) Act 2000 would be repealed by schedule 5 to the Bill.

³⁰ Assuming, of course, that she is not also his own daughter.

relation to the victim. In broad terms, the offence is aimed at: (a) anyone whose work involves providing care services to the mentally disordered person; or (b) anyone who is involved in the work of a hospital (or independent health care service) in which the mentally disordered person is receiving treatment. In relation to the second category, it may be noted that the level of professional involvement which the perpetrator has with the victim could vary considerably.

The Bill also provides for the repeal of the current offence in section 313 of the Mental Health (Care and Treatment) (Scotland) Act 2003.

PART 6: PENALTIES

Section 37 and schedule 1 of the Bill deal with the maximum penalties for all of the offences set out in the Bill.

The proposed penalties are generally the same as those proposed in the SLC Report. The only difference is that the Bill sets out penalties for the additional offences in section 27 of the Bill relating to older children engaging in penetrative sexual conduct with each other.

The offences set out in section 1 (rape) and section 14 (rape of a young child) of the Bill can only be prosecuted under solemn procedure in the High Court.³¹ All other offences set out in the Bill can be prosecuted under both summary and solemn procedures.³²

Where an offence can be prosecuted under summary procedure, the maximum penalty in all cases is imprisonment for a term not exceeding 12 months or a fine not exceeding the statutory maximum (currently £10,000) or both.³³ In relation to any prosecution under solemn procedure, the Bill provides for three different maximum penalties (depending on the offence involved):

- life imprisonment or an unlimited fine or both
- imprisonment for a term not exceeding 10 years or an unlimited fine or both
- imprisonment for a term not exceeding 5 years or an unlimited fine or both

Background information is set in the Policy Memorandum (paras 156 to 158) and the SLC Report (paras 7.11 to 7.13).

PART 7: MISCELLANEOUS AND GENERAL

The provisions in Part 7 of the Bill include a number of sections dealing with offences committed outside the United Kingdom. As noted above, the SLC Report did not deal with this topic.

³¹ This is provided for by amendments to the Criminal Procedure (Scotland) Act 1995 set out in schedule 4 to the Bill.

³² Solemn procedure is used in relation to the most serious of criminal cases and may ultimately lead to a trial on indictment, either before a judge in the High Court or before a sheriff in one of the sheriff courts. Trials under solemn procedure are conducted with a jury. Summary procedure is used for less serious cases and may ultimately lead to a trial before a sheriff or, in district/justice of the peace courts, before a bench of one or more lay justices of the peace. Trials under summary procedure are conducted without a jury.

³³ The maximum penalty is the same as the normal maximum sentencing powers for a sheriff court dealing with a person convicted of a common law offence under summary procedure (see section 5 of the Criminal Procedure (Scotland) Act 1995).

The equivalent part of a draft bill published as part of the SLC Report included some provisions relating to sadomasochistic practices which the Scottish Government decided not to include in the Bill.

Both of the above topics are considered below.

OFFENCES COMMITTED OUTSIDE THE UNITED KINGDOM

Sections 42 to 44 and schedule 3 to the Bill contain a number of provisions dealing with sexual offences committed outside the UK. The SLC Report did not deal with this topic.

Section 42 makes it an offence under Scots law for a person to incite another to carry out certain sexual activities outwith the UK. The act of incitement must include something done in Scotland (this could involve a message sent from or received in Scotland).

Section 43 makes it an offence under Scots law for a person to carry out certain sexual activities outwith the UK. There is no requirement for anything to take place within Scotland. However, the offence only applies to UK nationals and UK residents.³⁴

An offence is only committed under either of the above sections where the sexual activities (incited or carried out) would, if they had taken place in Scotland, be covered by one of the relevant sexual offences set out in schedule 3 to the Bill.

Both sections also draw a distinction between UK nationals and non-UK nationals. In relation to the latter, but not the former, an offence is only committed under Scots law if the sexual activities are also criminal under the law of the country where they take place (or are intended to take place). This requirement is sometimes referred to as 'dual criminality'.

The provisions in the Bill would replace similar provisions currently set out in sections 16A and 16B of the Criminal Law (Consolidation) (Scotland) Act 1995.³⁵ The main differences between the existing provisions and those in the Bill are:

- the current provisions require 'dual criminality' irrespective of whether or not the alleged offender is a UK national
- the provisions in the Bill apply to a wider range of sexual offences

SADOMASOCHISTIC PRACTICES

Scottish Law Commission Proposals

The SLC Report recommended that the law should clearly state that, within certain limits, consensual sadomasochistic practices do not give rise to criminal liability under the law of assault.³⁶ The SLC's approach is based on the view that "sexual practices involving consent

³⁴ This is not a requirement of the offence in section 42 of the Bill.

³⁵ Sections 16A and 16B of the Criminal Law (Consolidation) (Scotland) Act 1995 would be repealed by schedule 5 to the Bill.

³⁶ The topic is considered in the SLC Report at paras 5.19 to 5.27.

should not, unless there are weighty overriding reasons, be subject to legal sanction” (SLC Report, para 5.19).

Following [consultation](#) (SLC 2006) on proposals for legislating in this area, the SLC Report noted that:

“The proposal to allow an exemption for acts done for the purpose of sexual gratification from liability from assault received overwhelming support from consultees, though some thought that the existing law already achieved this result. By contrast there was a divergence of views as to the limits to any exemption. (...)

We have without any hesitation reached the conclusion that there should be an exemption from the law of assault for activities to which all parties have given their consent for purposes of sexual gratification. This position seems to reflect current understanding but we are of the view that the matter should be expressly stated in law to remove any doubt. However, we accept that there must be limits to this exemption. This is ultimately a question of social policy. A balance has to be struck between the protection of a person’s physical integrity and the promotion of sexual autonomy. We believe that that balance is best achieved by the requirement that a violent act done with consent and for the purpose of providing sexual gratification is not a crime if it is unlikely to result in serious injury to the person on whom the violence is inflicted.” (paras 5.22 to 5.23)

In light of this, the SLC Report proposed that it should not be the crime of assault for one person to attack another where all of the following apply:

- both parties are 16 or older
- the primary purpose of the attack is to provide sexual gratification to one or other (or both) of the parties, and the parties agree to that purpose
- the person receiving the attack consents to its being carried out
- the attack is unlikely to result in serious injury (whether or not it does in fact result in such injury)

The main arguments used in support of the SLC’s proposals in this area would appear to be:

- respect for sexual autonomy – consenting sexual conduct should not be criminalised unless there are strong reasons for doing so
- clarity of the law – the SLC proposals would help to clarify the law in relation to sadomasochism and assault

The legislative approach suggested in the SLC Report deals with the issue as part of the definition of assault, rather than as a possible defence to a charge of assault. Thus, in a relevant case, it would be for the prosecution to prove that at least one of the factors set out above did not apply (eg that the person receiving the attack did not consent to it being carried out).

Approach of the Scottish Government

The Scottish Government decided not to follow the SLC's recommendations in this area and the Bill does not contain any provisions on the topic.³⁷ Commenting on the Government's decision not to adopt the SLC's recommendations relating to sadomasochistic practices, the Justice Secretary said that:

“We also decided not to decriminalise consensual sexual violence as we agree that by weakening the law Parliament could open a legal loophole for rapists and perpetrators of domestic violence. It's also counter to the thrust of the Bill – to protect people from sex crimes and exploitation.” (Scottish Government 2008)

As noted above, the SLC Report stated that its proposal to exclude at least some sadomasochistic practices from potential criminal liability under the law of assault “received overwhelming support from consultees” (para 5.22).³⁸ However, the Scottish Government stated in the Policy Memorandum accompanying the Bill that the “vast majority of respondents” to its own consultation on the SLC Report were opposed to the SLC's proposals relating to sadomasochism.³⁹

The main arguments highlighted in the Policy Memorandum, against the SLC's proposals on sadomasochism, appear to relate to concerns that the SLC's proposals could in practice have unintended consequences in making the prosecution of non-consensual criminal activities more difficult. For example, a concern that a person accused of domestic abuse could claim that acts of violence were consensual acts carried out for sexual gratification, and that this would leave the prosecution with the potentially difficult task of trying to prove (beyond reasonable doubt) that at least one of the factors set out in the SLC's proposals did not apply (eg that the victim did not consent to the attack being carried out). Experience in relation to the prosecution of rape supports the view that proving a lack of consent in relation to sexual activities can be very difficult.

Some respondents to the Scottish Government consultation also raised concerns about the stance which the law should take in relation to the acceptability (or otherwise) of sadomasochistic practices. For example, a response from the Catholic Parliamentary Office stated that:⁴⁰

“The distortion of acceptable sexual activity has wider social repercussions than those for the particular participants. Sadomasochistic activity is intrinsically disordered and introduces violence to an aspect of intimate personal life. The law must protect wider society from the danger of violence being accepted as a legitimate part of sexual relationships.” (p 2)

³⁷ The topic is considered in the Policy Memorandum at paras 170 to 171.

³⁸ A list of those responding to the SLC discussion paper (2006) on the matter is set out in Appendix B of the SLC Report.

³⁹ See the Policy Memorandum at para 171.

⁴⁰ Responses to Scottish Government consultations are available for viewing in the Government's library in Edinburgh. Enquiries regarding viewing can be directed to individual departments or to the library on (0131) 244 4565.

An Alternative Approach

A different approach (not adopted by the SLC or the Scottish Government) might have been to create a defence to a charge of assault if it involved consensual acts carried out for sexual gratification. Under such an approach the accused would have some degree of burden in relation to actively proving the defence. This burden might be applied to all or some of the factors highlighted in the SLC's proposals.

The Bill as introduced includes a number of defences where an accused person carries a burden in relation to proving the defence. For example, under section 29 of the Bill it is a defence to all of the older child offences that the accused reasonably (albeit mistakenly) believed that the child had attained the age of 16 years at the time of the alleged offence. The SLC Report notes that such defences are intended to place an evidential burden on the accused:

“As a general point, the defences in this section require the accused to satisfy an evidential burden (as opposed to a legal burden). This means that the accused must put evidence before the court which, if believed, could be taken by a reasonable jury to support the defence. If the accused succeeds in this then he or she must be acquitted unless the Crown establish, beyond reasonable doubt, that the evidence which the accused has raised is not sound.” (p 160)

The alternative approach outlined above might help answer some concerns about the SLC's proposals on sadomasochistic practices making the prosecution of non-consensual criminal activities more difficult (eg by requiring the defence in a domestic abuse case to present some positive evidence in support of an assertion that the victim had actually consented to an attack for the purposes of sexual gratification). The alternative approach would not, however, answer criticisms based on the view that all sadomasochistic practices are intrinsically wrong and should, therefore, be discouraged by the criminal law.

SOURCES

- Gordon, G. (2000) *The Criminal Law of Scotland*. 3rd ed, Christie, M ed. Vol I. Edinburgh: W Green
- Gordon, G. (2001) *The Criminal Law of Scotland*. 3rd ed, Christie, M ed. Vol II. Edinburgh: W Green
- McCallum, F. (2008) *Sexual History and Character Evidence*. SPICe Briefing 08/33. Edinburgh: Scottish Parliament. Available at: <http://www.scottish.parliament.uk/business/research/briefings-08/SB08-33.pdf>
- McCallum, F and Ross G. (2008) *Rape*. SPICe Briefing 08/32. Edinburgh: Scottish Parliament. Available at: <http://www.scottish.parliament.uk/business/research/briefings-08/SB08-32.pdf>
- McCallum, F, Ross, G and Oag, D. (2004) *Children and the Scottish Criminal Justice System*. SPICe Subject Map (Devolved Area) 01/05. Edinburgh: Scottish Parliament. Available at: http://www.scottish.parliament.uk/business/research/pdf_subj_maps/smda01-05.pdf
- Scottish Government. (2007) *Scottish Government Consultation: The Scottish Law Commission Report on Rape and Other Sexual Offences*. Edinburgh: Scottish Government. Available at: <http://www.scotland.gov.uk/Topics/Justice/criminal/17543/Scottishgovtconsultation>
- Scottish Government. (2008) *Reform of Law on Rape and Sexual Offences*. Press release 18 June 2008. Edinburgh: Scottish Government. Available at: <http://www.scotland.gov.uk/News/Releases/2008/06/18101607> [Accessed 17 September 2008]
- Scottish Law Commission. (2006) *Discussion Paper on Rape and Other Sexual Offences*. Discussion Paper No 131. Edinburgh: The Stationery Office. Available at: http://www.scotlawcom.gov.uk/downloads/dp131_rape.pdf
- Scottish Law Commission. (2007a) *Report on Rape and Other Sexual Offences*. Scot Law Com No 209. Edinburgh: The Stationery Office. Available at: <http://www.scotlawcom.gov.uk/downloads/rep209.pdf>
- Scottish Law Commission. (2007b) *Justice, Clarity and Consent: New Sex Laws for Scotland* [Online]. Press release 19 December 2007. Available at: http://www.scotlawcom.gov.uk/downloads/nr_rep209.pdf [Accessed 17 September 2008]
- Sexual Offences (Scotland) Bill [as introduced] Session 3 (2008)*. SP Bill 11. Edinburgh: Scottish Parliament. Available at: <http://www.scottish.parliament.uk/s3/bills/11-sexualOffences/b11s3-intro.pdf>
- Sexual Offences (Scotland) Bill: Explanatory Notes (and other accompanying documents) Session 3 (2008)*. SP Bill 11-EN. Edinburgh: Scottish Parliament. Available at: <http://www.scottish.parliament.uk/s3/bills/11-sexualOffences/b11s3-intro-en.pdf>
- Sexual Offences (Scotland) Bill: Policy Memorandum Session 3 (2008)*. SP Bill 11-PM. Edinburgh: Scottish Parliament. Available at: <http://www.scottish.parliament.uk/s3/bills/11-sexualOffences/b11s3-intro-pm.pdf>