

Responses to 'Setting the Boundaries: Reforming the law on sex offences'

This document sets out the public's and the Government's responses to each of the recommendations made in 'Setting the Boundaries; reforming the law on sex offences', the consultation document on the review of sex offences. The public's and the Government's responses to each recommendation made in the Consultation on the Review of part one of the Sex Offenders Act 1997 have also been published. They can be found at www.sexualoffencesbill.homeoffice.gov.uk under the 'consultation documents' link.

The reviews and the responses to the consultation processes which ensued have been carefully considered, and the Government will be introducing a Sexual Offences Bill in Parliament in the New Year. 'Protecting the Public; strengthening protection against sex offenders and reforming the law on sex offences', a command paper setting out what the Government proposes to do in the Bill, has also been published. You can access this document online at www.protectingthepublic.homeoffice.gov.uk or purchase a copy from The Stationery Office (call 0870 – 6005522 to order your copy).

RECOMMENDATION 1

1: The offence of **rape** should be retained as penile penetration without consent, and extended to include oral penetration.

This should be defined as penetration of the anus, mouth or genitalia to the slightest extent, and, for the avoidance of doubt, surgically reconstructed male or female genitalia should be included in the definition in law.

Total no. of responses: 65

42 agreed

8 disagreed/ proposed an alternative

15 no view expressed

ISSUES RAISED IN RESPONSES

The majority of respondents supported the recommendation.

The reason given by most of those who thought that oral penetration should not be included in the offence was that, although this extremely degrading behaviour, including it in the definition of rape would dilute that offence.

Issues raised include:

- vaginal penetration had always been regarded as a separate offence, in part because of the risk of pregnancy, and should continue to be so
- the recommendation was sexually discriminatory and the definition of rape should be altered to ‘sexual intercourse without consent, by a man or woman.’

Government Response

Agree the recommendation.

The offence of rape is understood by the public to be an offence that is committed by a man on a woman or another man. Penile penetration is of a particular kind; it carries the risk of pregnancy and disease transmission. It should be treated separately from other penetrative assaults. We agree with the Review that the presumption of gender neutrality should be set aside in relation to the offence of rape and that it should be limited to penile penetration.

As modern surgical techniques can provide sexual organs, the law should clearly state that penetration of, or by, such organs is within the scope of the offence.

Forced oral sex is at present treated as an indecent assault, but is as traumatic and demeaning as penile penetration of the vagina or anus.

We therefore agree with the review that rape should be redefined as penile penetration of the anus, vagina or mouth, without consent.

RECOMMENDATION 2

2: **Rape** should not be subdivided into lesser or more serious offences.

Total no. of responses : 46

20 agreed

23 disagreed/ proposed an alternative

3 no view expressed

ISSUES RAISED IN RESPONSES

Views were divided on this recommendation.

A significant number of respondents believed that a separate offence of ‘date rape’ would result in more convictions and would provide better protection for victims.

Most of the respondents in favour of this recommendation recognised a measure of reluctance amongst juries to convict on “date rape” cases, but still considered that the grades of seriousness are best reflected by sentencing, with the impact on the victim being the deciding factor, rather than by grading the offence itself. Different degrees of rape would dilute the offence.

Government Response

Agree the recommendation.

In the estimation of many victims, far from being a lesser offence, ‘date’ or ‘acquaintance’ rape can be as, or more, traumatic for victims because of the betrayal of trust.

Victim's organisations told the Review that victims are deeply affected by such instances of rape and their feelings of victimization are often stronger than those who are victims of stranger rape. Rape by someone you know and trust is not a matter of pure chance. The betrayal of trust can lead to a victim feeling guilty for allowing themselves to be in a situation that allowed the rape to take place. Those raped by friends and family find it much more difficult to recover and take longer to do so.

Although responses to this recommendation were divided, we agree with the Review that it would be inappropriate to grade the offence of rape. The crime of rape is so serious that it needs to be considered in its totality rather than being constrained by any relationship between the parties. The issue of severity of the offence should be left to the judges on sentencing, rather than attempting to deal with it by creating a separate offence.

RECOMMENDATION 3

3: There should be a new offence of **sexual assault by penetration** to be used for all other penetration without consent.

This should be defined as penetration of the anus or genitalia to the slightest extent, and, for the avoidance of doubt, surgically reconstructed genitalia should be included in the definition.

In circumstances where the means of penetration is not clear, the offence of sexual assault by penetration would apply.

Total no. of responses 47

42 agreed

4 disagreed/proposed an alternative

1 no view expressed

ISSUES RAISED IN RESPONSES

The majority of respondents supported the recommendation because it recognised the severity of the harm caused by non-penile penetration and because it would cover situations where victims were not sure what had been used to penetrate them.

Those who disagreed with the proposed new offence did so on the grounds that it might put undue emphasis on penetration as being the central act of violation. Non-penile penetrative sexual assault can be extremely serious.

Government Response

Agree the recommendation.

Penetrative offences can be very serious. There is a clear need for the law to recognise this and to deal with a situation where penetration is by something other than the penis. A new offence of sexual assault by penetration with a maximum life penalty - the same as that for rape - should be available for all non-penile penetrative sexual offences. This offence would include the non-consensual penetration of the anus or vagina (including surgically reconstructed genitalia) by objects or parts of the body other than the penis.

This offence could be used if there were any doubts as to the nature of the penetration (for example where a child or a mentally impaired person is unable to explain with what they were penetrated). This offence can be committed by a man or a woman, on a man or a woman.

As with the offence of rape, it will be important to define what is meant by

penetration. The present law holds that the slightest penetration is sufficient. This seems to be the right approach. It should be absolutely clear that the offence relates to the penetration of the external genitalia and not simply the vagina.

There is an obvious overlap between recommendations 1 and recommendation 3. The question posed by many respondents is whether oral penetration should properly form part of rape or form part of sexual assault by penetration. The Review favoured the former arguing that everyone understands rape to be penile penetration (of whatever orifice). We support this view. The alternative is that the offence of rape should only relate to penile penetration of the vagina or the anus and that any other type of penetration (whether penile or not) should form part of sexual assault by penetration. We believe that this option would fail to recognise the true nature and consequences of forced penile penetration of the mouth, as evidenced by victims.

We therefore fully support recommendation 3.

RECOMMENDATION 4

4: Consent should be defined in law as “ free agreement ”.
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Total no. of responses : 59

46 agreed
7 disagreed/ proposed an alternative
6 no view expressed

ISSUES RAISED IN RESPONSES

The majority of respondents supported the recommendation.

A number made a variety of alternative proposals.

Issues raised include:

- any attempt to issue further clarification on such matters would actually serve to confuse the issue more – the more complicated directions become, the greater the likelihood of an appeal

Government response

Agree the recommendation in part.

In spite of the argument that further defining 'consent' could be confusing, we agree that it is vital to have a law that is as clear as possible about what 'consent' actually means and to make it clear that consent is different from submission.

RECOMMENDATION 5

5: The law should set out a **non-exhaustive list of circumstances** where consent was not present.

Total no. of responses : 42

- 34** agreed
- 5** disagreed/ proposed an alternative
- 3** no view expressed

ISSUES RAISED IN RESPONSES

The majority of respondents supported this recommendation.

Some of those who disagreed questioned whether, particularly in conjunction with recommendation 6, it would remove from the court the ability to fully consider the facts of in each case. Others thought that existing law and case law already provided sufficient guidance.

Government response

Agree the recommendation in part.

We do not think it is possible to identify many circumstances where one could say with absolute certainty that consent could never be present. We would prefer to have a list of circumstances in which it is most unlikely that consent was present, leaving it open to the defendant to challenge lack of consent.

We therefore propose setting out in statute a non-exhaustive list of circumstances in which consent is presumed not to have been present. Where the prosecution is able to prove, beyond a reasonable doubt, that sexual activity took place in one of the circumstances on the list, there will be a rebuttable presumption that consent was not present. It will then be open to the defendant to seek to establish, on the balance of probabilities, that the complainant did, in fact, give their consent to sexual activity on the occasion in question.

The list would by no means cover every set of circumstances and cases would still need to be decided on their facts. However, we believe that having a list set out in law could provide a helpful framework within which juries can reach fair and just decisions.

RECOMMENDATION 6

6: The law should include a non-exhaustive list of **examples of where consent is not present** such as where a person:

- Submits or is unable to resist because of force or fear of force;
- Submits because of threats or fear of serious harm or serious detriment of any type to themselves or another person;
- Was asleep, unconscious, or too affected by alcohol or drugs to give free agreement;
- Did not understand the purpose of the act, whether because they lacked the capacity to understand, or were deceived as to the purpose of the act;
- Was mistaken or deceived as to the identity of the person or the nature of the act;
- Submits or is unable to resist because they are abducted or unlawfully detained;
- Has agreement given for them by a third party.

Total no. OF RESPONSES: 42

27 agreed

11 disagreed

4 no view expressed

ISSUES RAISED IN RESPONSES

The majority of respondents supported the recommendation, although some of these held different views about which circumstances should feature on the list.

Other suggested other circumstances to add to the list.

Those who disagreed with the recommendation either disagreed with the list in principle or felt that some of the circumstances on this list should not be included.

Government response

Accept the recommendation in part.

The majority of the respondents to the Review supported this proposal. The public as well as lawyers and judges need to understand the meaning of consent and a restricted illustrative list in legislation may help.

The Review noted that submission may reflect reluctant acquiescence, but may also reflect a lack of consent and/or an inability to resist and acknowledged that their proposed list included examples of each scenario.

We agree that any list should make clear that submission does not equate to consent if

there is not genuine agreement, but, as discussed in our response to recommendation 5, we intend to incorporate in statute a list of circumstances in which consent is rebuttably presumed not to have been present.

We propose that consent should be presumed to be absent where the victim

- *was subject to force or the fear of force; or*
- *was subject to threats or fear of serious harm or serious detriment to themselves or another person; or*
- *was abducted or unlawfully detained; or*
- *was unconscious; or*
- *was unable to communicate his or her decision by reason of physical disability; or*
- *had agreement given for them by a third party.*

We prefer to keep the list short since it is only in rare circumstances that a reverse burden can be justified.

RECOMMENDATION 7

7: There should be a standard direction on the meaning of consent and consideration should be given as to whether this should be placed in statute.

Total no. of responses 44

24 agreed
10 disagreed/ proposed an alternative
10 no views expressed

ISSUES RAISED IN RESPONSES

The majority of those who expressed a view agreed with the recommendation.

Some of those who disagreed commented that including a standard direction on consent wrongly implied that juries have difficulty with the concept of consent. It would also erode the principle that the prosecution had to prove its case. Others felt that existing standard directions and guidelines worked satisfactorily.

Some of those who felt that there should be a standard direction on consent believed that it should be incorporated into statute on the grounds that this would provide for consistency in the instructions given to juries.

However, most would prefer the flexibility offered by a specimen direction issued by the Judicial Studies Board.

A number recommended alternative ways of dealing with this issue.

Government response

Agree recommendation in part.

There is no precedent for standard directions to be included in statute. Consultation with the Judicial Studies Board has confirmed our view that it would be inappropriate to incorporate a standard direction on consent in statute, because the exact direction in any particular case will need to vary according to the individual circumstances.

Once the new legislation is in force, the Judicial Studies Board will be invited to consider whether there needs to be a specimen direction and, if so, what the appropriate terms of such a direction might be.

RECOMMENDATION 8

8: Rape / sexual assault by penetration may be committed intentionally or recklessly and the definition of recklessness in sex offences should include the lack of any thought as to consent; this can be described as “could not care less about consent”.

Total no. of responses: 38

30 **agreed**
3 **disagreed/ proposed an alternative**
5 **No view expressed**

ISSUES RAISED IN RESPONSES

The majority of respondents agreed with the recommendation commenting that it was consistent with current law.

Others proposed alternative formulations.

Government response

Agree the recommendation.

This recommendation reflects the current law and we agree with the Review.

RECOMMENDATION 9

9: A defence of **honest belief in free agreement** should not be available where there was self induced intoxication, recklessness as to consent, or if the accused did not take all reasonable steps in the circumstances to ascertain free agreement at the time.

Total no. of responses : 86

38 agreed

48 disagreed/ proposed an alternative

ISSUES RAISED IN RESPONSES

Views were divided about this recommendation.

A significant number of respondents were in favour of retaining the purely subjective test on the basis that there shouldn't be criminal liability for such a serious crime unless a defendant intended to commit the crime. They considered that recklessness is the appropriate minimum threshold for criminal liability.

Many respondents who supported the recommendation did so because it retains the defence of honest belief but fetters it appropriately, ensuring that a defendant will have to satisfy a jury that reasonable steps were taken to ascertain free agreement. Honest belief and reasonable belief are two different things and both are important factors in determining consent.

A number of respondents raised issues about

- whether it would be fair that the defence of honest belief in free agreement should not be present where there was self-induced intoxication
- whether taking all reasonable steps suggested too formal and bureaucratic an approach to sexual activity.

Government Response

Agree the recommendation in part.

We are not satisfied that this recommendation, as it stands, would provide adequate protection for victims. It is not clear what "all reasonable steps" would involve and whether determining if a defendant's belief was reasonable would necessarily entail whether he took reasonable steps.

We propose instead the following test:

Where the prosecution can prove that there was room for uncertainty about the complainant's consent and that the defendant did not do what was

reasonable in the circumstances to ensure that the complainant was willing to take part in sexual activity, the offence will be proved.

In considering the question of consent, the jury would be required to take into account the reasonableness of the actions of both parties, the circumstances in which they have placed themselves, the level of responsibility exercised and, therefore, the presumption of consent having been given.

The jury would also be expected to take account, where relevant, of the circumstances in which the accusation or revelation is delivered (including any media involvement), the time that has elapsed and the manner in which the accusation was made.

RECOMMENDATION 10

10: There should be a new offence of **sexual assault** to cover sexual touching (defined as behaviour that a reasonable bystander would consider to be sexual) that is done without the consent of the victim.

Total no. of responses: 36

27 agreed
5 disagreed/ proposed an alternative
4 no view expressed

ISSUES RAISED IN RESPONSES

The majority of respondents supported the recommendation.

A number of respondents felt that existing law was adequate and raised questions about what kinds of behaviour would be covered by this offence, particularly since it was defined by reference to the reasonable by-stander.

Government response

Agree the recommendation.

The more serious offences – rape and sexual assault by penetration, are dealt with by earlier recommendations. An offence of sexual assault which captures within its scope less serious offending behaviour such as non-consensual touching, would close any possible gaps in the legislation that might allow a perpetrator to be acquitted.

We propose that the offence should relate to any activity that a reasonable person would consider sexual or indecent in all the circumstances. It is understandable that some might wish for clear definitions of what is sexual and what is unacceptable behaviour. However, what might amount to sexual is not capable of being defined and the reasonable bystander test is one used in the Sexual Offences (Amendment) Act 2000. Many tests such as this are objective and left to the finders of fact in a criminal trial i.e. the magistrate or jury. In addition, while it might be difficult to define, in most circumstances an individual can be expected to know what is sexual or indecent and what is not.

Under existing law, where an assault is inherently indecent, it is not necessary to establish a specific indecent intent; it is sufficient to establish an intention to commit the assault. It is only where the indecent element turns on the defendant's motive, that it is necessary to establish an indecent intent as well as an intention to commit the assault. We believe that this approach is sensible and should be retained.

RECOMMENDATION 11

11: There should be a new offence of **assault to commit rape or sexual assault by penetration**.

NO. OF RESPONSES: 33

28 agreed
2 disagreed
3 no view expressed

ISSUES RAISED IN RESPONSES

The majority of respondents supported the recommendation.

Some respondents felt that the existing law of indecent assault adequately covered the behaviour involved. Others felt the proposed penalty was too low.

Government response

Agree the recommendation in part.

We agree with the Review that there is a gap in the law and that the fear and terror suffered by victims in such cases justifies the creation of relevant offences.

However, we do not think that the offence of assault with intent should be limited to the intent to commit rape or sexual penetration. Such specific intent may be difficult to prove, enabling a potential sex offender to be acquitted. The level of fear and trauma generated would not necessarily be lower where a lesser sex offence is intended; in any event a victim cannot be expected to know what offence is in the mind of the accused. We therefore propose that the offence should relate to the intent to commit any sex offence.

In addition, we are not convinced that the offences proposed in recommendations 11 and 13 would necessarily catch all criminal behaviour that has a sexual intent. It is important that the law should fully recognise the sexual motivation of the offender and that he or she should be charged with a substantive offence and, if found guilty, managed as a sex offender. We therefore propose a generic offence to cover any criminal offence committed with intent to commit a sex offence.

RECOMMENDATION 12

12: A new offence of **trespass with intent to commit a serious sex offence** should replace burglary with intent to rape.

Total no. of responses: 32

- 25** **agreed**
- 2** **disagreed/ proposed an alternative**
- 5** **No view expressed**

ISSUES RAISED IN RESPONSES

The majority of the respondents agreed with the recommendation.

Issues raised included that:

- the sex offence that was intended should be specified. Others, however, proposed the opposite view.
- the offence could be difficult to prove

Government Response

Agree the recommendation in part.

We agree with the Review that there is a gap in the law and that the fear and terror suffered by victims in such cases justifies the creation of a substantive offence. As trespass is a tort, this would not be covered by the generic criminal offence we have proposed in response to recommendations 11 and 13.

As discussed above, we do not think that the offence should be limited to the intent to commit a serious sex offence. Such specific intent may be difficult to prove, enabling a potential sex offender to be acquitted. We therefore propose an offence of trespass with intent to commit a sex offence.

RECOMMENDATION 13

13: There should be a new offence of **abduction with the intent to commit a serious sex offence**.

Total no. of responses: 31

24 **agreed**
2 **disagreed/ proposed an alternative**
5 **no views expressed**

ISSUES RAISED IN RESPONSES

The majority of respondents supported this recommendation.

Issues raised included that:

- the sexual intent could be treated as an aggravating factor to be considered in sentencing rather than by creating a separate offence
- the offence could be difficult to prove.

Government response

Agree the recommendation in part.

We believe this offence should be incorporated into the generic offence referred to in the response to recommendation 11.

RECOMMENDATION 14

14: There should be an offence of **obtaining sexual penetration by threats or deception** in any part of the world.

Total no. of responses : 35

26 **agreed**
6 **disagreed/ proposed an alternative**
3 **No view expressed**

ISSUES RAISED IN RESPONSES

The majority of respondents supported the recommendation.

Others thought that this behaviour was already satisfactorily covered by existing offences.

Issues raised included:

- this offence might be seen as an alternative and compromise verdict in rape cases
- the behaviour covered ought not to be limited to penetration
- how threats and deception would be defined
- matters concerned with the offence applying “in any part of the world.”

Government response

Agree the recommendation in part.

It is important to protect people from those who are prepared to threaten or deceive another person into agreeing to sexual activity. However, we do not see the need to create a separate new offence.

Where the threat or deception negates consent, rape, sexual assault by penetration or sexual assault will be committed. Where the threat is one of violence or of serious detriment, we propose that it should be included in the list of circumstances where there is a rebuttable presumption of lack of consent – please see the response to recommendation 6.

RECOMMENDATION 15

15: An offence of **administering drugs** (etc.) with intent to stupefy a victim in order that they are sexually penetrated should be retained.

Total no. of responses: 30

28 agreed

0 disagreed

2 no view expressed

ISSUES RAISED IN RESPONSES

Issues raised included whether :

- the offence should be limited to sexual penetration.
- “drugs” included alcohol.

Government response

Agree the recommendation in part.

The Sturman Report highlighted drug-related sex offences as a real area of concern. There is an argument that administering drugs to a victim should be an offence in any event, but our remit is to consider sex offences. It is the sexual intent, combined with the stupefaction that is currently a criminal offence and it should continue to be so.

However, there seems to be no good reason to limit the offence to penetration and we believe the offence should be extended to cover any activity that a reasonable person would consider to be sexual or indecent in all the circumstances.

RECOMMENDATION 16

16: There should be new offences of compelling another to perform sexual acts, with several levels of seriousness depending on the nature of the compelled acts.

Total no. of responses : 29

24 agreed
1 disagreed
4 No view expressed

ISSUES RAISED IN RESPONSES

The majority of respondents welcomed this proposal.

An issue raised was the need to exclude consensual if unorthodox sexual behaviour that involved a degree of “compulsion”.

Government response

Agree the recommendation.

Making a sexual act happen without the consent of the person involved is a serious matter. This offence will provide for the prosecution of someone who forces another person to perform sexual or indecent acts, either on themselves or the offender, or to engage in sexual activity with another person against their will. It will make it clear that the guilt lies with the person who causes the act to happen rather than the immediate victims.

It will cover situations where a man is compelled to penetrate another person, male or female, and will thus provide an equivalent to the offence of rape that can be charged in relation to female offenders. This will remove the present discriminatory nature of penetration offences.

RECOMMENDATION 17

17: As a matter of public policy, the **age of legal consent** should remain at sixteen.

Total no. of responses: 43

28 agreed

15 disagreed/ proposed an alternative

ISSUES RAISED IN RESPONSES

The majority of respondents supported the recommendation.

Some respondents argued for lower ages of consent and at least one respondent for a higher age.

Issues raised included:

- whether, contrary to current law, the age of consent to homosexual activity ought to be higher than for heterosexual activity
- consent should depend on the maturity of the child rather than their age

Government response

Agree the recommendation.

The age of consent at 16 is well established and understood.

RECOMMENDATION 18

18: The law setting out specific offences against children should state that **below the age of 13 a child cannot effectively consent** to sexual activity.

Total no. of responses: 45

32 agreed

13 disagreed/ proposed an alternative

ISSUES RAISED IN RESPONSES

The majority of respondents agreed with this recommendation.

Some respondents argued that there should be an age below which a child should not be deemed able to consent but that it should be higher than 13, whilst some argued it should be lower.

An issue was raised by a number of respondents that a child below this age should automatically be deemed unable to give consent in any circumstances and that the issue of their consent should, therefore, be irrelevant in court proceedings.

Government response

Agree the recommendation in part.

The age 13 threshold is set in legal precedent and is recognised and respected.

However, the Review recommended that this threshold should only apply to instances where the child had in fact consented to sexual activity – their recommendation would not apply to the non-consensual offences, such as rape or sexual assault by penetration. This means that in such cases the prosecution would still have to prove that a child under 13 did not in fact consent to intercourse.

We propose going further. It seems incongruous to suggest that a child's capacity to consent could in some way be linked to the type of offence perpetrated against them. It would also be anomalous to require the court to test the consent of a child in a rape case, but not in relation to a charge of "adult sexual activity with a child", when the maximum penalty would be the same (life imprisonment) in both cases. Furthermore, requiring a child's consent to be tested in court would seriously undermine the protection that we would wish to see afforded to very young children by the law.

We therefore propose that a child below the age of 13 should be deemed incapable of giving legally valid consent to any form of sexual activity in any circumstances. Any sexual activity with such a child would always fall to be charged as a non-consensual offence, to be decided on a strict liability basis.

RECOMMENDATION 19

19: There should be an offence of **adult (over 18) sexual abuse of a child (under 16)**. The offence would cover all sexual behaviour that was wrong because it involved a child; it would complement other serious non-consensual offences such as rape, sexual assault by penetration and sexual assault.

Total no. of responses: 52

36 agreed

16 disagreed/ proposed an alternative

ISSUES RAISED IN RESPONSES

The majority of respondents supported this recommendation.

Issues raised included whether:

- “abuse” accurately described the activity concerned. Some may occur within mutually agreed relationships between people of broadly similar ages
- the existence of such an offence would deter those below the age of consent from seeking contraceptive advice. For example, a 15 year old might be afraid of getting her 18 year old boyfriend into trouble
- the offence should be defined in terms of the disparity in age of the two parties involved rather than by reference to specific ages.

Government Response

Agree the recommendation in part.

The offence would apply to a man or woman of 18 or older who engaged in any sexual or indecent act with a child under 16. It would also cover cases where the adult

- *incited or caused a child to carry out a sexual or indecent act, whether on the accused, another person or the child himself; or*
- *performed a sexual or indecent act towards a child ; or*
- *caused a child to witness a sexual or indecent act (whether live or recorded).*

However, the term "abuse" could result in inappropriate action being taken by child protection agencies, for example where the relationship is not in fact abusive. We therefore propose that the offence should be adult (over 18) sexual activity with a child (under 16).

RECOMMENDATION 20

20: There should no time limit on prosecution for the new offence of adult sexual activity with a child.

Total no. of responses : 50

36 agreed

14 disagreed/ proposed an alternative

ISSUES RAISED IN RESPONSES

The majority of respondent supported this recommendation.

Some of those who disagreed with it referred to the damage cause by unfounded allegations of abuse in childhood. Others thought that there should be some time limit within which allegations of abuse could be brought.

Government Response

Agree the recommendation.

Although concerns have been raised about false allegations, there is no logical reason why this offence alone (or indeed sex offences in general) should be singled out for a time limit.

RECOMMENDATION 21

21: A **mistake of fact in age** should be available as a defence, but with the following restrictions: that it should be limited to honest and reasonable belief and that the defendant has taken all reasonable steps to ascertain age.

Total no. of responses : 50

34 agreed

16 disagreed/ proposed an alternative

ISSUES RAISED IN RESPONSES

The majority of respondents supported the recommendation.

A few thought this defence should not be available at all.

Issues raised include:

- whether this defence should be phrased as “mistaken belief in the age of victim”
- that there should be no requirement on the defendant to take either all or any reasonable steps given that the defence was limited to honest and reasonable belief
- what the reasonable steps would constitute
- that reasonable should be taken to mean “reasonable in the circumstances”.

Government Response

Agree the recommendation in part.

If we are to have such a test, adding in the need to take “all reasonable steps” would be unnecessary. It is not clear what all steps would involve and whether the defendant's belief was reasonable will necessarily entail whether he took reasonable steps.

The test should therefore be honest and reasonable belief, but with no need for the requirement for the defendant to demonstrate that he took all reasonable steps to establish age. The defence would only apply where the child is 13 or over but under 16. Anyone engaging in sexual activity with a child below the age of 13 will be charged with a strict liability offence in relation to which there will be no defence available.

It is our intention that the defence of mistaken belief in age will only apply in relation to the offences of familial sexual abuse of a child and abuse of trust. In all other cases involving a child victim, it will be for the prosecution to prove that, in circumstances where there was room for doubt about a child's age, the defendant did not do what was reasonable in the circumstances to establish the age of the child.

RECOMMENDATION 22

22: The use of the defence of mistake of fact in age should be limited to raising the defence in court on one occasion only.

Total no. of responses: 48

22 agreed

26 disagreed/ proposed an alternative

ISSUES RAISED IN RESPONSES

Views were divided on this recommendation with a small majority disagreeing with it.

Issues raised included:

- why the defence should be limited to use on one occasion
- that the prosecution should be able to inform a court that the defendant had used it previously.

Government Response

Disagree with the recommendation.

It would be unjust to convict a person who had a mistaken belief in age where that belief was both honest and reasonable.

However, we recognise that there is a danger of the defence being repeatedly used by abusers. We therefore feel that the court should be entitled to have regard to all the available evidence about a claimed mistaken belief in age, including not only all the reasons put forward by the defendant for having that mistaken belief, but also whether the defendant has raised the same defence in court on a previous occasion, in order to determine whether the defence is made out.

The court would not automatically be entitled to be made aware of circumstances where the defendant used the defence in relation to a charge that did not result in a prosecution, or where he or she was acquitted on a technicality, but would need to be made aware of any cases where the defence had been raised and the defendant had formally been found guilty or not guilty of the charge(s) brought against him or her.

RECOMMENDATION 23

23: In principle, the defence of mistake of fact in age should remain **limited by age of defendant**.

Para 3.6.16: Children – a defence of mistake of fact in age

Do you agree that there should be a limitation on the age of the defendant who can use a mistake of fact defence?

If so should it be absolute (i.e. set at a particular age) or should there be an age differential (e.g. a maximum gap in age between the defendant and the child)?

What should the age differential, if any, be?

Total no. of responses 74

46 agreed *(most in favour of a 5 year age differential)

28 disagreed/ proposed an alternative

ISSUES RAISED IN RESPONSES

The majority of respondents agreed with the recommendation.

Many thought that there should be an age differential of 5 years between the parties involved.

Some thought the age of the defendant should not be relevant, suggesting that any age limit or age differential would be arbitrary and lead to injustice.

Government Response

Disagree with the recommendation.

The Review recognised there is no argument for this in terms of what is just. Whatever age was chosen would be arbitrary and an older person may be just as likely to make a mistake.

The jury would be able to take account of the relative age difference in deciding whether they believed the defendant's version of events.

RECOMMENDATION 24

24: *Belief in marriage should remain a defence to offences involving sex with a child, but this should not apply where the child is below the age of 13.*

Total no. of responses : 35

18 agreed

17 disagreed/ proposed an alternative

ISSUES RAISED IN RESPONSES

Views were divided on this recommendation.

Issues raised include:

- if children under 16 cannot consent to sex they should not be able to consent to marriage
- religious or cultural reasons should not be allowed to justify sex with children aged between 13 and 16 in this country.

Government Response

Agree the recommendation.

We have no evidence about how often this defence is used, but in light of the special position accorded to marriage by the ECHR and the UK's international obligations to recognise valid overseas marriages we agree that the defence should remain.

We consider that we are justified in excluding children who are under 13 from the defence because of the need to protect such children.

RECOMMENDATION 25

25: An offence of the persistent sexual abuse of a child reflecting a course of conduct should be introduced.

Para 3.7.6: Children – a course of conduct offence to reflect a pattern of abusive behaviour

We would welcome views whether there should be any course of conduct offences relating to the abuse or sexual exploitation of children.

Total no. of responses : 70

57 agreed

13 disagreed/ proposed an alternative

ISSUES RAISED IN RESPONSES

The majority supported this recommendation because it would assist the courts in passing sentences which properly reflected patterns of persistent abuse.

Issues raised include:

- practical difficulties in prosecuting the offence might mean that it was more difficult to prove than existing legislation and might be little used
- each count would still have to be carefully drafted to ensure that the defendant knew what was alleged against him and he could mount a proper defence
- existing legislation enabled judges to pass higher sentences in cases of persistent abuse.

Government Response

Disagree with the recommendation.

The Review has recommended a new offence of persistent sexual abuse of a child to reflect a course of conduct where a person had, on three or more separate occasions, engaged in abuse of a particular child.

On the basis that generalised allegations of abuse would be difficult to defend, the prosecution is currently required to identify specific incidents. This clearly establishes the charges a defendant needs to address and enables the jury to consider specific facts. Under present arrangements, proving one specific count can lead to a conviction, but where the prosecution wishes to deal with a larger pattern of abuse, counts can be put on an indictment relating to specific incidents over a period of time. There are successful prosecutions for abuse over a period of years and, where there is more than one count, indicative of a pattern of abuse, sentences for offences against children are often in double figures.

We have consulted with the legal profession, which believes that the current practice

of listing specific counts serves the same purpose as the proposed new offence, which would not add to the present law.

We believe this recommendation is not necessary and should be rejected.

RECOMMENDATION 26

26: Those recognised as giving help, advice, treatment and support to children and young people in matters of sexual health should not be regarded as aiding and abetting a criminal offence, nor should the children and young people who seek help and advice about sexual health matters, including contraception.

Para 3.8.2: Children – seeking or giving advice on sexual health matters should not be criminal

Is it sufficient to make this intention clear, or does this need to be set out in any new statute?

Total no. of responses: 80

72 agreed

8 disagreed/ proposed an alternative

ISSUES RAISED IN RESPONSES

The large majority of respondents supported this recommendation.

A few raised the need to ensure that the recommendation should not cover staff providing relevant advice or treatment to children who went beyond their legitimate remit and engaged in sexual abuse of children.

Government Response

Agree the recommendation.

This effectively reflects current practice and we believe it should continue.

RECOMMENDATION 27

27: There should be an offence of **sexual activity between minors** to replace the existing offences of unlawful sexual intercourse, buggery, indecency with children and sexual activity prohibited for children. It should apply to children under the age of 18 with those under the age of consent.

Total no. of responses : 47

28 agreed

19 disagreed/ proposed an alternative

ISSUES RAISED IN RESPONSES

The majority of respondents agreed with the recommendation.

Issues raised include:

- such an offence should take account of the proximity of age and the circumstances of the relationship between those involved
- that the offence should either not lead to registration under the Sex Offenders Act or should not necessarily lead to registration
- the practical difficulties in proving guilt where the activity is consensual.

Government Response

Agree the recommendation.

While children engaged in mutually agreed sexual activity should not normally be prosecuted, there has to be some criminal law in place to ensure the protection of children from each other as well as adults. The law must protect children from sexual abuse regardless of the age of the offender. However, the law should distinguish between sexual activity between an adult and a child and sexual activity where both are technically children. The offence of sexual activity between minors would be used only where the behaviour was not mutually agreed, but was exploitative and coercive.

The defence of marriage would apply to the juvenile offence of underage sexual activity as to the adult offences. However, bearing in mind our recommendation that a child under the age of 13 should be deemed not to have the capacity to consent, a boy under 18 who has sexual intercourse with a girl under 13 would theoretically be guilty of rape, regardless of the apparent consensual nature of the activity. This raises some difficult issues of fairness and child protection and it should be open to the CPS to decide, on the facts of each individual case, whether prosecution is in the interests of the public and the two children involved - please see the response to recommendation 28. This would need to be made clear in the implementing guidelines.

RECOMMENDATION 28

28: We recommend that further consideration should be given to **appropriate, non-criminal interventions** for young people under 16 engaging in mutually agreed under-age sex who are not now and should not in future, normally be subject to prosecution.

Total no. of responses : 46

38 agreed

8 disagreed/ proposed an alternative

ISSUES RAISED IN RESPONSES

The majority of respondents agreed with the recommendation.

Issues raised include:

- the purpose of any interventions would need to be clear
- some respondents believed all sexual activity between teenagers should be lawful.

Government Response

Agree the recommendation.

This policy would apply where there was consensual sexual activity between those under the age of consent – unless the relationship is abusive or coercive in some way, the intervention of the criminal law is not appropriate. Cases should be individually assessed for possible referral to a range of services from sex education to other forms of intervention, ensuring that these reflect the aims of a national sexual health strategy. The purpose of any interventions would need to be clearly recorded.

RECOMMENDATION 29

29: The criminal law needs to have measures in place which can be used to deal with **children who sexually abuse other children.** Sentencing decisions should reflect specialist assessment of risk and potential for longer term offending and include treatment options.

Total no. of responses : 28

25 agreed

3 disagreed/ proposed an alternative

ISSUES RAISED IN RESPONSES

The majority of respondents were in favour of this recommendation.

A number commented on the need for resources to be specifically devoted to this area.

Government Response

Agree the recommendation.

This follows on logically from the new offence of sexual activity between minors. A detailed assessment of a child should be available to inform the judges' decision on sentencing and disposal. This would need to take into account the perceived risk presented by the young offender; other factors such as family perceptions; collusion; denial etc; and any kind of abuse suffered by the offender.

RECOMMENDATION 30

30: There should be a **statutory definition of capacity to consent** which reflects both knowledge and understanding of sex and its broad implications. We recommend adoption of the definition proposed by the Law Commission.

Total no. of responses: 74

45 **agreed**
21 **agreed, subject to amendment**
8 **disagreed/ proposed an alternative**

ISSUES RAISED IN RESPONSES

The large majority of respondents agreed with the recommendation, although some proposed amendments to the definition of capacity to consent.

Issues raised include:

- many felt the Law Commission's definition was either too wide or set too high a test and proposed a variety of amendments
- evidence of lack of capacity should be determined by expert testimony, not cross-examination of the victim.
- the key question is whether an individual can, or cannot, give consent to sexual activity.

Government response

Agree the recommendation in part.

We are proposing that the law should criminalise sexual activity with a person who did not, by reason of a learning disability or mental disorder at that time, have the capacity to consent.

RECOMMENDATION 31

31: There should be a specific offence relating to **sexual activity with a person with severe mental disability** who would not have the capacity to consent to sexual relations.

Total no. of responses : 45

21 agreed

24 disagreed/ had reservations/proposed an alternative

ISSUES RAISED IN RESPONSES

Views were divided on this recommendation. Of those who disagreed with it, some felt there was no need for a new offence whilst others proposed a variety of alternative ways of framing it.

Issues raised included that the use of the term “severely mentally disabled” was not helpful in this context. The relevant fact is not a person’s general mental status, but their capacity to consent.

Government Response

Agree the recommendation.

However, the offence will be worded so as to relate to sexual activity with a person who did not, by reason of a learning disability or mental disorder at that time, have the capacity to consent. This will tie the offence to the complainant's capacity to consent at the particular time of the sexual activity in question.

RECOMMENDATION 32

32: There should be offences of a **breach of a relationship of care** to prohibit:

- sexual relationships between a patient with a mental disorder, whether inpatient or outpatient, and any member of staff, whether paid or unpaid;
- sexual relationships between a person in residential care and a member of staff, whether paid or unpaid;
- sexual relationships between a person receiving certain care services in the community and designated care providers whether paid or unpaid;
- sexual relationships between doctors and their patients, and therapists and clients.

Total no. of responses : 94

72 agreed in principle

15 disagreed/ proposed an alternative

7 made other points

ISSUES RAISED IN RESPONSES

The large majority of respondents supported the recommendation.

Some expressed concern at how it could be made to work in practice.

Issues raised include:

- a wider definition of residential care
- a wider definition of services in the community
- physical frailty should be included
- the term therapist should be defined widely to go beyond mental health therapy
- there should be a wider definition of sexual activity
- secure institutions should be included within the scope of the offence
- the inclusion of ministers of religion clergy, teachers and the police within the scope of the offence
- some groups highlighted the fact that sex education for mentally disabled people could be given in a 'hands-on' way. There should be a defence where sexual therapy is a recognised part of a person's treatment and is conducted by regulated sexual counsellors within the legitimate framework of their employment.

Government Response

Agree the recommendation in part.

We are proposing that the offence should relate only to victims who have a learning disability or mental disorder and are, therefore, particularly vulnerable to abuse and exploitation within a relationship of care. The government has no wish to interfere with mutually agreed consensual behaviour between individuals who are over the age of consent. We think that it would be an unnecessary intrusion in an individual's right

to a private life for the law to criminalise, as a matter of course, all consensual sexual activity within relationships of care. We feel that the appropriateness of such relationships should continue to be governed by codes of conduct and disciplinary measures.

However, there is a need to ensure the protection of particularly vulnerable members of society. We believe that where someone has a learning disability or mental disorder, their capacity to consent can be vitiated by their vulnerability to abuse or exploitation within a relationship of care. We therefore agree that sexual activity should be criminalised in such circumstances

Any perceived interference in the individual's right to have a sex life would be minimised by the option to break the relationship of care before engaging in a genuine sexual relationship or to use the defence that the parties have contracted a valid marriage.

RECOMMENDATION 33

33: There should be a defence of a pre-existing sexual relationship for the offence of breach of a relationship of care where there is some degree of capacity to consent

Total no. of responses 32

28 agreed

4 disagreed/ proposed an alternative

ISSUES RAISED IN RESPONSES

The majority of respondents agreed with the proposal.

The main concern, voiced in different terms by different respondents, was uncertainty about how the requirement that the person receiving care should retain “some capacity to consent” would be interpreted or applied.

Government Response

Agree the recommendation.

Where the sexual relationship existed before the onset of the relationship of care and the person being cared for is still capable of consenting to sexual activity, it would be unreasonable to criminalise that activity.

RECOMMENDATION 34

34: There should be a specific offence of **obtaining sex with a mentally impaired person by threat or deception.**

Total no. of responses: 35

30 agreed

5 disagreed/ proposed an alternative

ISSUES RAISED IN RESPONSES

The large majority of respondents agreed with the recommendation.

Issues raised included:

- it would be no easier to prove than the general offence of obtaining sex by threat or deception
- evidence about the nature of the threat or deception would necessarily bring into consideration the victim's state of mind
- it may be seen as a less serious offence than the general offence
- proliferation of offences is undesirable

Government Response

Agree the recommendation in part.

It is important for the law to recognise that victims who are suffering from a mental impairment can be induced or coerced into sexual activity by threat or deception. We therefore consider that inducement should be specifically covered by the offence. The level of threat or deception needed to coerce a person with a mental impairment into sexual activity may be comparatively low. This is a question of evidence and will need to be assessed on a case by case basis, taking account of the mental capacity of the victim.

In line with our proposals in response to recommendations 31 and 32, we are proposing that the offence should protect all those who have a learning disability or who have, or had at the time of the alleged offence, a mental disorder.

RECOMMENDATION 35

35: There should be an offence of **familial sexual abuse** to reflect the looser structure of modern families which will replace and extend the existing offences of incest.

Total no. of responses: 66

53 **agreed**

13 **disagreed/ proposed an alternative**

ISSUES RAISED IN RESPONSES

The majority of respondents to the consultation supported the recommendation.

Some of those who disagreed supported the recommendation in principle but made alternative proposals about which relationships should be covered by it.

Government Response

Agree the recommendation.

It is important that the law should provide protection from abuse and exploitation within the family unit where a child might reasonably have an expectation of safety. The abuse of trust associated with sexual abuse within the family unit makes it a particularly heinous crime. The law needs to make special provision to increase protection and provide appropriate remedies.

The term 'incest' in existing legislation only catches abuse by blood relatives. With today's looser family structures, adults within the family unit who have power and responsibility over children may or may not be blood relations. The abuse of their position within the family unit is unacceptable whether there is a blood relationship or not and needs to be addressed by a wider offence.

RECOMMENDATION 36

36: For the purpose of the offence of familial sexual abuse, the prohibition on sexual relations with a child should apply **until the child is 18.**

Total no. of responses: 41

31 agreed

10 disagreed /proposed an alternative

ISSUES RAISED IN RESPONSES

The majority of respondents supported the recommendation.

Issues raised include:

- whether the prohibition should exist at all, whether it should stop at 16 or at 18
- some young people may in practice find it very difficult to withhold their consent although the relationship is deeply unwelcome.

Government Response

Agree the recommendation.

Young people are particularly vulnerable if targeted by older family members upon whom they are heavily reliant. In such circumstances, even if they know that the sexual relationship is wrong and find it unwelcome, they may in practice be incapable of withholding their consent. This enhanced vulnerability is a sufficiently powerful argument to justify an age limit of 18 for offences of sexual abuse within the family.

We also agree that where a child under 18 is involved in a prohibited sexual relationship with an adult in the family unit, the responsibility and the criminal culpability should always be deemed to lie with the adult. This reflects the need to provide the maximum protection for children who are victims of abuse within the family unit.

As the offence would cover the abuse of a child under 18 by either an adult or another child within the family unit, we propose that the offence should be framed in terms of "familial sexual abuse of a child".

RECOMMENDATION 37

37. The offence of familial sexual abuse should apply to the sexual penetration of a child by all of those relations included in the existing offence of incest with the addition of uncles and aunts who are related by blood.

Total no. of responses: 64

38 agreed

26 disagreed/ proposed an alternative

ISSUES RAISED IN RESPONSES

Views were divided although a majority supported the recommendation.

Some who disagreed believed that the new offence should not extend to uncles and aunts, whether by blood, marriage or partnership. Others thought that it should include some but not others of these relationships.

Issues raised include:

- whether there should be an age limit for this offence and if so, what it should be
- the offence should apply not only to aunts and uncles, but also to first cousins
- the offence should apply to a wider range of activity than sexual penetration.

Government Response

Agree the recommendation in part.

We intend to widen the scope of the offence to cover uncles and aunts by marriage or partnership.

We believe that the fundamental issue for these proposed offences is the position of care, authority and trust held within the family unit, rather than the blood relationship.

The term "partnership" will be defined to make the law absolutely clear about the scope of the offence.

We can see no justification for limiting the scope of this offence to sexual intercourse, as any type of sexual abuse perpetrated within the family unit is equally heinous. We propose that this offence should cover all activity that a reasonable person would consider to be sexual or indecent in all the circumstances.

RECOMMENDATION 38

38: Adoptive parents should be treated on the same basis as natural parents for the purposes of the offence of familial sexual abuse.

Total no. of responses: 42

40 agreed

1 disagreed

1 questioned formulation of offence

ISSUES RAISED IN RESPONSES

Almost all respondents supported the recommendation.

One respondent questioned what the position would be in relation to adoptions overseas and in situations where one party to a marriage had adopted the child, but their spouse has not.

Government Response

Agree the recommendation.

Existing legislation excludes adoptive relationships from the offence of incest, on the basis that the concept of incest is based on eugenics arguments. We think that a fundamental issue for the proposed offence of familial abuse is the position of care, authority and trust held by the other person within the family unit, not only whether he or she is a family member by blood or adoption. Nor do we think the offence should distinguish between those who have formally adopted a child and those who are in a familial relationship with a person who has adopted a child.

We therefore think that the scope of the offence should be widened to include spouses and partners of adoptive parents and other members of the family into which the child has been adopted.

The law would need to be very clear about culpability where a marriage or relationship with an adoptive parent has ended. We are recommending that the offence should cover children up to the age of 18, even where the marriage or relationship between the adoptive parent and the non-adoptive spouse or partner has broken down.

RECOMMENDATION 39

39: Sexual relations between adoptive siblings should be prohibited until the age of 18.

Total no. of responses: 44

28 agreed

16 disagreed/ proposed an alternative

ISSUES RAISED IN RESPONSES

The majority of respondents supported the recommendation.

Many of those who disagreed with the proposal did so on the grounds that the age at which adoptive siblings should be able to have a relationship should be 16.

Government Response

Agree.

Adoptive siblings are very much part of the same family and sometimes do not even know that they are adopted. It therefore seems sensible for them to be regarded in much the same way as blood siblings and for the law to treat them as such.

It is consistent with the general offence of familial sexual abuse of a child that this should apply until the children reach the age of 18.

RECOMMENDATION 40

40: There should be a defence of marriage for adoptive siblings over the age of 16.

Total no. of responses: 36

19 agreed

15 disagreed/ proposed an alternative

2 made other points

ISSUES RAISED IN RESPONSES

Views were divided but a majority agreed with the recommendation.

Of those who disagreed, most were concerned about the unequal treatment of same sex relationships.

Government Response

Agree the recommendation.

An upper age limit of 18 is preferred for the prohibition on sexual relationships between adoptive siblings, in the interests of providing maximum protection for children in familial relationships.

However, as the law does not prohibit marriage between adoptive siblings, it is clearly right to provide a marriage defence for adoptive siblings who marry with parental consent between the ages of 16 and 18.

RECOMMENDATION 41

41: The offence of familial sexual abuse should apply to stepparents and foster-parents. If that relationship has ended, a prohibition should still apply until a child is 18.

Total no. of responses: 60

48 agreed

9 disagreed/ proposed an alternative

3 made other points

ISSUES RAISED IN RESPONSES

The majority of respondents supported the recommendation.

Issues raised include:

- a number of respondents thought that the prohibition should be lifelong
- a few thought that, whilst such adult relationships are not necessarily desirable, they should not be criminalised.

Government Response

Agree the recommendation.

Foster parents or stepparents usually assume the same role as natural parents and the issues relating to care and trust are the same.

Continuing to apply the prohibition up to the age of 18 even where the familial relationship has ended is in keeping with the aim of providing maximum protection for children in familial situations.

A marriage defence must be available where a foster or stepparent marries a child of 16 or 17.

RECOMMENDATION 42

42: The offence of familial sexual abuse should apply to sexual penetration with or of a child by any other person who is living in the household and in a position of trust or authority over that child

Total no. of responses: 42

32 agreed

4 disagreed

6 proposed an alternative or amendment

ISSUES RAISED IN RESPONSES

The majority of respondents supported the recommendation.

Issues raised include:

- why the offence should be limited to penetration only
- the offence should apply even when the child reached adulthood.
- the test should be that of living in the household and/or in a position of trust
- all sexual partners of the mother/parent should be included, however transitory.

Government Response

Agree the recommendation in part.

We agree that extending the scope of the offence of familial sexual abuse, to cover those who are not in a formal relationship, will increase the relevance of the law to the looser family structures common in today's society. It is in keeping with our aim to provide as much protection as possible for children within the family environment.

A marriage defence should be available for such an adult who marries a child aged 16 or 17.

However, as discussed in response to recommendation 37, we propose that the offence should relate to all forms of sexual or indecent activity.

RECOMMENDATION 43

43: Sexual penetration between adult close family members (defined as certain blood and adoptive relationships) should continue to be forbidden by law.

In the light of evidence about the early onset and abusive nature of incestuous relationships started in childhood, the responsibility for any offence should sit with the person who was adult at onset.

Total no. of responses 52

27 agreed

6 disagreed

19 proposed an alternative

ISSUES RAISED IN RESPONSES

Views were divided. A significant number of respondents proposed changes to the relationships which should be covered by the offence.

Government Response

Agree the recommendation in part.

Incestuous relationships between adult blood family members should continue to be prohibited. The fundamental motivation for this offence is the breach of trust, which underpins the rest of the proposals relating to familial sexual abuse. The proposed lifelong prohibition is consistent with the existing offence of incest, which is well understood and is already accepted not only for genetic reasons, but also as a means by which moral standards are upheld.

We agree that ignorance of the familial relationship should be a defence.

Existing legislation specifically excludes adoptive relatives from the offences of incest. Although we have agreed with the Review that adoptive relationships should be included in the proposed offence of familial sexual abuse of a child, we do not believe that they should be included in the adult offence. We think that it would be an unnecessary intrusion for the law to criminalise sexual relationships between consenting adults who are not related by blood.

RECOMMENDATION 44

Recommendation 44: The criminal law should not treat people differently on the basis of their sexual orientation. It should offer protection from all non-consensual sexual activity. Consensual sexual activity between adults in private that causes no harm should not be criminal.

Total no. of responses 45

39 agreed

4 disagreed

2 No view expressed

ISSUES RAISED IN RESPONSES

The large majority of respondents supported the recommendation.

Issues raised include:

- whether the recommendation covered sado-masochistic activity

Government Response

Agree the recommendation.

The criminal law should not be used as an arbiter of private morality but an expression of what is needed to protect society as a whole. There is no good justification for it to be used to regulate consensual sexual behaviour between competent consenting adults where there is no harm to either of them. There is no justifiable reason for treating men and women differently in the criminal law on the basis of their sexual orientation.

This is in accordance with the Government's commitment to the principle of equality before the law and the principles enshrined in the ECHR.

RECOMMENDATION 45

Recommendation 45: The present offences of buggery and gross indecency should be repealed, with separate provision made for the protection of children and animals and for regulating sexual behaviour in public.

No. of responses 39

33 agreed

6 disagreed/sought further detail

ISSUES RAISED IN RESPONSES

A large majority of respondents supported the recommendation.

Issues raised included how existing convictions for these offences should be treated if these offences are repealed.

Government Response

Agree the recommendation .

The criminal law must have in place provisions for the protection of children and animals, and for regulating sexual behaviour in public - these are dealt with in other Recommendations made by the Review.

RECOMMENDATION 46

Recommendation 46: Section 16 of the Sexual Offences Act 1956 and Section 4 of the Sexual Offences Act 1967 will no longer be necessary and should be repealed.

No. Of Responses 33

30 Agreed

3 Disagreed/Sought Further Detail

ISSUES RAISED IN RESPONSES

Nearly all respondents supported the recommendation.

Government Response

Agree the recommendation.

RECOMMENDATION 47

Recommendation 47: Section 32 of the Sexual Offences Act 1956 should be repealed.

No. of responses : 36

36 agreed

8 disagreed

ISSUES RAISED IN RESPONSES

The majority of respondents agreed with this recommendation.

Many of those who did not argued that this matter should be considered as part of a wider review of prostitution, rather than in a piecemeal way as part of these proposals

Government Response

Agree the recommendation.

This behaviour will be covered by a gender-neutral offence.

RECOMMENDATION 48

Recommendation 48: Consideration should be given to the regulation of soliciting by men for the purposes of prostitution under section 1 of the Street Offences Act 1959 on the same basis as soliciting by women.

Total no. of responses 37

32 agreed

5 disagreed/sought further detail

ISSUES RAISED IN RESPONSES

A majority of respondents supported the recommendation.

Of those who did not, some commented that

- the Street Offences Act 1959 is flawed because it is gender specific and should not be seen as a good way of dealing with male soliciting
- a review of the law on prostitution as a whole is needed.

Government Response

Agree the recommendation.

The criminal law needs to be able to deal with soliciting whether it is carried out by males or females. We will therefore be creating a gender-neutral offence to deal with such behaviour.

RECOMMENDATION 49

49: There should be a **specific trafficking offence**. This offence could involve bringing or enabling a person to move from one place to another for the purposes of commercial sexual exploitation or to work as a prostitute (e.g. knowingly facilitating transportation), for reward.

Any such new offence should have attached powers to trace assets overseas.

Total No. Of Responses 43

35 Agreed

8 Disagreed/Sought Further Detail

ISSUES RAISED IN RESPONSES

The majority of respondents agreed with the recommendation.

Issues raised include:

- the offence should adopt the definition of trafficking used in the UN Protocol.
- the proposed offence is too widely defined and would criminalise all aspects of a prostitute's free movement
- the offence seems to presuppose that all commercial sexual activity is exploitative
- whether the offence should be defined in terms of force, coercion and harm
- the exploitation should not have to be 'commercial'.

Government Response

Agree the recommendation.

There should be a specific offence of trafficking for the purposes of sexual exploitation. We have already introduced a new offence of trafficking to control someone in prostitution in the Nationality Immigration and Asylum Act 2002 but this is a stop gap measure and would need to be replaced by this measure to take account of the changes to the law on sexual exploitation.

RECOMMENDATION 50

50: The review considers that the **commercial sexual exploitation of children** should be dealt with by specific offences in which ‘child’ should refer to any person up to the age of 18, and where sexual exploitation includes the use of a child in prostitution or in the making of pornography.

Total no. of responses: 36

31 agreed

5 disagreed or proposed changes (to age or ‘commercial – see below)

ISSUES RAISED IN RESPONSES

The large majority supported the recommendation.

Issues raised include:

- “child’ should refer to any person up to the age of 16, not 18
- “child” should refer only to those under the age of consent
- the offence should not be one of strict liability
- the offence should not require that the exploitation be ‘commercial’
- children may be used in pornography that is intended for circulation without gain
- it should be an offence to attempt to use a child in prostitution. The police should not have to wait for sexual activity to take place before they can make an arrest.

Government Response

Agree the recommendation.

The commercial sexual exploitation of children should be dealt with by specific offences. ‘Child’ should refer to any person up to the age of 18 and the offences should cover the use of children in prostitution or in the making of pornography. The threshold definition of pornography relating to children should be that in the Protection of Children Act 1978, indecent images of children.

There should be an exception for children aged 16 or 17 who take intimate photographs of themselves for their own use since they are over the age of consent and it seems an undue invasion of their privacy to stop them taking pictures of themselves for their own use.

RECOMMENDATION 51

51: It should be an offence to:

- **Buy the sexual services** of a child;
- **Recruit, induce or compel** a child into commercial sexual exploitation;
- **Participate in, facilitate or allow** the commercial sexual exploitation of a child;
or
- **Receive money or other reward, favour or compensation** for the sexual exploitation of a child.

No. Of Responses 36

34 Agreed

2 Asked for Clarification

ISSUES RAISED IN RESPONSES

Nearly all respondents wholly agreed with the recommendation.

Issues raised include:

- some respondents sought clarification of what the terms 'buy', 'recruit', and 'allow' would mean in practice
- whether 'allow' was too broad a term
- concern that the offence would criminalise those 16 and 17 year olds who make pornographic images of themselves for their own non-commercial use.

Government Response

Agree the recommendation in part.

This is an important area and is the subject of international action. It is important that the law is strengthened. We will ensure the commercial sexual exploitation of children is criminalised.

Care must be taken to ensure that persons providing legitimate advice to children in prostitution are not liable for the offence of 'allowing' the commercial sexual exploitation of a child.

RECOMMENDATION 52

52: There should be offences of :

- **Exploiting others** by receiving money or reward from men and women who are prostitutes;
- **Managing or controlling** the activities of men and women who are prostitutes, for money or reward; and
- **Recruiting men or women into prostitution** whether or not for reward or gain.

No. Of Responses: 39

29 Agreed

10 Disagreed

ISSUES RAISED IN RESPONSES

A majority of respondents agreed with the recommendation.

Many of those who disagreed argued that there should a thorough review of prostitution as a whole.

Issues raised include:

- whether receiving money from prostitution is inherently exploitative
- the recommendation would perpetuate the criminalisation of prostitutes and their families
- prostitutes with the ability to give free agreement should not be subject to laws designed to protect the vulnerable.
- refusing to allow commercial sex in safe environments would expose prostitutes to risk and fail to respect the right to a private life.

Government Response

Agree the recommendation in part.

We disagree that it should be an offence to 'exploit others by receiving money from men and women who are prostitutes'. This would criminalise any person who entered into a legitimate transaction with a prostitute, such as selling them groceries. The criminal behaviour in the current offence of 'living off the earnings of prostitution' should be covered by the offence of 'controlling the activities of men and women who are prostitutes'.

We disagree that it should be an offence to manage the activities of men and women who are prostitutes because this would, for example, catch the person employed by the single prostitute working alone to book her appointments. There is no public policy justification for preventing this activity. The real criminal behaviour is when persons control the activities of prostitutes. We are proposing instead an offence 'to

control (in whole or in part) the activities of men and women who are prostitutes for reward or gain'.

We agree that it should be an offence to recruit men or women into prostitution for gain.

RECOMMENDATION 53

53: There should be a further review of the law on **prostitution**. (Para 7.8.3)

No. Of Responses: 43

41 Agreed

2 Disagreed

ISSUES RAISED IN RESPONSES

Nearly all respondents supported the recommendation.

Government Response

Agree the recommendation in part.

We will examine the scope for a review of the issues surrounding prostitution and the exploitation, organized criminality, drug abuse and anti-social behaviour associated with it.

RECOMMENDATION 54

54: There should be a new offence of **indecent exposure** relating to exposing the penis when he knew or should have known that he might cause fear, alarm or distress to another person.

Total No. Of Responses 452

23 Agreed

21 Disagreed

408 Agreed in part

ISSUES RAISED IN RESPONSES

The overwhelming number of responses on this recommendation were from private individuals and the majority focused on the need to ensure that the proposed offence does not interfere with the rights and individual freedoms of Naturists.

Issues raised included:

- the proposed offence should not criminalise nudity practiced as part of religious ritual
- the offence as worded would outlaw all public nudity
- that there should be a test that a 'reasonable person' knew/should have known the effect of his behaviour
- that there should be a test that the exposure would cause fear, alarm or distress to a 'reasonable person'
- that there should be a test that the penis was exposed in an aggressive or threatening manner.
- rather than creating an offence limited to one sex, there should be a presumption in law of equal treatment between the sexes unless there is an overwhelming case otherwise.

Government Response

Agree the recommendation in part.

However, the offence should be couched in gender neutral terms i.e. exposure of the genitalia in circumstances where the person intended to cause or was reckless as to causing alarm or distress. It is not intended that the offence will apply to naturists engaged in leisure pursuits with no intention of causing alarm or distress.

RECOMMENDATION 55

55: There should be an offence of **voyeurism** where a person in the interior of a building or other structure has a reasonable expectation of privacy and is observed without their knowledge or consent, whether by remote or mechanical means or not. There should be an exception for authorised surveillance.

Total no. of responses : 94

20 Agreed

5 Disagreed

69 Agreed in part

ISSUES RAISED IN RESPONSES

Views were divided on this recommendation. A majority agreed in principle but proposed changes to the definition of the offence.

Issues raised include:

- what constitutes a private area
- many respondents felt the offence was too narrowly drawn and should extend to outdoor areas such as gardens, vehicles and caravans.
- the individual being observed would need to have taken care to ensure that they would not be observed or had a reasonable expectation that this would be the case
- the offence should avoid unintentional sight of someone
- a test of sexual intent or a sexual element to the crime was necessary
- the offence should not hinder the legitimate activities of the press.

Government Response

Agree the recommendation.

We intend to criminalise the covert observation, whether by remote, mechanical or manual means, of another person or persons performing acts of a sexual and/or intimate nature without his or her consent in circumstances where he or she has a reasonable expectation of privacy. The offence will apply where the person carried out the covert observation for his or her own sexual gratification or for the sexual gratification of others. This offence will not interfere with or hinder the legitimate operations of the press.

RECOMMENDATION 56

56: A new **public order offence** should be created to deal with sexual behaviour that a person knew or should have known was likely to cause distress, alarm or offence to others in a public place.

Total no. of responses: 71

Agreed 24

Disagreed 3

Agreed in part 44

ISSUES RAISED IN RESPONSES

Views were divided on this recommendation. A majority partially agreed with it.

There was a wide range of comment including :

- disapproval of all, or some forms of sexual activity in public
- concern that nudity by naturists might be caught by the offence
- concern at the lack of definition of "sexual behaviour"
- concern that the offence must operate in a way that does not discriminate between homosexual and heterosexual activity (although one respondent thought that the law should discriminate in such a way)
- noting that incorporation of the European Convention on Human Rights into UK law should have the effect of preventing discriminatory charging
- a suggestion that there should be additional tests to be satisfied, including intent, recklessness, or harm caused
- the proposed penalty (6 months) was considered too high by some and too low by others.

Government Response

Accept the recommendation.

We plan to introduce a new offence that specifically deals with sexual behaviour in a public place, with a penalty to address this type of offending behaviour.

The new offence of sexual behaviour in a public place will send out a strong signal of our intention to protect people from being unwilling witnesses to overtly sexual behaviour that most people consider should take place in private. It will be in addition to, and not a replacement for, existing public order offences. However it is not our intention to interfere in everyday behaviour in public that does not cause offence to the vast majority of people such as kissing or cuddling. It is also not our intention to criminalise sexual activity that takes place outdoors but in an isolated place where one would reasonably expect not to be observed.

RECOMMENDATION 57

57: A specific offence of bestiality should be retained.

Total no. of responses: 38

27 Agreed

11 Disagreed

ISSUES RAISED IN RESPONSES

A majority of respondents agreed with the recommendation.

Some respondents questioned why such actions could not be dealt with under animal cruelty legislation.

Government Response

Agree.

This type of offending behaviour is understood to be unnatural as well as degrading for the animals concerned and there can be no question of consent. Moreover, sexuality activity with animals is generally recognised to be profoundly disturbed behaviour.

We agree with the Review that this offence needs to be retained. It should be gender neutral to criminalise penetration of an animal or causing or allowing an animal to penetrate a person.

RECOMMENDATION 58

58: Sexual interference with human remains should be an offence.

Total no. of responses : 31

30 Agreed

1 Disagreed

ISSUES RAISED IN RESPONSES

Nearly all respondents agreed with the recommendation.

Issues raised include the need to formulate the offence in such a way that it did not catch legitimate dealings with corpses, such as by pathologists or undertakers.

Government Response

Agree the recommendation.

Although there is no indication that such activity is anything but rare, when it does occur, it causes considerable distress to relatives and is a violation of the dignity of the dead person.

Sexual penetration of a dead body can form part of a continuum of sexual offending.

We believe this behaviour is so deviant as to warrant the intervention of the criminal law.

RECOMMENDATION 59

59: Sex offender treatment should continue to develop and be made available to those convicted of relevant offences and early professional assessment of the need and suitability for treatment should be part of any sentence for such offenders.

Total no. of responses: 22

21 agreed

1 disagreed

ISSUES RAISED IN RESPONSES

Nearly all respondents agreed with the recommendation.

Most respondents felt that an early assessment of suitability for treatment was an important element of the sentencing process for sex offenders. They also considered that suitable treatment ought to be available to those who require it.

Government Response

Agree that sex offender treatment ought to continue to develop and that early professional assessment of the need and suitability for treatment ought to form part of any sentence.

RECOMMENDATION 60

60: All of the offences that we recommend, except for those which we recommend as public order/public nuisance offences, carry some degree of risk that would justify their consideration as part of a review of Schedule 1 of the Sex Offenders Act 1997.

Total no. of responses : 22

22 agreed

0 disagreed

ISSUES RAISED IN RESPONSES

All the respondents supported this recommendation.

Issues raised included:

- murder with a sexual element ought to trigger registration.
- registration for offences that have been repealed, particularly in the case of homosexual offences, ought to end.

Government Response

Agree the recommendation.

This work has already been taken forward by the Review of the Sex Offenders Act 1997 and the outcome will be dealt with in the same legislation as these proposals.

RECOMMENDATION 61

61: The issue of the requirement for children to register under the Sex Offenders Act should be separately considered in a review of the Act.

Total no. of responses : 20

20 agreed

0 disagreed

ISSUES RAISED IN RESPONSES

All respondents supported this recommendation.

Issues raised included:

- consensual sexual activity between young people should not trigger registration.
- abusive behaviour by juvenile offenders ought to be subject to the same provisions for registration as an adult.

Government Response

The review of the Sex Offenders Act 1997 examined how the Act should apply to those aged under 18 convicted of sexual offences.

This work has already been taken forward by the Review of the Sex Offenders Act 1997 and the outcome will be dealt in the same legislation as these proposals.

RECOMMENDATION 62

62: The provision of alternative verdicts should be considered in the preparation of new legislation, and for the avoidance of doubt that they should be set out in statute.

Total no. of responses : 20

20 Agreed

0 Disagreed

ISSUES RAISED IN RESPONSES

All respondents agreed with the recommendation.

Government Response

Agree the recommendation.

We consider that alternative verdicts ought to be set out in statute for some of the more serious offences proposed by the Review. The Criminal Law Act 1967 provides that where a jury finds a defendant not guilty of an indictment of one crime, and the allegations in the indictment includes an allegation of another offence, the jury may find him guilty of that offence. For example, a defendant charged with rape might be convicted instead of sexual assault by penetration if it was proved that the victim was penetrated by something other than the defendant's penis.

The recommendation in Setting the Boundaries proposes that the law should set out which alternative verdicts will be available for each relevant offence.

