

Sexual Offences (Scotland) Bill

Written testimony submitted to the Scottish Parliament's Justice Committee

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Children in Scotland welcomes both the opportunity to submit written testimony and the invitation to appear before the Justice Committee on 4 November 2008. Our testimony is confined to issues within this *Bill* regarding children and young people.

There are many aspects of this *Bill* that we support. We are particularly heartened by its emphasis on ending the sexual exploitation and sexual abuse of children by adults – including adults having positions of trust in relation to children. No adult has the right to harm children in these ways and a criminal justice response to the perpetrators is fully justified. Assisting child *victims* of sexual exploitation or abuse also should be a priority.

Children in Scotland favours a *Bill* that will lead to a renewed, active effort by all relevant parties and individuals to achieve the following three general outcomes:

- ❖ **Actively and effectively discourage sexual intercourse not only among everyone under the established age of consent (16), but also among older teenagers who are not ready to become fully sexually active.** There is little evidence of the benefits – and significant evidence of the personal, social and economic costs – of full sexual activity by pre-16-year-olds.
- ❖ **Actively and effectively encourage all children below the age of consent (16) - - who, despite robust advice to the contrary, choose to engage in sexual intercourse -- to behave in a manner that will have the fewest and least serious negative consequences.** This means easy, confidential access to first-rate information about, and support for, avoiding pregnancy, preventing the transmission of sexually transmitted infections and dealing well with the social/emotional effects of sexual relationships.

- ❖ **Ensure that this *Bill* and other relevant law, policy, guidance and professional practice are based upon the best attainable evidence, rather than competing sets of assumptions, ideologies and preferences.** This includes heeding the call by Scotland's Commissioner for Children and Young People for in-depth research and a meaningful consultation process. Views should be sought from a national cross-section of children and young people about what messages and measures *would* really discourage early sexual intercourse, as well as what information and assistance *would* really encourage behaviours having the fewest and least serious negative consequences. A robust consultation process would be in keeping with Article 12 of the UN Convention on the Rights of the Child.

With these broad outcomes in mind, we have several specific comments and recommendations about Part 4 of the *Bill*. These deal with the use of age boundaries; criminal records for younger children; gender equalisation; criminalisation versus decriminalisation of consensual sex between 13-15 year-olds; and, the uniqueness of Scots law and Scottish policy.

Age boundaries

While they are useful tools in law and policy, it should be remembered that the age boundaries appearing in this *Bill* are only rough *proxies* for actual individual maturity, knowledge and ability. All aspects of human development (intellectual, sexual, social and emotional) can, and do, vary widely for children of the same age. No fundamental transformation occurs on young people's 13th or 16th birthdays.

And yet, the *Bill* draws strict lines between the actions/consequences of a 12-year-old and a 13-year-old, as well as between a 15-year-old and a 16-year-old. While only months apart in age – and sometimes equals in understanding and capacity – one would be classified as a 'victim' and the other as a 'perpetrator/criminal' for engaging in exactly the same behaviour.

There is at least one way of retaining these age boundaries in this *Bill* without causing problems in the implementation/enforcement process. We suggest that a presumption be added within the *Bill* that *criminal charges will not be made against either party in a consensual sexual relationship occurring between young people whose ages are within two years of each other.*

This suggested solution to the problem of artificial distinctions at the upper and lower ends of the 13-15 age boundaries also is imperfect. However, it might present significantly fewer difficulties in practice than strict adherence to the age boundaries in the current *Bill* (or the proposed use of "age proximity" as a defence in a criminal proceeding). After all, for the "age proximity" defence to be used, a criminal charge must already have been made – an event that is not likely to benefit (or advance the welfare of) the young people involved.

Criminal records for younger children

Children in Scotland shares the concerns raised by various other groups (mentioned in the SPICe briefing of 23/10/08) about the potential of this *Bill* to result in criminal records for children – when both are below the age of 13 -- who participate in a wide array of 'sexual activities' with each other. These include behaviours far short of sexual intercourse.

We see the potential of significant harm – and no significant benefit or advancement of the best interest of younger children – in identifying and treating their non-coerced, non-exploitative sexual explorations with each other as *criminal* behaviour. There are cases when such behaviour among younger children signals important health and welfare problems. In such cases, the appropriate and proportionate response is to ensure health and welfare interventions that will result in them getting the help they need.

Gender Equalisation

One distinctive positive feature of this *Bill* is its recognition of the gender inequalities of current sexual offence laws. We support the intent to promote gender equality in this *Bill* -- with one exception.

For reasons explained later in this testimony, we do not agree with the Part 4 provisions about 'older children' (13-15 years-old) that would expose these young women to a new set of potential criminal charges for consensual sexual intercourse with other older children. While this would make their legal status/vulnerability equal to that of young men of their age, we do not share the view that either males or females of this age should be treated as *criminals* for engaging in consensual sexual intercourse with each other.

In the memorable words of Kathleen Marshall during a recent Radio Scotland interview, this *Bill* should make the law "equally right not equally wrong"!

Criminalisation versus Decriminalisation of consensual sex between 13-15 year olds

Children in Scotland endorses the recommendation of the Scottish Law Commission (2007) that consensual sexual intercourse between two older children (13-15 year-olds) should be *decriminalised*. The Law Commission, the SPICe briefing on this *Bill* and the written evidence provided by other children's and sexual health organisations make the essential arguments in favour of decriminalisation cogently.

We wish only to add a few other points omitted or underemphasised to date:

1. The Scottish Government's stated intent toward older children -- throughout the Bill and its related *Policy Memorandum* -- is to be benevolent and protective (not punitive). However, it is a curious version of 'advancing welfare' that seeks to lay criminal charges against the very people it ostensibly seeks to benefit.

In the absence of a meaningful, extensive consultation process with children and young people across Scotland, their views of such governmental actions cannot be stated with certainty. And yet, it seems plausible that a large percentage of Scotland's children and young people would not welcome powerful adults criminalising their behaviour as an act of kindness or as 'protection'. Indeed, they might think they need more protection *from* criminal charges than protection *through* such criminalisation.

It also seems likely that few children and young people would themselves view consensual sexual intercourse with people their own age as *criminal* behaviour. Robbing a shop, stealing a car, selling cocaine, knifing someone, vandalising a building – all of these would be recognised by children and young people as *criminal* behaviour. Far fewer (if any) are likely to identify making love with a girlfriend/boyfriend of roughly the same age as similarly *criminal* behaviour.

2. The Scottish Government explicitly wants to use this *Bill* to 'send a message' to older children about society's disapproval of sexual intercourse between them. Children in Scotland shares the same aspiration. We agree that all children should receive the message loud and clear that sexual intercourse is not a healthy or wise choice for them to make while still children themselves. We also agree that government at all levels (as well as the rest of adult society) has a major role to play in communicating this good advice.

Clearly, the intent of this *Bill* is for 13-15-year-olds throughout Scotland to take on board the following message:

- *Going all the way and having sexual intercourse is such a bad idea and so dangerous to the health and well-being of people my age that they have made it a crime. The Government is serious about this and I will be too -- by not having sexual intercourse until I am at least 16 years old.*

Doubtless, there will be some older children who would understand the message in the way intended, take it to heart and refrain from any sexual intercourse during these years. That would be a positive and welcome outcome.

Nevertheless, we think it is plausible (indeed likely) that at least as many 13-15-year-olds will end up interpreting the 'message' of this *Bill* in one or more of the following unhelpful (and unintended) ways:

- *Drinking alcohol, smoking tobacco and lousy eating/exercise habits all are really bad for my health, so why aren't they illegal for me to do at home, too?*
- *They say that having sex is illegal, but it turns out that it's just fine for us to have all the oral sex we want.*
- *They say it's a crime for us to have sexual intercourse, but it turns out that they're just trying to scare us -- because nobody is even thinking about arresting or prosecuting us.*
- *It's illegal for us to have sexual intercourse. That's another reason to do it!*
- *It's a crime. So what? They just hate that they're old and we're young, so they try to stop us from having fun and feeling good. Forget the law.*
- *The Government doesn't 'get' that making love with my girlfriend/boyfriend has nothing in common with anything else that I understand to be a crime.*
- *If I buy contraceptives, then I am admitting to planning a crime. Forget contraceptives.*
- *If I think I might have an STI and go to get it treated, then I am confessing to a crime. They will not keep my crime confidential. Forget seeking treatment.*
- *I'm pregnant, so now I'm going to be a mum -- and a criminal. I have to hide this baby for as long as possible while I figure out what to do. Forget ante-natal care or even discussing what to do with any doctors or nurses.*

- *I'm pregnant and the baby is proof of my crime. I have to get rid of the baby.*
OR *My girlfriend's pregnant and I know they can prove I'm the father, so we have to get rid of the evidence or we'll be locked up.*

3. These examples illustrate the potential for serious gaps between the intended message of the *Bill* to 13-15 year olds and the unhelpful meanings these older children easily could derive from this *Bill* making consensual penetrative intercourse between them a criminal offence. This is not simply a question of misinterpretation on the part of young people. Rather, these examples bring into sharper focus the dilemma the *Bill* creates by being understood *either* as an empty threat *or* as a genuine threat of criminal sanctions.

At a minimum, criminalising these behaviours creates a powerful *disincentive* for older children to seek contraception, health services or adult counsel. At the same time, making consensual sex a criminal offence could create difficulties for involved adults. Health professionals know that confidentiality is a key factor encouraging older children to seek their advice, assistance and services. But, confidentiality will be much harder to promise (and to believe), as well as to maintain if criminal behaviour becomes part of the equation.

Although the *Bill* itself is silent on this point, it raises concerns about both the legal liability and the moral responsibility of other adults involved. Just to cite one of many examples, will there be legal liability for an adult who sells condoms to an older child (as there is now for selling them alcohol or tobacco)? Would giving free contraception to older children constitute aiding and abetting a crime?

4. There also is a potential communication problem with the course of action that we recommend – namely, that the *Bill* should be revised to *give young men the same non-criminal status currently accorded to young women*. The understandable worry is that decriminalisation of non-coercive, non-exploitative sex between older children will be interpreted by these young people to mean that the Government and society approves of sexual intercourse between under-16 year olds – or, at least, doesn't view it as a significant problem.

Unlike the inherent difficulties of getting the right message across in the face of criminalisation of sexual intercourse between 13-15 year olds, there is a straightforward way of making it plain to older children that *decriminalisation does not equal approval*. That way is for the government and other relevant adults to say so – loudly and clearly. In other words, the solution is to link decriminalisation to a major new public health campaign directed to – and conducted with the active participation of – young people across Scotland. As noted earlier, this campaign should have two complementary purposes:

- ❖ **Actively and effectively discourage sexual intercourse not only among everyone under the established age of consent (16), but also among older teenagers who are not ready to become fully sexually active.**

The point is to tell young people that the age of consent remains at 16 and to explain why sexual intercourse between younger people is a bad idea and unhealthy behaviour.

- ❖ **Actively and effectively encourage all children below the age of consent (16) -- who, despite robust advice to the contrary, choose to engage in sexual intercourse -- to behave in a manner that will have the fewest and least serious negative consequences.**

This means easy, confidential access to first-rate information about, and support for, avoiding pregnancy, preventing the transmission of sexually transmitted infections and dealing well with the social/emotional effects.

5. There is a valuable precedent within the Scottish Government's *Policy Memorandum* accompanying this *Bill*. In dealing with the perceived public misunderstanding of rape and the rape-related laws (including among potential jurors), the Government accurately noted the need for – and its responsibility to provide the resources for – a significant public awareness campaign to spread the right message throughout our nation.

The Government's positive action to combat misinformation and misunderstanding about rape should be mirrored in an expanded educational/public health campaign sending the right message about sexual behaviour and sexual health to children and young people in appropriate, effective ways. Doing so would remove the main pitfall to granting young men and young women equal non-criminal status in Scotland's sexual offence law. It also would reinforce the common sense idea that there are unwise, risky, dumb or unhealthy behaviours that effectively can be discouraged -- without resorting to the heavy hand of criminal law to express societal disapproval.

This recommended heightened public health campaign should be accompanied by a redoubling of Scotland's current efforts to make sexual health and relationship education an integral part of what children and young people actually learn at school. After all, this is an area in which ignorance does not remain bliss for very long.

The uniqueness of Scots Law and Scottish policy

One of the distinguishing characteristics of public policy in Scotland (when compared to England) is the tendency to view and treat children as *children*, even in the aftermath of their negative or worrying behaviour. For more than 40 years, Scotland's Children's Hearings system has received justifiable accolades internationally for providing a sensible and effective alternative to the criminalisation of children and young people. That admired Scottish tradition should be reflected and extended through revisions to this *Bill*.

Once children are labelled (or come to regard themselves) as "criminals", there are a series of both documented and predictable negative consequences. In part, it is a matter of young people living up – or, more precisely, *living down* – to this negative expectation. In part, one consequence for some children and young people is the development of an 'in for a penny, in for a pound' attitude – i.e., *if I'm going to be considered to be a criminal anyway, then why not stop with only this crime?*

The last thing that the Scottish Government or any other responsible group of adults wants is for the passage of the new *Sexual Offences Bill* to result in more teen pregnancies, more STIs, more disrespect/disregard for the law or more young people avoiding competent adult counsel and assistance in making decisions about, and dealing with, sexual matters. Our concern, however, is that criminalising consensual sexual behaviour between older children will have all of these unwanted effects.

That is why Children in Scotland – along with the Scottish Law Commission, Scotland's Commissioner for Children and Young People and a variety of respected children's and sexual health groups – recommends that the current *Bill* be revised to decriminalise consensual sexual intercourse between young people.

This *Bill* offers commendable improvements to the ways in which sexual offences by *adults* against children are defined and will be handled by the criminal justice system. **Stopping adults from exploiting, abusing and harming children is where all relevant parties should focus their attention and resources.**