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Liberty's second reading briefing on the Sex Offences (Amendment) Bill in the House of Commons

July 2003

Liberty (The National Council for Civil Liberties) is one of the UK's leading civil liberties and human rights organisations. Liberty works to promote human rights and protect civil liberties through a combination of test case litigation, lobbying, campaigning and research.

Introduction

1. The Sexual Offences (Amendment) Bill introduced into the House of Commons on 18 June 2003 seeks to reform the law on sexual offences and strengthen measures to protect the public from sexual offending.

2. Liberty welcomes the opportunity to comment on the provisions of the Bill because, while we welcome the codification of some aspects of the law relating to sexual offences, we remain concerned that some of the proposals do not strike an adequate balance between the individual's right to freedom of expression through sexual behaviour and the victim's right to be protected from unwelcome sexual contact.

Analysis of the Bill

PART 1: SEXUAL OFFENCES

Clauses 1-8: General offences

3. Clauses 1 - 8 make provision for general sexual offences, as follows:

- Clause 1 - rape
- Clause 2 - anonymity of defendants in rape etc cases
- Clause 3 - assault by penetration
- Clause 4 - sexual assault
- Clause 5 - causing a person to engage in sexual activity without consent
- Clause 6 - rape of a child under 13
- Clause 7 - assault of a child under 13 by penetration
- Clause 8 - sexual assault of a child under 13
- Clause 9 - Causing or inciting a child under 13 to engage in sexual activity

4. **Clause 1** of the Bill is significant in its attempts to clarify the law relating to consent in **rape**. We note that the effect of the new definition is that not only the offender who knows or is reckless (i.e. gives no thought) as to whether the victim consents will be guilty of rape (Clause 1(2)), but also the offender who acts in circumstances in which a "reasonable person" would doubt whether the victim consents and does not act in a way that such a reasonable person would consider sufficient in all the circumstances to resolve such doubt (Clause 1(3)). We note that similar provisions are found in **Clause 3** (**assault by penetration**) and **Clause 5** (**causing a person to engage in a sexual activity without consent**).

5. We are conscious of the background to this change, namely the concern that the low conviction rate in sex cases may have flowed in part from the fact that the concept of consent was largely subjective (i.e. depending on whether the defendant himself actually believed there was consent). We do accept the need to strengthen the law in this area in order to afford greater protection to the victims of sexual offences. Further, while we are generally concerned to ensure that the elements of criminal offences are defined with sufficient clarity as to discharge the requirements of legal certainty inherent in the European Convention on Human Rights, Article 6 we accept that this objective aspect

of the consent definition is reasonably 'tightly' worded; and hope that the twin concepts of (i) whether a reasonable person would in all the circumstances doubt whether the victim consents; and (ii) the actions a reasonable person would take to resolve any doubts as to consent, are ones which juries should be capable of grappling with.

6. We note that **Clauses 3 and 7** make provision for the offence of **assault by penetration**. While we welcome the attempt to make specific provision for non-penile penetration (which we suspect will cover a large number of sex cases) we wonder whether it would lead to greater clarity to specify that the new offence *only* applies when the assault is with something other than the penis (such as a digit or bottle). Without such clarification we are concerned that there is an unnecessary duplication between Clauses 1 and 3 and 6 and 7. In other words we are concerned that an offender guilty of rape under Clause 1 or 6 will automatically also be guilty of the offence of assault by penetration under Clauses 3 or 7, with no immediately apparent justification. The consent provisions and sentences for the two offences are identical, and so we do not understand why the Clause 3/7 offence should not be limited to non-penile penetration.

7. We generally welcome the attempt at **Clauses 5 and 9** to criminalise **causing a person to engage in sexual activity,** as this will effectively provide a further option for prosecutors in sex cases. For example, we are conscious that in the past it may not have been straightforward to prosecute an offender who forced a victim to watch him masturbate but did not actually touch the victim; or who forced the victim to masturbate themselves. Such behaviour would now fall naturally within the provisions of Clause 5 or 9 and is therefore to be welcomed.

8. We note that **Clauses 6, 7, 8 and 9** provide for the offences of rape, assault by penetration, sexual assault and causing a person to engage in sexual activity **where the victim is under 13**. In each of these clauses (as opposed to the 'mirror' offences on adults in Clauses 1, 3, 4 and 5) consent is not an issue, as the child under 13 is deemed incapable of giving legally significant consent to any form of sexual activity. Anyone who commits any of these sexual acts with a child under 13 is therefore automatically guilty of the relevant offence.

9. While we do not take issue with the fixing of 13 as the age below which consent in law cannot be given, we are concerned to ensure that this section does not unduly criminalise behaviour where there has been consent *in fact* by the under-13 year old. We say this because there are, and will be, cases where 11 and 12- year olds genuinely consent to sexual contact with each other ('Doctors and Nurses'?) or where a 14 year old boy and his 13 year old girlfriend wish to engage in sexual behaviour to which both consents. The concept of the distinction between consent in law and in fact is notoriously difficult and is one which the Criminal Injuries Compensation Authority has to grapple with, as paragraph 9(c) of their Rules precludes them from awarding compensation to an individual who has suffered mental injury alone from a sexual offence but who consented in fact to the offence, albeit that they were deemed not to have consented in law. However the emerging jurisprudence on this issue (see, for example, *R v Criminal Injuries Compensation Appeals Panel, ex parte A (2001) 2 WLR 1452* and *R v Criminal Injuries Compensation Appeals Panel, ex parte JE* [2002] EWHC 1050 (Admin) (in Court of Appeal, 29 January 2003) recognises that there will be relatively young children who are *Gillick* competent to engage in sexual behaviour - in other words that they comply with the approach set out in that case for determining whether a child has capacity to reach the decision to engage in sexual relations[1].

10. Accordingly we would like to see further consideration being given to the approach to be taken in cases where the actual consent of the alleged child victim is an issue. It may be that this could be factored into the Code for Crown Prosecutors so that the prosecution of such cases is less likely; alternatively that if the issue is squarely at large in the case, the Director of Public Prosecutions' consent would be required for a prosecution; alternatively that entirely separate offences be created for those cases where there has been factual but not legal consent. At the very least, actual consent

[1]See *Gillick v West Norfolk and Wisbech Area Health Authority and the Department of Health and Social Security* [1986] 1 AC 112, at p.189, where Lord Scarman said that when considering the legal capacity of a girl under the age of 16 to consent to contraceptive treatment: "...there is much that has to be understood.... It is not enough that she should understand the nature of the advice which is being given: she must also have a sufficient maturity to understand what is involved. There are moral and family questions, especially her relationship with her parents; long-term problems associated with the emotional impact of pregnancy and its termination; and there are the risks to health of sexual intercourse at her age, risks which contraception may diminish but cannot eliminate. It follows that a doctor will have to satisfy himself that she is able to appraise these factors before he can safely proceed upon the basis that she has at law capacity to consent to contraceptive treatment".

would have to be a heavily mitigating factor for the defendant convicted of these offences. Alternatively if it is felt, as we suspect it might be, that these provisions are intended to protect the child victim from the adult offender, the wording of the offences in Clauses 6, 7, 8 and 9 could be altered to make clear they only apply to older offenders, such as those over 18, or perhaps 16. We would certainly like to see this issue looked at again.

11. It is appropriate to look at the defendant anonymity provisions in Clause 2 in some detail, as this clause was not contained in the original bill published in the House of Lords. Complainants in rape cases have been given anonymity since 1976 when S.4 of the Sexual Offences (Amendment) Act of that year introduced prohibitions against publication of any matter which could lead to their public identification. The principle of anonymity was introduced as a result of the Heilbron Report (Report of the Advisory Group on the Law of Rape: Cmnd 6352, December 1975). The Heilbron committee considered whether the defendant should also be anonymous and concluded, forcefully, that he should not be. At para 177,

' The reason why we are recommending anonymity for the complainant is not only to protect victims from hurtful publicity for their sake alone, but in order to encourage them to report crimes of rape so as to ensure that rapists should not escape prosecution. Such reasoning cannot apply to the accused. The only reason for giving him anonymity is the argument that he should be treated on an equal basis. We think it erroneous to suppose that the equality should be with her – it should be with other accused persons and an acquittal will give him public vindication.'

12. Despite the recommendations of the Heilbron Report, the 1976 Act did include anonymity for the defendant in cases of rape, introduced by concessionary amendment during the debate stage. This was removed by S.158 of the Criminal Justice Act 1988 following a recommendation by the Criminal Law Revision Committee (Fifteenth Report, Sexual Offences, Cmnd 9213, April 1984) The CLRC, which approved of the Heilbron proposals, recommended that defendants' anonymity be removed. They found there was no reason in principle why rape should be distinguished from other offences, concluding at para 2.92, 'the 'tit for tat argument' – that the man should be granted anonymity because the woman has it – is not in our opinion valid despite its superficial attractiveness'.

13. Liberty accepts the principle of anonymity for complainants in rape or other serious sexual offences is justifiable. The disparity between the numbers of rapes that apparently occur each year and the very low number of convictions by the courts demonstrates that the criminal justice system is failing the victims of rape. In order to ensure that those who are raped feel able to report this to the police victims should retain their right to anonymity. Liberty agrees that the protection from publicity encourages victims to report the crime.

14. Liberty does not support the extension of this principle to defendants. The parties in a rape offence are not 'equal' in the sense that they both require the protection of anonymity: the public interest in encouraging complainants to give evidence permits a departure from the general rule that court proceedings are truly public hearings. There is no equivalent public interest in permitting others to remain anonymous. Liberty considers that the original arguments as outlined above continue to be valid, and that the public interest in open justice over rides the 'tit for tat' argument. Trials should take place in public, and the press should be able to report them in full. The rights of the public to scrutinize the criminal justice system, even where the parties themselves may not welcome it, is a fundamental protection which should not be eroded.

15. Liberty understands that there may be a public perception of apparent 'unfairness' where a defendant has been acquitted of the charge, the publicity attending the trial has been extensive and detailed, and the complainant continues to be protected by anonymity. However, where the acquittal can properly be seen, in the words of the Heilbron report, as a 'vindication' of the defendant's innocence, perceptions of unfairness are misconceived. Where the public perception is or might be that 'there is no smoke without fire', the defendant in a rape offence is in no different position from any other defendant who has faced trial where there has been extensive publicity of the facts.

16. We believe that arguments based on 'no smoke without fire' are not strong enough to justify further limitations on the right of the press to report trials – the answer to such argument is of course that the presumption of innocence under Article 6(1) provides defendants with the protection from innuendo that is required, and that a respect for the integrity of the jury system and its decisions should be positively encouraged.

17. Notwithstanding our comments on the anonymity of defendants we do appreciate that recently a number of high profile arrests have received widespread coverage in the press. Because of this we believe that anonymity should be present prior to charge. As there is no reason why sex offences should be treated differently from any other case prior to charge this anonymity should extend to all cases.

Clauses 10 - 17: Child Sex Offences

18. Clauses 10 - 17 make specific provision for sex offences on children as follows:

- Clause 10 - sexual activity with a child
- Clause 11 - causing or inciting a child to engage in sexual activity
- Clause 12 - engaging in sexual activity in the presence of a child
- Clause 13 - causing a child to watch a sexual act
- Clause 14 - offences under clauses 10-13 when committed by offender under 18
- Clause 15 - arranging or facilitating the commission of a child sex offence
- Clause 16 - marriage exception for clauses 10-15
- Clause 17 - meeting a child following sexual grooming etc

19. The offences in **Clauses 10 - 14** provide that the offender has a defence if s/he reasonably believed that the alleged victim was 16 or over. We recognise that this is a common sense provision which has worked in a similar form over the years with the so-called "young man's defence" to rape allegations.

20. However we are concerned that there is still inadequate recognition of the concept of actual consent, which if anything is all the more pressing in the 13-16 age group. For example, an 18 year old boy engaging in consensual heavy petting with his 15 year old girlfriend would have committed offences under both Clauses 10 and 11 (assuming he knew her age), and therefore liable to imprisonment for up to 14 years, regardless of that fact that she was capable of consenting to the activity and did so consent. A 16 year old boy would be similarly liable to imprisonment for up to 5 years by virtue of Clauses 10 and 11 read with Clause 14. We cannot believe that the Bill was intended to criminalise such widely occurring and harmless activity and would be concerned to see the issue of actual consent in this context re-visited.

21. We are concerned by the drafting of Clauses 11 - 13. Effectively these make provision for 'secondary' sexual offences of **causing or inciting a child to engage in sexual activity** (**Clause 11**), **engaging in sexual activity in the presence of a child** (**Clause 12**) and **causing a child to watch a sexual act** (**Clause 13**) where either the child is under 13 or where the child is 13-16 and the defendant does not reasonably believe the child is over 16. We are conscious that these clauses would seem to overlap with clause 9 (causing or inciting a child under 13 to engage in sexual activity) which we had certainly assumed would cover the sort of activities mentioned in Clause 12 and 13. We therefore wonder if the drafting would be clearer and more effective if (i) the offence in Clause 9 was expanded to include incitement and to specify the activities in Clause 12 and 13 as examples of the way in which the Clause 9 offence can be committed; and (ii) reference to children under 13 were removed from Clauses 10-13. This would also have the benefit of making clear that Clauses 1 - 9 generally dealt with the under 13's and Clauses 10 - 14 with the 13-16 age group.

22. We are also concerned by the breadth of **Clause 13** (**causing a child to watch a sexual act**). We accept that an adult handing an under 16 year old child pornographic material (which Clause 13 specifically encompasses) may not be appropriate but question whether it should be deemed 'so' criminal as to justify liability for imprisonment up to 10 years (Clause 13(2)(b)). We are especially concerned again that, when read with **Clause 14** (**offences by under 18's**), this offence does not acknowledge actual consent, and would make two 15 year old boys looking at pornographic material together, in a fully consensual fashion, liable to imprisonment for up to 5 years (Clause 14(2)(b)). We do not feel this is a proportionate response and would ask that the breadth of Clause 13 be looked at again.

23. We are concerned by the breadth of **Clause 15** (**arranging or facilitating the commission of a child sex offence**). It appears from the Explanatory Notes that this clause is intended to cover, for example, the person who approaches an agency and asks them to procure a child for sexual purposes. We cannot think of many other examples where this would apply; and are concerned that the existing and new provisions addressing conspiring, attempting or inciting others to commit sexual offences and the new offence in **Clause 17** (**meeting a child following sexual grooming**) would be

adequate to address the activities Clause 15 is aimed at (although please see paragraph 18).

24. We note that **Clause 16** provides an exception to the offences in Clauses 10 - 14 for the offender who proves that he was lawfully married to the child at the time the offences took place. Therefore a foreign national who can prove that he was married to a child of 15 would be entitled to have sexual contact with her without falling foul of the offence in Clause 9. While we recognise the attempt herein to afford due respect to cultures where marriage traditionally occurs at a relatively young age, we are concerned that in theory this provision could apply to legalise non-consensual sexual contact with under-13's simply by virtue of marriage. We are concerned that the cloak of marriage should not provide a defence to any sexual offence where there has been a lack of consent. ***R v R*** [1992] A.C. 599 recognised a long time ago that a husband can rape his wife, and we are concerned that Clause 16 is something of a regression to the perception of wives as their husbands' 'property'.

25. **Clause 17** Creates an offence of **meeting a child following sexual grooming**. People can already be arrested for conspiring, attempting, or inciting others to commit a paedophile offence. The danger is that a law going further would mean prosecuting people not for anything they've done but for things someone thinks they might do - because someone is second-guessing their thoughts. If you make people afraid that talking to your neighbour's children could be seen as a paedophile offence, you actually make those children less safe. Neighbours and communities are important to keeping our children safe - both from abuse by strangers and, sadly, from the far greater risk of abuse in their own homes. In terms of 'internet grooming', simply, the police will almost never come across this information. That's why it's so important for parents to be vigilant on behalf of their children. We appreciate that the bill is slightly more restrictive than the White Paper 'Protecting the Public' in that it has made grooming an offence to meet or to travel to meet the child. However, this is still criminalisation of an act that is not in itself criminal. In its admirable desire to prioritise child protection, the government should be careful of creating what is effectively 'thought crime'.

Clauses 18-26: Abuse of a position of trust

26. **Clauses 18 - 21** mirror those at Clauses 10 - 13 apart from the fact that they relate to a situation where the defendant is in a position of trust. The key distinction is that these offences can be committed against the 16-18 age group. We do accept the need to offer specific protection to those people vulnerable by their residence in institutions etc, and welcome the broad definition of "positions of trust" in **Clauses 23 and 24**. However, we query whether there really is a justification for applying a higher age threshold to these offences. If Parliament decrees that generally, the age of consent is 16, it is hard to see why those in institutions etc have to be subject to a higher age of consent. There may even be a risk that this provision could stigmatise those aged 16-18 in institutions, hinder their normal development, and provide a further barrier to their integration with non-institutionalised society. We are firmly of the view that breach of trust should be an aggravating factor to the offence (potentially a heavy one) but should not affect the age of consent. We wonder whether this issue might be addressed more effectively by requiring judges to increase the sentence to reflect the fact that the offence was committed in breach of trust, as is similar with offences which are racially aggravated but are essentially otherwise identically defined.

27. We do not agree with the marriage exception in **Clause 24** as this would appear to excuse even non-consensual sexual behaviour within marriage which is out of step with the *R v R* approach set out above. In the abuse of trust context, there is the additional concern that the "pupil" half of the marriage may be pressured into agreeing to the marriage in the first place, which makes this provision even more of a concern.

Clauses 27 - 31: Familial child sex offences

28. These clauses **criminalise sexual activity with a child family member** (**Clause 27**) and **inciting a child family member to engage in sexual activity** (**Clause 28**) while essentially providing a defence if the offender can prove he did not know that he was related to the victim. While we recognise the need to address the particular concerns raised by incest we again query whether this

needs to be done in the form of a specific offence rather than by way of an aggravating feature on sentence. We are also again concerned at the raised age threshold of 18 years, and do not accept that the family relationship justifies a heightened age of consent (just as the "trust" relationship does not either). We are very concerned by the breadth of **Clause 29** which defines **family relationships** well beyond any blood link. Clause 29, when read with Clauses 27 and 28, would mean, for example, that the 30 year old stepbrother who had regularly been involved in caring for his 17 year old stepsister would be guilty of an offence and liable to imprisonment for up to 5 years for having sexual activity with her, even if she fully consented to it (unless he somehow did not know that she was his partner's niece). While such activities may be hurtful and damaging to those involved, and considered distasteful or scandalous by others, if there is full consent on both sides, we do not accept that they should be criminalised. We also find the **marriage exemption** in **Clause 30** particularly complex in the context of familial sexual relationships and cannot see how it will be of any practical benefit.

Clauses 32-46: Offences against persons with a mental disorder or learning disability

29. These clauses make specific provisions for offences against those with a mental disorder or learning disability, which we broadly welcome, conscious of the need to protect this group in particular. We are conscious that others with more specialist knowledge of mental health issues (such as MIND) are making their own observations on these sections. We know, for example, that they are concerned to see that physical disabilities as well as mental disabilities are covered; and may not be satisfied with the definition of "mental disorder" adopted by the Bill in other ways. We would refer the reader to those observations as it is likely that Liberty would support them.

30. For our own part we would again canvas the issue of actual consent. We say this because the fact that a person has a mental disorder or learning disability does not mean that they can never consent in fact to sexual activity, and we believe it would be wrong to assume so. In the same way that a child can be *Gillick* competent to consent to sex, a person with a mental disorder or learning

disability can have *Re T*[2] or *Re MB*[3] capacity to make serious decisions, including that to have sex. We would therefore like to see consideration being given to the role played by actual consent from such individuals, as from children.

Clauses 47-48: Indecent photographs of children

31. The effect of Clause 47 is to amend the Protection of Children Act 1978 to criminalise the activities relating to indecent photographs of children under 18 (as opposed to under 16), subject to a defence that the photograph is one of a child over 16, and the child consents. While we accept the need to address the rapidly increasing evil of Internet pornography we question whether policing this amendment will be realistically possible. We say this because many 16-18 year olds look much older than they are, and we can envisage the police being involved in difficult judgment calls as to whether any of the offences are made out. Given the increasing openness about sex and sexuality in the media, even that aimed at young children, it is possible that a provocative photograph of teenage girl band in a magazine aimed at teenagers would fall foul of these provisions, which cannot be the evil at which they are aimed.

32. We would wish to see the police's limited resources focused on combating those photographs which are particularly damaging by virtue of the fact that they involve children being subjected to cruelty or

[2] *Re T (Adult: Refusal of Treatment*) [1992] 2 FLR 458 at p.479 where Lord Donaldson MR set out the approach to be adopted in relation to mentally disordered adults, saying: "Capacity to decide. The right to decide one's own fate presupposes a capacity to do so. Every adult is presumed to have that capacity, but it is a presumption which can be rebutted. This is not a question of the degree of intelligence or education of the adult concerned. However, a small minority of the population lack the necessary mental capacity due to mental illness or retarded development....This is a permanent or at least a long-term state. Others who would normally have that capacity may be deprived of it or have it reduced by reason of temporary factors....Doctors faced with a refusal of consent have to give very careful and detailed consideration to the patient's capacity at the time when the decision was made...the doctors should consider whether at that time he had a capacity which was commensurate with the gravity of the decision which he purported to make. The more serious the decision, the greater the capacity required".

[3] *Re MB (Caesarean Section)* [1996] 2 FLR 426 at p.433, where Butler-Sloss LJ reviewed the authorities including in *Re C (Refusal of Medical Treatment)* [1994] 1 FLR 31 where at p.36, Thorpe J had formulated a test to be applied in determining capacity in three stages: first, comprehending and retaining treatment information, secondly believing it, and, thirdly weighing it in the balance to arrive at a choice. The Law Commission had proposed a similar approach in para. 2.20 of its consultation paper 129, "Mentally Incapacitated Adults and Decision-Making". At p.437, in *Re MB* the Court adopted the further recommended definition of capacity to consent by the Law Commission in para. 3.2-3.23 of its consultation paper 231, "Mental Incapacity" that a person is without capacity at the material time if he or she is unable by reason of mental disability to make a decision for himself on the matter in question either because "(i) he or she is unable to understand or retain the information relevant to the decision, including information about the reasonably foreseeable consequences of deciding one way or another or failing to make the decision; or (ii) he or she is unable to make a decision based on that information".

abuse rather than those of older children who may look even older than they are. We are also concerned that the latter factor would make it hard for a recipient of the photographs to know whether s/he was in fact committing a crime (i.e. is that girl/boy in the photograph 17 or 19?) and this flies in the face of the need for legal certainty in criminal provisions referred to at paragraph 5 above.

Clauses 49-53: Child abuse through prostitution and child pornography

33. We generally accept the provisions made in these sections in so far as they relate to under 16s. However, Liberty's policy has always been that prostitution and taking part in pornography should be legalised for the over 16's. We believe that people who are above the age of consent should be able to make choices as to how they lead their lives and that it is not for the state to determine the morality of prostitution in terms of criminality. Accordingly we object in principle to the requirement in **Clauses 49, 50 and 51** that the person involved be under 18 as we do not believe this activity should be criminalised where the prostitute or pornographic model is over 16.

34. Following on from our belief that prostitution for over 16s should not be criminalised we do not think that **Clauses 54 (Causing or inciting prostitution for gain) and 55 (Controlling prostitution for gain)** should stand. While the targeting of child prostitution is a legitimate and laudable aim the fact is that many of those who facilitate prostitution are in fact in a consensual relationship with the prostitutes. These provisions are separate from those relating to trafficking which provides protection for those people who are clearly not likely to be in a consensual relationship with those who are profiting from it.

Clauses 58-61 Trafficking

35. Again we generally welcome these provisions but defer to those with more specialist knowledge of this area, such as Anti-Slavery International. We know, for example, that they would wish to see the prohibition on trafficking extended beyond trafficking for sexual exploitation (which these Clauses provide for) and we would concur with that view. We see no reason why this Bill, albeit

predominantly about sexual offences, could not offer protection to all victims of trafficking, for sexual purposes or otherwise. We also note Anti-Slavery International's concerns at the practical enforcement of these provisions given that many, if not all, of the victims will be illegal entrants to the UK and so may be reluctant to come forward and give evidence for fear of deportation. Accordingly we support their recommendation that witness protection measures should be introduced not only to make it easier for them to give evidence (of the "special measures" variety - TV links, screens etc), but also including some undertaking that they will not be automatically deported as a result of coming forward. While we appreciate that having given evidence cannot be a bar to deportation we would hope that any asylum application were treated sympathetically (although this is of course beyond the scope of this bill).

Clauses 62 - 64: Preparatory offences

36. **Clause 62** (**administering a substance with intent**) is intended to address the growing evil of 'date rape' drugs such as Rohypnol, and we welcome the law's acknowledgement of this problem. We also accept that **Clause 64** (**trespass with intent to commit a sexual offence**) seems sensible and workable. We are a little concerned, however, by the breadth of **Clause 63** (**committing an offence with intent to commit a sexual offence**) as it is not clear what this will relate to that will not already be covered by the range of sexual offences now to be available (which includes incitement to some of the offences), together with the established concepts of conspiracy, aiding and abetting etc. If it is to be included we would be concerned to see that the "preparatory" offences are narrowly defined to include, for example, abduction and violence with a view to committing a sexual offence, and not offences such as speeding, which we think would be virtually impossible to prove and disproportionate.

Clauses 65 - 66: Sex with an adult relative

37. As we explained at paragraph 21 above, we believe that while consenting sex between members of the same family might be scandalous or distasteful, it should not be criminal. Accordingly we object

to these provisions.

Clauses 67 - 72: Other offences

38. **Clause 67** creates an offence of **Sexual activity in a public lavatory.** This replaces the earlier provision in the bill of sexual activity in public. We do not accept that the current public order legislation (the Public Order Act 1986, ss. 4 and 5) cannot adequately address offensive sexual behaviour in public. We consider that in the spirit of sexual mores being more not less progressive, it is not appropriate for the state to seek to intervene in this arena more directly than the law currently does. Sexual activity in a public lavatory is a particularly difficult offence to justify. There is no need for the activity to be visible or for others to be present so it could take place behind a locked cubicle door in an empty lavatory in the middle of the night when it is extremely unlikely that anyone would enter. It would not however appear be an offence to engage in engage in the same behaviour in broad daylight against the outside wall of the same lavatory. Of course the latter act is likely to constitute a public order or public indecency offence but this merely emphasizes our point that the existing law is sufficient.

39. **Clause 68** (**exposure**) was originally widely drafted, with its requirement only that it be "reasonably likely" (reckless) that someone who witnesses the exposure will be caused alarm or distress, that naturists and others who have no criminal intent will be caught by its provisions. We are pleased to see that it has been amended so that there must be a knowledge or intent that offence will be caused.

40. **Clauses 69 and 70** criminalise **voyeurism.** We broadly welcome the bills recognition of privacy following with the incorporation into domestic law of the right to privacy in Article 8 of the European Convention on Human Rights via the Human Rights Act 1998. However, we are not convinced that voyeurism should be a matter for criminal law.

41. **Clause 71** addressing **intercourse with an animal** is of some concern to us. We say this because

it is by no means clear that the current animal cruelty legislation cannot adequately deal with this issue, such that there is a need, only now, to specifically criminalise it. We would assume that the issues of cruelty to the animal in question is of greater concern than the morality of the sexual act. However, if the offence is to be created we do not see why it should be limited to vaginal or anal penetration of the animal or the person. In other words if the case is made out for criminalising bestiality, in the interests of consistency, it should surely extend to all sexual acts with animals rather than simply penetrative ones.

42. **Clause 73** and its prohibition on **sexual penetration of a corpse** is again novel in only now criminalising act which (presumably) has been occouring for years, albeit rarely. We again query whether necrophilia should be specifically criminalised but otherwise broadly accept the drafting attempts to protect those who are having sex with someone who dies mid-*coitus*, and funeral parlour workers who by necessity penetrate corpses in a non-sexual way.

43. We do consider, like the Spanner Trust, that **consensual sado-masochistic sex** should be decriminalised and wonder whether this comprehensive review of sexual offences law can look again at this issue.

Clause 73: Offences outside the United Kingdom

44. We welcome the re-enactment at **Clause 75** of the Sex Offenders Act 1997, part 2, extending the remit of domestic sexual offences legislation to those British citizens or residents who commit them overseas. However we feel it appropriate, in the name of legal certainty, that some consideration be given to the lower ages of consent present in other countries.

Clauses 76 - 77: Presumptions etc

45. We note that these clauses effectively provide for both rebuttable and irrebutable presumptions as to the absence of consent. We acknowledge that the current sexual offences provisions do not lead to

many victims feeling their rights are adequately protected (as is evidenced by the low conviction rate) and therefore, albeit with some reluctance (bearing in mind our comparable concern to avoid miscarriages of justice), welcome the **rebuttable presumptions** set out in Clause 76 (which permit, for example, an absence of consent and belief in consent to be presumed where there is violence or the threat of it, or where the victim is asleep).

46. We are more concerned at the scheme of **irrebuttable presumptions** in Clause 77(1) which effectively provides that where the only evidence of lack of consent comes from a third party, the defendant is presumed to have acted unreasonably as to consent. We do not see how this clause will operate in practice and are concerned that it will be unduly onerous for defendants who are frequently in the position of finding they have very little positive defence to sex allegations other than "your word against mine". We are similarly, but less, concerned at Clause 79(3) and (4) which provides irrebuttable presumptions as to a lack of consent or belief in consent where the offender has deceived the complainant as to the nature of the act or as to his/her identity. We wonder if, for the limited number of cases when this is likely to arise, this should still also be a rebuttable presumption.

PART 2 – NOTIFICATION AND ORDERS

47. Liberty agrees that some former sex offenders may require supervision in the community. However such supervision may involve ongoing social stigma and significant inroads into the privacy and freedom of the subject. It is vital that final judgments about who does and does not present an ongoing risk to the community should be left to the discretion of Courts (ideally as part of the sentencing process) rather than the preferences of police officers, or the straightjacket of mandatory legislation. Further, being branded a sex offender, and subject to onerous obligations, is a very serious matter in a modern democracy. Parliament should not permit any citizen to meet such a fate unless he or she has been charged, convicted and sentenced for an actual sex offence in the time-honoured tradition.

48. **Clauses 81 to 94** replicate and modify the Sex Offenders Act 1997. It should be remembered that this Act has already been amended to make its requirements much more onerous than was intended when the original legislation was scrutinised and passed (e.g. the obligation to notify of an intention to travel abroad in accordance with regulations). The consequences of being subject to Sex Offender Act notification are considerable. They include an obligation to tell the police of any change of residence for periods of 7 days or more or any intention to travel abroad (and restrictions to 3 days have been proposed using powers contained in Clause 87). Further, the police may take your fingerprints or photograph any part of your anatomy. Such obligations should only be imposed by order of a Criminal Court. Instead, clauses 81 to 83 and Schedule 3 decide who is subject to the regime as a matter of automatic and mandatory legislation.

49. It is a further disappointment that the Government has failed to take the opportunity to remove those formerly convicted of discriminatory offences (which are already decriminalised or which Part 3 of and Schedule 6 to this very Bill propose to repeal) from such stigma and punishment. The Sexual Offences (Amendment) Act 2000 finally equalised the age of consent at 16 years for gay and straight people alike. However, gay men (aged 20 and above) previously convicted of consensual sex with 17 year-olds remain subject to the Sex Offender Act regime as transposed into this Bill. This is the case notwithstanding the Government's clear view (as expressed in the endless debates relating to the 2000 Act) that these people are not criminals and present no risk to the public.

50. The Government's reported position on this issue is deeply flawed. The line has been that citizens should obey the law in operation at the time and that even where legislation is disgraced and repealed, past offenders should not be decriminalised or pardoned. This part of the position has a certain logic. However, in defending the retrospective and non-judicial nature of the Sex Offender Act regime (it bites upon those convicted of offences before it came into being), the Government has repeatedly (including in the European Court of Human Rights), characterised it as an administrative risk-prevention measure rather than a criminal punishment. On this basis, clauses 81 to 83 should not bite on those who (on the Government's own case) do not present a risk. Liberty hopes that Parliamentarians will see the injustice this continued notification regardless of their previous

positions on the equalisation of the age of consent.

51. It is completely inappropriate that clause 81(1)(d) should replicate the 1997 Act in making those cautioned by the police for a sex offence subject to this onerous regime. Liberty knows of many cases where suspects are cautioned without legal advice and under inappropriate pressure from the police. It is of even graver concern when such a caution results in ongoing liability under the Sex Offender regime. If the act is serious enough to require sex offender registration then perhaps it is inappropriate that a caution is considered a suitable disposal in the first place.

52. Liberty believes that a "child sex offender" is often a child victim and always a child in need. Subjecting such children to criminalisation is rarely appropriate. Subjecting them to ongoing supervision by the police instead of the engagement of therapeutic and educational professionals, is both cruel and a wasted opportunity to prevent a damaged child growing into a potentially dangerous adult offender.

53. **Clauses 96 to 98** contain an extension of the Sex Offender obligations to those convicted (fairly or otherwise) of sex offences abroad. Under clause 96, a chief police officer may make an application to a magistrates' court where it *"appears to him"* that a person was convicted etc. abroad of an offence which would constitute a domestic sex offence as listed in Schedule 3 and which constituted an offence in the country concerned. While a complex judgment as to the nature of the criminal law of e.g. Saudi Arabia is pending in the local magistrates' court, clause 98 allows the individual concerned to be subject to the Sex Offender regime (with the associated stigma and obligations) on an interim basis. Where the conditions set out in clause 95 are met, clause 95(5) provides that the court *"must"* make a notification order. Thus police discretion but no judicial discretion is permitted. Further, it is not a condition that the country where the person was convicted had any semblance of a fair system of law or that the person was properly convicted.

54. **Clauses 112 to 120** create a new civil foreign travel banning order. We do not have a principled objection to the use of such orders. Concerns about overseas child sex tourism are justified and the

use of such orders to protect children abroad have merit. However, the requirements justifying the creation of an order are extremely broad. The defendant must be a qualifying offender - generally meaning they must have committed one of the offences contained in schedule 3 which relate to children. They must also have acted in such a way as to give reasonable cause to believe an order is necessary to protect children from serious sexual harm outside the UK. The offences contained in schedule 3 can include possession of indecent pseudo photographs under the Protection of Children Act 1978 and therefore there is no need for the person to have committed a sex offence against a child. The requirement that they have 'acted in a way to give reasonable cause' is extremely broad and contains no comments on criminality. Presumably visiting websites of country where there is sex tourism would qualify. Banning someone from leaving the country is a serious step and we would like to see some from of risk assessment relating to the individual and a more rigorous test than 'reasonable cause'.

55. **Clauses 121 to 127** contain an affront to any notion of traditional British justice. Clause 121 permits the badge of paedophilia and accordingly broad and ill-defined *"prohibitions"* (clause 121(6)), to be placed upon a person who has never been convicted of any criminal offence. No criminal offences need even be anticipated (clause 122(2)). A magistrates' court may make such an order (on the application of a chief police officer) on the mere basis that twice previously the subject has given *"a child anything which relates to sexual activity"* or communicated with a child *"where any part of the communication is sexual"*(121(3)). The court need not fear the commission of sexual offences, but find the order *"necessary…for the purpose of protecting children generally or any child from harm from the defendant"* 121 (4)(b). An 18 year-old who gives a 15 year-old sibling a condom inflated as a balloon, could find himself facing proceedings for a *"risk of sexual harm order"*. Likewise, a parent or adult babysitter who watches love scenes in a non-pornographic film (e.g. certificate "15") with their 15-year-old charge. There is no obvious exception for sex education or "facts of life" discussions. Communications are *"sexual" "regardless of any person's purpose"* (Clause 111(6)).

56. One does not have to strain to think of scenarios where the controlling parents of teenagers who begin to discover their sexuality (gay or straight) pressure the police into applying for such orders

against friends, neighbours and teachers. Lives may be destroyed even where magistrates' eventually refuse to make an order, or where an order is discharged by the Crown Court on appeal. By putting adults in fear of talking to children about delicate matters (or talking to children at all), this regime may seriously undermine child protection and constitutes a hysterical legislative distraction from the serious social issue of tackling sexual abuse in and beyond the home.

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