

## Sex Education: Left Hand, Right Hand

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### Introductory

For many years I have been privileged to be a Research Associate of the Oxford University Centre for Socio-Legal Studies, though I have to admit that up to now my researches have been far more “legal” than “social”. In this article I am confronting the social side as well. The subject is the way sex education is taught in our schools, especially having regard to those provisions of the Sexual Offences Act 2003 which render criminal any sexual behaviour by under-16s however minor it is, and whether or not consenting.

The precipitating factor for this article was the recent publication of a research paper which I will refer to as the Wallace Report.<sup>1</sup> I was alerted to it by an article written by the Guardian's health correspondent Polly Curtis.<sup>2</sup> This began with the following startling pronouncement:

“Pupils should be taught sex education based on their sexual experience, academics suggest in a radical departure from current methods.”

Can this be right, I wondered, when a recent Act of Parliament, intended to update sex law across the spectrum, renders any sexual activity by under-16s a criminal offence? Legislating in this way seems to be part of a trend. The Observer recently noted “a widening rift between the government and children's justice groups, which are becoming alarmed by what they see as an increasing trend to criminalise young people”.<sup>3</sup>

The Wallace Report begins with an abstract:

“A survey of 3820 school children in England aged 13-16 years examined sexual activity using the Transtheoretical Model (TTM) Stages of Change. A quarter (26%) of teens were sexually experienced, 44.8 per cent did not use contraception and 48.9 per cent did not use condoms, every time. Past history of condom and contraceptive use, and partner willingness to use condoms, were the best predictors of being in Action or Maintenance stage for condom use. Of virgins, 19.82 per cent were in Contemplation or Preparation stages for intercourse, and 85.4 per cent would use condoms every time. Sex education should be tailored to Stage, and signposting to sexual health and contraception services.”

I will examine this in more detail later, but at first sight it reads oddly. Why is the age range 13-16 years?<sup>4</sup> This mixes 16-year olds, who are above the age of consent, and 13-15 year olds, who are below it and thus incur criminal liability for their sexual activities with others whether consensual or not. Do the authors of the report attach no significance to this distinction – or are they unaware of it? They say a quarter of the teens were sexually

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<sup>1</sup> Wallace LM, Evers, KE, Wareing H, Dunn OM, Newby K, Johnson, JL and Paiva, A, “Sexual Behaviour and Attitudes towards Sexual Activity and Condom Use of Children Aged 13-16 in England”, *Journal of Health Psychology* 12(1) (February 2007) 179-183.

<sup>2</sup> *The Guardian*, February 9 2007, p. 5.

<sup>3</sup> *The Observer*, February 18 2007, p. 12.

<sup>4</sup> Professor Wallace says the reason was “because it was in whole class sizes, years 9-11, and was not about legal issues”.

experienced, which apparently means “had at least one sexual intercourse”<sup>5</sup>. The age breakdown, which is vital from a criminal viewpoint, was as follows:

- Year 9: 13.7% had “had sex”.
- Year 10: 28.8% had “had sex”.
- Year 11: 39.7% had “had sex”.

The report does not mention whether all the sexual activity found was heterosexual, though this seems to be implied. Why was homosexual activity ignored?<sup>6</sup>

The figures in the Wallace Report can be compared to those of a UNICEF survey recently reported on.<sup>7</sup> This said that the number of children in the United Kingdom who have “had sex” by the age of 15 constitutes 38 per cent. of that age group. What exactly is meant by saying they had “had sex” is not explained. It is common for such statistics to employ this expression, which is so vague as to render them largely meaningless. Presumably it equates to references in the Wallace Report to being “sexually experienced”, which is equally uncertain in meaning.

These first impressions led me to consider a crucial fact about school sex education. It stands at the interface of no less than six disciplines:

1. Health.
2. Psychology.
3. Education.
4. Law.
5. Religion/morality.
6. Social and family welfare.

Are all these disciplines taken fully into account when sex education in English schools is planned? Here it needs to be borne in mind that strangely there is no official curriculum for that item of the school syllabus.<sup>8</sup>

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### **Sexual Offences Act 2003**

I will return to the Wallace Report and the other matters I have raised. First I need to go into more detail about the 2003 Act. For this purpose I will start with a book I wrote on a print-on-demand basis at the time of its enactment, *Briefing on the Sexual Offences Act 2003* (3<sup>rd</sup> edition, 2003).<sup>9</sup> I will refer to this as *Briefing*. The following passage on the Act is based on the introduction to *Briefing*.<sup>10</sup>

The Act refuses to recognise the sexual needs of the under-16s when interacting with age mates. Of course the sexualised tot, ruined by prolonged abuse, is a horrific spectacle. But for the ordinary child who has embarked on puberty, a natural process essentially sexual, the position is different. We adults should not be so quick to forget our own passage through those troubled waters, or the childish age mates who perhaps added to our happiness when doing so. Of course there are dangers even with childish sex play between consenting age mates. I give the following true-life example as an awful warning.

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<sup>5</sup> Wallace Report, p.181.

<sup>6</sup> Professor Wallace says “the funders were interested in sex education as a means to reduce unplanned and early conception”.

<sup>7</sup> See eg *The Guardian*, February 17 2007, pp. 14, 15.

<sup>8</sup> I am grateful to Professor Louise Wallace for providing this information and helping generally with this article, though the responsibility for what is stated is entirely mine.

<sup>9</sup> Oxford, Lester Publishing 2003. The book’s text is at <http://www.francisbennion.com/2003/009.htm>.

<sup>10</sup> *Briefing*, pp. 5-7.

Katy was 10 when she was referred by a social services department because it had become clear some months previously that she was extensively involved in sexual activities with other children. After having been removed from her own family because of extensive abuse and neglect, she had been placed in a variety of different contexts, finally being placed for adoption. This had broken down and at the time of referral she was placed with experienced professional foster parents. After her sexual activities had been noted, investigation revealed that in her short life she had been involved in sexually-abusive incidents with approximately 29 children . . . The therapeutic task was to help her regain her childhood.<sup>11</sup>

No one would doubt that such excessive sexual activity between age mates should have been dealt with by social services long before poor Katy got to that point in her young life. It does not follow even in that extreme case that her colluding age mates should have been charged with criminal offences and hauled before a court. Yet that is what the Sexual Offences Act 2003 provides for.

In the hope that the Bill for the Act would be suitably amended before it was too late, I spent a lot of time and effort in producing the first two editions of *Briefing*. The first edition ran to 34 pages. The second edition was very much longer - but still not long enough to embrace all aspects of a difficult subject. The third edition, running to 166 pages, altered the second edition to fit it to the new Act, and added three new chapters at the end.

The Act makes anyone between the ages of 10 (the minimum age of criminal responsibility) and 16 (the age of consent) guilty of a criminal offence if they carry out a sexual act on or with another child between those ages, even consensually. The maximum penalty is five years imprisonment.<sup>12</sup> One of the Sexual Offences Bill's many Parliamentary critics, Mr Humfrey Malins MP (Conservative), said in standing committee-

“Clauses 6 to 9 [now sections 7 to 10], but particularly clauses 6 to 8, will create very serious offences relating to people who perform sexual acts with children under 13. That makes sense to all of us when the defendant is older than the victim, but does it make sense when the defendant is the same age or much the same age as the victim? Perhaps not. Let me give some examples. If a boy and girl aged 12 indulge in French kissing to which each consents, they will be committing an offence under clause 8 [section 9]. If a boy fondles a girl sexually over her clothes, or vice versa, both will be committing a sexual offence under clause 8 [section 9], and that offence will be punishable by 14 years imprisonment. I am not being flippant, but if two 12-and-a-half-year-old boys relieve the boredom of their first year at boarding school by indulging in mutual masturbation - which has happened - a serious offence will have taken place. If, at the suggestion of a girl aged 12, a boy of the same age puts his finger into her vagina, the boy will be committing an offence punishable under clause 7 [section 8] by imprisonment for life. We think that that is a preposterous proposition, for the reasons I have outlined.”<sup>13</sup>

The provisions to which Mr Malins objected were not changed before the Bill became an Act.

Clause 6 [section 7] (Sexual assault of a child under 13) fell foul of the parliamentary Joint Committee on Human Rights, which said-

“In our view, the Government has not established that the impact of clause 6 . . . would be proportionate to a legitimate aim so as to be justifiable under ECHR Article 8.2. The offence seems to us to be over-broad, to impose liability in a way that is not adequately tailored to the legitimate objective, to interfere with the right to respect for private life

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<sup>11</sup> *Children and young people as abusers: An agenda for action*, National Children's Bureau, 1991, pp. 29-31.

<sup>12</sup> The Act also covers sexual acts with children by persons aged 16 or over. I am not here concerned with these.

<sup>13</sup> Standing Committee B, 11 September 2003 (Morning), col 094. See *Briefing*, pp. 43-44.

more than is necessary for that purpose in a democratic society, and to contain insufficient safeguards against violation of the rights.”<sup>14</sup>

The Family Planning Association (fpa) joined in the condemnation.

“fpa’s major concern about this Bill is that it makes all consenting sexual activity between children, from full sexual intercourse to touching someone through clothes, a criminal offence. At the most extreme, this means that a 12 year-old boy who has sexual intercourse initiated by a girl his age will be automatically guilty of the offence of rape of a child under clause 6, carrying the maximum penalty of life imprisonment. At the other end of the spectrum, two 15 year-olds who indulge in consensual ‘sexual touching’, which includes kissing, will both also be automatically committing criminal offences under clause 10, imprisonable for up to five years. fpa believes that the Bill should be amended to permit the defence of consent to those who have ‘proximity of age’ – specifically, the

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defence should be allowed for under-16s who have sex with under-13s, and for under-18s who have sex with under-16s.”<sup>15</sup>

I have added my own arguments against this horrifying intention to make criminals of the nation’s children.<sup>16</sup> There were signs that all this pressure on the Government might have an effect. On clause 14 [section 13] the Home Secretary Mr David Blunkett rather flippantly made out that the Government would remove the objectionable features if only they knew how to draft the necessary amendment. Here is an extract from Hansard.

**Mr. Blunkett:** I make this generous offer: I will buy a flagon of champagne for anyone who comes up with a satisfactory answer. [Hon. Members: ‘A flagon?’] Not a flagon -

**The Parliamentary Under-Secretary of State for the Home Department (Paul Goggins):** A magnum.

**Mr. Blunkett:** Well, those who come from the north of England need civilising, don’t they? We will settle for a magnum of champagne. The hon. Gentleman is entirely right: it is an ass, but we have to deal with the ass by providing a carrot, rather than a stick.<sup>17</sup>

As a former legislative draftsman I responded to Mr Blunkett’s carrot.<sup>18</sup> I sent him the result, but there was no sign of my magnum. Nor did the Government amend the Bill.

During the passage of the Bill Ministers gave assurances that a number of individual sections would be monitored. In the first 8 months of the Act being in force, there were 38 prosecutions, and 21 convictions, under section 13 (application of adult sex offence provisions to children).<sup>19</sup> It is not clear whether any of these involved the prosecution of children under 16. The Home Office seeks to justify the Act by saying that prosecution guidelines stress children should be brought before the courts only when strictly necessary, and should preferably be dealt with by social services. This overlooks the fact that children suspected of offending against the Act are always liable to prosecution. Apart from anything else, this places them at a disadvantage when dealing with social services or other authority figures.

### ***Smith and Hogan’s View of the 2003 Act***

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<sup>14</sup> See *Briefing*, p. 140.

<sup>15</sup> See *Briefing*, chapter 7. The Bill was not so amended.

<sup>16</sup> See eg *Briefing*, chapters 4, 6 and 15.

<sup>17</sup> See *Briefing*, p. 24.

<sup>18</sup> See *Briefing*, chapter 1.

<sup>19</sup> *Sexual Offences Act 2003: A stocktake of the effectiveness of the Act since its implementation* (Home Office, February 2006), para. 17.

The respected textbook on criminal law *Smith and Hogan* says that the underlying policy of the offences created by the Sexual Offences Act 2003 “is to protect the child from the ‘predatory’ older offender, and to guard against exploitation of young people, but the breadth of the offences raises a number of problems”.<sup>20</sup> After referring to the present author’s 2003 article in this journal<sup>21</sup> they go on to make four points:

“First, the legislation makes no attempt to distinguish between exploitative sexual activity against a child under 13 (whether by an older individual or not) and that of fully informed consensual sexual experimentation between children under that age.

Secondly, denying the relevance of the factual consent of the under-13-year-old clashes with the law’s willingness to accept their capacity to consent to, for example, invasive medical procedures. Elsewhere the law recognizes a child’s capacity to consent. The Home Secretary has stated in a press release on the Act receiving Royal Assent that there would be no prosecution for sexual activity between children under the age of 16 where the activity is genuinely consensual. This rather begs the question why the Act is not drafted so as to include a requirement of an absence of consent.

Thirdly, this poses potential problems under the ECHR. It is possible that a child aged 12 who was a willing participant to sexual conduct (which includes activity as limited as kissing) could claim an infringement of his/her Article 8 rights to respect for private life. There is no additional restraint on prosecution such as a requirement of the DPP’s consent.

The final general point to note is that the breadth of the new offences means that in cases of consensual sexual activity between 12-year-olds they will both commit an offence – for example, as penetrator (s 5) and penetrated (s 9). In this context, the drafting undermines the principle in *Tyrell*<sup>22</sup> whereby a child ‘victim’ could not be convicted as a participant in the offence.”<sup>23</sup>

### **Back to the Wallace Report**

The Introduction to the Wallace Report makes clear that it is concentrating exclusively on the problem of teenage pregnancy. It refers to a 10-year strategy, aimed to halve teenage pregnancy by 2010, which was produced by the Social Exclusion Unit.<sup>24</sup> The Introduction ends by saying that sex education “is a core part of local public health delivery”. Later the report refers to change in sexual activity as one of the “health behaviours”<sup>25</sup>. So the Wallace Report puts school sex education exclusively into the first two of the six disciplines mentioned above.<sup>26</sup> What of the others? I shall come to that later.

The Wallace Report concentrates on what it calls “risky behaviour” by “younger age teens”, namely sexual behaviour

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which, by failure to use a condom or other contraceptive, risks pregnancy or the contracting of a sexually transmitted infection. It makes no reference to religion or morality apart from saying: “Delay of sex is the target for virgins, since the median age of first sex has been

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<sup>20</sup> Smith and Hogan, *Criminal Law* (Oxford University Press, 11<sup>th</sup> edn, ed. David Ormerod, 2005), p. 626.

<sup>21</sup> F A R Bennion, ‘Criminalizing Children under the Sexual Offences Bill’ 167 JPN (2003) 784, <http://www.francisbennion.com/2003/007.htm>.

<sup>22</sup> *R v Tyrrell* [1894] 1 QB 710.

<sup>23</sup> *Smith and Hogan, loc. cit.*

<sup>24</sup> I find that the strategy has since been taken over by a new body, the Teenage Pregnancy Unit, part of the Children, Young People and Families Directorate in the Department for Education and Skills. It has produced a report *Teenage Pregnancy: Accelerating the Strategy to 2010* (Department for Education and Skills, September 2006).

<sup>25</sup> Wallace Report, p. 180. Another “health behaviour” listed is “smoking cessation”.

<sup>26</sup> I am grateful to Professor Wallace for pointing out that the report is also concerned with the second discipline Psychology. She is Professor of Psychology and Health at Coventry University.

declining for some years”.<sup>27</sup> However, the report’s compilers did ask how many children would abstain until married. Only 5% said they would do this.

The aims of the Wallace Report are briefly described in the following paragraph:

“The current study aims to understand the Stages of change and sexual experience variables that are associated with risky behaviour. This is the first stage in developing a stage-based intervention using CD ROMs to enable individuals to receive stage-based TTM health messages for use in schools.”<sup>28</sup>

The report concentrates heavily on the desirability of condom use. It says “we recommend emphasis should be given to school-based, whole-class teaching of negotiation skills for condom use and that girls should feel able to supply condoms if partners do not”.<sup>29</sup> This is because the focus of the study is on contraception and prevention of sexually transmitted diseases.

Perhaps the most significant part of the Wallace Report is its concluding passage:

“Rather than try to address the diverse needs of whole classes with such a range of variation in experience, it may be more appropriate and effective to focus on attitude formation and behaviour change tailored to the young person’s personal history and current readiness to adopt safer sexual practices or delay sexual intercourse, via CD ROM technology that affords information and influencing messages appropriate to current stage. *It is our intention to develop and test such an intervention.*”<sup>30</sup>

In other words the proposal is that each child should be given a CD to use on his or her personal computer. These would vary in content according to the child’s age and sexual experience. The content would be exclusively concerned with delay of sexual activity for those not yet sexually active, and achieving safer sex when and if the child chose to engage in sexual intercourse.<sup>31</sup>

### **Left Hand, Right Hand**

I have said that the Wallace Report puts school sex education into the first two of the six disciplines mentioned above, adding What of the others? It is all very well to give attention to health and psychology in this field, but what of education, law, religion/morality and social and family welfare? Should children really be instructed in the health aspects of sex to the exclusion of all the others? Obviously not.

As an Emeritus Chairman of the Professional Association of Teachers (PAT) I consider that health aspects of human sexuality need to be fitted into an educational course covering biological and emotional elements as well as those concerned with “safer sex”.

As a lawyer I certainly do not think that children should be left in ignorance of the legal aspects outlined above. The thought of the Wallace Committee solemnly asking children below the age of consent to incriminate themselves by confessing to illegal sexual activity without warning them of the risks they run in doing that beggars belief.

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<sup>27</sup> Wallace Report, p. 180.

<sup>28</sup> Wallace Report, p. 180.

<sup>29</sup> P. 182. The mind boggles at the thought of the whole-class teaching of girls in how to “negotiate” with boys on how they are to conduct their criminal activity.

<sup>30</sup> Ibid. Emphasis added.

<sup>31</sup> Professor Wallace comments on the CD ROM project: “It is in the context of both school education and what parents can do. We also have a programme for parents: What Should We Tell The Children\_ About Relationships and Sex - a group programme so parents can consider how best to communicate with their child as s/he grows up”.

As the author of a book on secular sexual morality<sup>32</sup> I believe that this subject also needs to be brought into the sex education syllabus. Space does not permit any extensive quotation from the book, but paragraphs 48 and 49 of the code included in it are of obvious relevance:

#### *Sex education*

48. It is the duty of the persons rearing a child to ensure that it undergoes whatever sex education may be necessary to enable it progressively to learn the facts about human sexuality, and eventually to carry out its duties of ethical understanding and ethical action. Subject to this, a child-rearer who has not been proved to lack a genuine intention to promote the welfare of the child has the right to decide what it is to be taught about sex.

#### *Consent by young people to sexual acts*

49. Apparent consent by a youngster to a sexual act with an older person is morally ineffective, and therefore counts as no consent, where the youngster is too immature to understand the nature and quality of the act, that is its physiological, emotional and ethical significance. Apparent consent by a youngster to a sexual act with an age-mate is however to be treated as morally effective. A test for whether a youngster who apparently consents to a sexual act really understands its nature and quality is whether, when maturity is attained, he or she would be likely to regret having committed the act.<sup>33</sup>

Finally, having just been asked by PAT to review a book on religious education<sup>34</sup> I appreciate that it needs to be recognised that the world religions have a great deal to say about the proper treatment of the human sexual instinct.

The different disciplines tend to be handled by different people. Some of these are in government departments; others in academic establishments. Sometimes it seems, in this as in other matters, that the left hand does not always know what the right hand is doing.<sup>35</sup>

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#### **Conclusion**

There may be dangers in persons with an interest in, and knowledge of, only one or two of the relevant disciplines preparing sex education material for use directly by children. A holistic approach is surely to be preferred. Stafleu referred to “a holistic, not an analytical, approach to the phenomena of life”.<sup>36</sup> For teaching children about their sexuality this is surely desirable, or the right balance may not be struck.

In any sex education material officially put before them, children should be presented with an all-round view. This would let them know that other dimensions exist even where, as with the CD ROMs envisaged by the Wallace Report, the emphasis is placed on one particular dimension (here the importance of safer sex).

In her comments on a draft of this article Professor Wallace said: “An academic paper is not concerned re morality”. Obviously the authors of an academic paper such as the Wallace Report may legitimately choose to ignore moral aspects. That does not apply to material that they recommend should be placed before schoolchildren as a teaching aid.

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<sup>32</sup> F A R Bennion, *The Sex Code: Morals for Moderns* (Weidenfeld & Nicolson, 1991), <http://www.francisbennion.com/book/sexcode.htm>.

<sup>33</sup> Op. cit., pp. 304-305. See <http://www.francisbennion.com/1991/005/295.htm>.

<sup>34</sup> Julian Stern, *Teaching Religious Education: Researchers in the Classroom* (Continuum, 2006).

<sup>35</sup> Professor Wallace comments: I agree it may have implications for other aspects of social policy - but the focus was a psychology and health journal and widening the audience's interest to health policy is wide enough; it is an academic journal.

<sup>36</sup> F. A. Stafleu, *Linnæus and Linnæans* ii 39.

The same applies to law. Surely in their sex education lessons children who are under the age of consent should be taught that they are committing a criminal offence if they willingly engage in sexual activity with another person. Teachers too should be made aware that if, as the Wallace Report contemplates, they teach girls under the age of consent how to “negotiate” with boys over the wearing of condoms during sexual intercourse they risk criminal sanctions as accomplices.