Introductory Note by FB

The article below is a further addition to my writings on children and the criminal law. Others are included within my 'Topic: Children and the criminal law' which can be found on this website at www.francisbennion.com/topic/childrenandcriminallaw.htm. See also the further information at the end of the article.

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Criminal Law and the Sexual Child

Francis Bennion explores a difficult issue

An Iconoclast

Professor John Spencer, fellow of Selwyn College Cambridge, made a brave gesture when in a recent radio programme he urged that the sexual laws penalising children in England and Wales should be substantially relaxed where the behaviour is consensual.[1] In the broadcast the professor attacked provisions of the Sexual Offences Act 2003 (SOA) which render criminal consensual sexual acts, however trivial, which are committed by children who are under the age of consent (16) with other such children. This contrasts with his observation that 25% of girls and 30% of boys enjoy full sex before they have reached the age of consent and that the average age of first sexual activity is 14 for girls and 13 for boys.

The professor is not of course the first to attack these outrageous provisions of the SOA, which were alleged by Peter Tatchell in the programme to infringe the human rights of children. I myself have frequently attacked them. In fact I did so with some vigour even while the Bill for the SOA was going through Parliament.[2]

Professor Spencer said that part of the trouble is that our age of criminal responsibility is too low. Parliament has fixed the age at 10, whereas in Germany and Italy it is fixed at 14. So under our system children who are below what the common law has always treated as the age of discretion (14) are nevertheless treated as capable of full criminal acts.

Until 1933 the criminal responsibility of children was determined by the judges. A child under 7 was at common law incapable of incurring criminal responsibility, an incapacity described by the Latin phrase *doli incapax*. Between 7 and 14 a child was presumed by the common law to be *doli incapax*, which could be rebutted by proving that the child knew he was doing something that was wrong.[3]

Parliament then intervened. Section 50 of the Children and Young Persons Act 1933 provided that it should be conclusively presumed that no child under the age of 8 years could be guilty of any offence. This was increased to 10 by the Children and Young Persons Act 1963 s. 16. It was further increased to 14 (except for homicide) by the Children and Young Persons Act 1969 s. 4, but this was never brought into force. Throughout this time the general position of a child under the age of 14 years remained governed by common law, which treated 14 as the age of attaining discretion.[4]

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[1] *Iconoclasts*, BBC Radio Four, 23 September 2009.
[2] See *Briefing on Sexual Offences Act 2003* (Lester Publishing 2003), www.francisbennion.com.2003/009.htm.
[3] This is the so-called *doli incapax* presumption, abolished by the Crime and Disorder Act 1998 s. 34: see F A R Bennion, 'Mens Rea and Defendants Below the Age of Discretion', [2009] Crim. LR 757-770, www.francisbennion.com/2009/031.htm.
[4] See *R v JTB* [2009] UKHL 20 at [3], [4] and F A R Bennion, 'Mens Rea and Defendants Below the

In Italy the age of consent is the same as the age of criminal responsibility (14), which is the logical arrangement. In England and Wales there is a gap of six years between the two, which is what gives rise to the improper penalisation of pubescent children. The SOA, said Professor Spencer, creates 21 separate offences of sex with children and young persons. It criminalises consensual sexual acts between children and other children. It applies however freely and enthusiastically the act is done. It covers any sexual activity however minor, for example simple kissing. It extends to acts which no sane person thinks are seriously wrong. The legislative overkill, said the professor, is astonishing.

Professor Spencer insisted that there is absolutely no need for this oppressive law. Those defending it say it sends a signal, but the purpose of the criminal law is to punish wrongdoing, not send signals - least of all signals we do not seriously expect people to obey. Do we need it for the precocious minor who forces his attention on another child? No we do not, insisted the professor. I applaud his vigorous condemnation, which I fully support.

The problem is what to do about it. I am not saying, said the professor, that where sex is consensual it ought not to be a criminal offence at any age. To lower the age of consent for all purposes would help the paedophile to gratify his or her reprehensible lusts, and would not be tolerated by parents. I will return to this problem later. First I must deal with a related feature of the present system. This is that those in authority are too prone to withhold from children knowledge of the grave risks they run from the criminal law.

National Health Service Advice on Sex Education

On 12 July 2009 newspapers were full of a sensational new sex education leaflet published by NHS Sheffield. A *Times* headline screamed: 'Pupils told: Sex every day keeps the GP away'. The *Daily Mail* said:

> 'Pupils told they have a 'right' to a good sex life: That's the advice for youngsters from the NHS'.

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My reaction on reading of this official 'advice' was: 'What about the law?'. I sent for the leaflet. Refreshing my memory of what I had written on the subject I noticed that inside the front cover of my own copy of my *Sexual Ethics and Criminal Law*[5] I had scribbled 'The point is that the law does not correspond to what people actually do'.

The NHS leaflet is titled *Pleasure*. It announces that it is informed by 'The Pleasure Principle' conference held in Sheffield on 14 September 2007. This included keynote presentations by Professor Roger Ingham, author of 'Putting Pleasure into Policy: Young People and Sexual Health' (2007) and Dr Julia Hirst, author of 'Young People, Sexual Education and SRE' (2007). I approve of everything the leaflet says. It's what it doesn't say that worries me.

The nature of my own views on this subject is conveyed by an extract from my book on the Bill for the SOA *Sexual Ethics and Criminal Law* which said it was

> '. . . based on the fundamental proposition laid down in my book *The Sex Code: Morals for Moderns* (Weidenfeld & Nicolson 1991) that sex positivism or the happy acceptance of human sexuality, seeking its fulfilment, is largely absent from our society - even though it is essential for human happiness. Directly or indirectly, that absence of sex positivism is the root cause of most of the sex crimes that trouble us. Do the Government acknowledge this, and investigate that cause with a view to its removal? The answer is no. Instead they offer us this deeply flawed Bill.'

Which is now a deeply flawed Act of Parliament. It sets out the Blair Government's idea of what laws should govern our sexual behaviour in the twenty-first century. As I have said, it

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Age of Discretion', [2009] Crim. LR 757-770, www.francisbennion.com/2009/031.htm.

[5] Lester Publishing 2003.

imposes an age of consent of 16, with dire penalties for any child aged 10 or over who infringes this.

The *Pleasure* leaflet enthusiastically proclaims my own view of sex-positivism. In his introduction Professor Ingham says we are very confused about sex, adding:

> 'For example, some see sexual activity in clinical and medical terms, some as part of religious doctrines, some as an integral part of loving and stable relationships, some as an almost spiritual process, some as a commodity that can be exchanged for something else, and some as a fun and exciting part of life.'

But Professor Ingham fails to mention that some people (for example police officers) see sexual activity as something to be investigated, while some people (for example lawyers of the Crown Prosecution Service) see it as a means of landing under-age children in court.

Recently I wrote an article about a case which went up to the House of Lords Appellate Committee for final decision.[6] It concerned a boy of twelve (Boy A) who had been convicted in the Crown Court. He admitted 12 counts of causing or inciting unlawful sexual acts, but said that he had not thought that what he was doing was wrong. The willing recipients of his 'causing or inciting' were young boys and the activity, which seems to have been a form of consensual sex-play, included anal penetration with the penis, oral sex and masturbation. The Lords upheld Boy A's conviction. He was only following Professor Ingham's advice, but his young life is ruined.

Professor Ingham's conclusion from his words quoted above is: 'Given all this, is it any wonder that many young people grow up confused and bewildered by it all?' If their mentors in sex education told them the truth about what the law has to say about their activities they might be even more confused and bewildered. But are they not entitled to be told? Do their mentors not have a duty to tell them? Clearly they do, but it is a duty too often neglected.

The *Pleasure* leaflet continues in the same vein. It says:

> 'A key message to convey is that *everyone* engaged in consenting sexual activity has a right to fun, enjoyment and fulfilment or, in other words, to sexual pleasure.'

I have italicised that word *everyone*. It is the wrong word because it would include the unfortunate Boy A and his like. Try substituting 'anyone who has attained the age of consent'.

The leaflet goes on to give 'Ten Good Reasons' why workers and parents/carers should raise the issue of sexual pleasure with young people. They do not include anything about the need to tell youngsters their position under the law and the danger of prosecution. Later this is expanded to no less than thirty ways to raise the same issue. Again, these thirty ways do not include the legal aspect. Then the leaflet says 'An orgasm a day keeps the doctor away'. It does not add that if you are under 16 and share your orgasm with someone else it won't keep the police officer away.

Many workers and parents/carers are themselves ignorant of the law's demands. So it is unwise for two of the thirty ways to be framed as: 'Support young people's right to sexual autonomy' and 'Be assertive when working with others in challenging the generally negative views of young people's emerging sexuality' when the leaflet says not one word about the SOA.

The *Pleasure* leaflet is produced by a public body at public expense. Although I sympathise with those who produced it, I believe it to be irresponsible and dangerous.

Back to Professor Spencer

I have given two examples of what officialdom does to children in our country. In one it subjects them to the risk of the lifelong drawback of a criminal conviction if they engage in

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[6] 'Mens Rea and Defendants Below the Age of Discretion', [2009] Crim. LR 757-770, www.francisbennion.com/2009/031.htm.

trivial consensual sexual congress with age-mates. In the other it encourages them to engage in such congress without warning them of the resulting dangers from the criminal law.

Now I return to Professor Spencer. What was his answer to the problem he so ably outlined? He gave a clue by pointing out that some countries provide exceptions where the other participant is of similar age. Then he said, presumably in relation to consensual activities only, that 'it ought not to be an offence if the other person is not more than three years older'.

This points the way to a sensible 'age-mates' system which would accommodate what is often little more than natural sex play or exploration while not letting in the paedophile. I would support an investigation of this possibility.

Note On page 642 of the issue of the CL&J in which the above was published the Consultant Editor Adrian Turner LLB, Barrister, published the following Comment:-

Comment 41: Children and Sex

I have had advance sight of Francis Bennion's article 'Criminal Law and the Sexual Child', which criticises the provisions of the SOA 2003 that deal with consensual sexual activity between 'children'. I respectfully agree with every point the author makes. As such, I would not normally want to add my own comments. But it seems to me that this is not just a case of a law that is repressive in relation to child sexuality; it is also highly hypocritical.

To explain this it is necessary to say something about my own age group. We are probably the most fortunate and privileged generation to have lived in Great Britain for centuries, if not ever. We were spared conscription and the horror of a world war. We had access to higher education before tuition fees and students loans arrived to saddle today's ablest young with a mountain of debt which they will struggle to pay even if they find jobs. Many of us were able to buy our own homes before we were 30 and then profit from spiralling house prices. Most significantly of all in the present context, we enjoyed an unprecedented degree of personal and sexual freedom. If there was a minus side – apart from having to put up with lots of pretentiousness dressed as 'culture' – I cannot recall it. We were, and remain, very lucky.

The most senior figures in Parliament today are from my generation. Many of their political careers began in the student union, where hours were spent attacking the establishment and demanding greater rights and freedoms. What has happened to these 'revolutionaries'?

If you had asked any of them when they were young, or even before they were 40, whether or not it should be criminal for two 15-year-old young people (quite rightly they do not like to be called 'children' at that age) to kiss and cuddle, they would surely have laughed in your face. Why on earth, therefore, did the government criminalise such natural and common sexual behaviour in the SOA? Where, when, how and why have they undergone this puritanical conversion?

It is certainly the case that this government is 'hung up' about sex. They have even made it an offence to possess pornographic cartoons (which suggests we have gone full circle since the notorious 'Oz' trial). The reason behind these new laws appears, however, to owe more to laziness than morality. During debates on the Bill the then Home Secretary famously offered a magnum of champagne to anyone who could resolve the issue of accommodating consensual sexual activity between young people by providing satisfactory, offence definitions that would catch only conduct generally thought worthy of criminal punishment. There were several interesting attempts to win this prize (would the Home Secretary have claimed it on expenses?), but nobody succeeded. But surely the onus should have been the other way round. In the context of youth and intimate personal relations, in particular, it is entirely inappropriate to enact deliberately broad offences and then rely on prosecutorial discretion to ensure that they are pursued only in appropriate cases. The law needs to be transparently clear and fair, and not left to the enforcement agencies to determine its scope.

The last decision of the Appellate Committee of the House of Lords was, of course, in the *Purdy* case. The appellant persuaded their Lordships that the DPP should be required to set out in detail his policy in relation to the offence of aiding and abetting suicide. Such clarity was deemed to be necessary to comply with art 8. Now you might think that if planning a suicide engages art 8, so does managing a teenage relationship in a way that will keep it out of the criminal jurisdiction. Perhaps we now need a young person, petitioning through his/her 'best friend', or even a concerned parent, to bring proceedings to require the DPP to spell out how much and what kind of petting, etc, it takes to bring a case over the threshold for prosecution. Of course, this is not going to happen. Even if did it would not solve the problem. Many young 'offenders' end up receiving warnings or cautions, in which there may be no CPS involvement at all. It is left, therefore, to ordinary police officers to set the relevant standards in these cases. This is a most unsatisfactory state of affairs. Young people deserve better.

Anyone with any experience of child care knows the importance of setting clear boundaries and being consistent. Nothing, however, could be more opaque or erratic than our handling of child sex. On the one hand, we give out free condoms for attending sex education classes, but on the other, we give out charge sheets to those who attempt to put what they have learned into practice. The Pleasure Leaflet which Francis Bennion refers to is an even more striking example of two-facedness; a case, one might say, of NHS v CPS. Who would be a kid today?

I return to the point I made at the start. Young people know what things were like for my generation when we were their age. It remains a very accessible era. Many of its icons are still around. Therefore, they know this is a case 'Do as we say and not as we did'. There is nothing more certain to breed resentment in a youngster than this kind of hypocrisy.

AJT

For FB's comments on the Purdy case see:

2009.027 CL&J018L Assisted suicide: an open letter to the DPP and his reply, 173 CL&J (1 Aug 2009) p. 494 and (8 Aug 2009) p. 511. www.francisbennion.com/2009/027.htm.

2009.028 CL&J086A 'Assisted Suicide: A Constitutional Change, 173 CL&J (15 Aug 2009) 519-523. www.francisbennion.com/2009/028.htm.

For more articles by FB on assisted suicide see:
www.francisbennion.com/topic/assistedsuicide.htm.

When Magazine Editor Diana Rose sent an advance copy of the article to Professor Spencer he replied:

> 'I'm really glad to see this. Being publicly commended by Francis Bennion more than makes up for being publicly condemned by the *Daily Mail* and by the *Sun*!'

For an editorial on the subject of this article, expressing agreement with it, see www.francisbennion.com/2009/nfb/007.htm.