



House of Commons  
Home Affairs Committee

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# **Sexual Offences Bill**

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**Fifth Report of Session 2002–03**





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**Fifth Report of Session 2002–03**

*Report, together with formal minutes, oral and written evidence*

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## Home Affairs Committee

The Home Affairs Committee is appointed by the House of Commons to examine the expenditure, administration, and policy of the Home Office and its associated public bodies; the administration and expenditure of the Attorney General's Office, the Treasury Solicitor's Department, the Crown Prosecution Service and the Serious Fraud Office.

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### Committee staff

The current staff of the Committee are Dr Robin James (Clerk), Ms Sarah Ioannou (Second Clerk), Mrs Amy Fitzgerald (Committee Legal Specialist), Mr Ian Thomson (Committee Assistant) and Mrs Melanie Barklem (Secretary).

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### Footnotes

In the footnotes of this Report, references to oral evidence are indicated by 'Q' followed by the question number. References to written evidence are indicated by the page number as in 'Ev 12'.

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## Summary

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The Sexual Offences Bill proposes to strengthen and modernise the law on sexual offences, whilst also improving preventative measures and the protection of individuals from sexual offenders. The Bill, which was introduced in the House of Lords, is split into two main parts, with the first part devoted to sexual offences and the second to sexual offenders.

Since we began our inquiry, the Bill has been amended substantially and some of our initial concerns have now been resolved. In particular, we welcome:

- The revised test for determining whether a defendant's belief in consent—in a rape case—is reasonable (Clause 1(c)). We believe that the test is now clear, simple and sufficiently flexible to take account of characteristics, such as a learning disability, which might bear on the defendant's ability to understand that the complainant was not consenting.
- The changes to the presumptions against consent and belief in consent (Clauses 76 & 77), which respond to several concerns about the operation of the original provisions. In our view, it is not unreasonable to require the defendant—in the circumstances specified—to show sufficient evidence to raise a real issue about consent, or his belief in consent, before the matter can be put to the jury. We also support the conclusive presumptions, on the basis that the amended Clause is now confined to two very specific (and indeed unusual) situations involving deception and impersonation, both of which reflect the existing law.
- The removal of recklessness from the offence of exposure (Clause 69), which we believe adequately addresses the concerns of naturists. We do not accept that the offence should be further restricted by a requirement for a sexual motive as this would run the risk of undermining the very purpose of the offence, which is to protect individuals from distressing—and potentially dangerous—types of behaviour.

We also support the extension of rape to include non-consensual penile penetration of the mouth (Clause 1(1)(a)) and the creation of a new offence to cover 'sexual grooming' of children (Clause 17).

However, there are other aspects of the Bill which continue to cause us some concern. Whilst we support the removal of Clause 74 from the Bill (which proposed a new offence of 'sexual activity in public'), its disappearance has not addressed concerns about sex in public toilets. We recommend that sex in public toilets should be a criminal offence and suggest that this might be achieved by amending section 5 of the Public Order Act 1986. In any event, we believe that such an offence should be dealt with in the Magistrates' Court, rather than in the Crown Court. Whilst we accept the need for Risk of Sexual Harm Orders, we have concerns about the requirement for orders to be made for a minimum period of five years and the comparatively low threshold for making an interim order.

Finally, we considered the issue of anonymity for defendants, which has since found its way into Clause 2 of the Bill in relation to rape. We recommend that the reporting restrictions, which currently preserve the anonymity of complainants of sexual offences, be extended to persons accused of those offences (which extend beyond rape). We suggest, however, that the anonymity of the accused be protected only for a limited period between allegation and charge. In our view, this strikes an appropriate balance between the need to protect potentially innocent suspects from damaging publicity and the wider public interest in retaining free and full reporting of criminal proceedings.

# 1 Introduction

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1. The Sexual Offences Bill was introduced into the House of Lords on 28th January 2003 and arrived in the Commons on 18 June. Its purpose is to strengthen and modernise the law on sexual offences, whilst also improving preventive measures and the protection of individuals from sexual offenders. As the Home Secretary has acknowledged, the Bill touches on “highly complicated and sensitive issues which test the balance between the role of Government and the individual”.<sup>1</sup>

2. The Bill was preceded by a period of reviews and consultation and many of the issues which arise in the Bill are set out in the reports of those earlier reviews.<sup>2</sup> The current law “is widely considered to be inadequate and out of date”<sup>3</sup> and has also been criticised for its complexity, having been “made more difficult by piecemeal changes and amendments” in the past.<sup>4</sup>

3. The Bill is split into two main parts, with the first part devoted to sexual offences and the second to sexual offenders. Part I will create several new offences, such as ‘meeting a child following sexual grooming’, and redefine some existing ones, including rape. It seeks to establish a non-discriminatory approach, by repealing offences such as gross indecency and creating gender-neutral offences. Part II seeks to improve the management of sex offenders by strengthening the ‘Sex Offenders Register’ and by establishing a range of new preventative civil orders. The emphasis throughout is on protection for children and other vulnerable individuals with mental disorders or learning disabilities.

4. In this inquiry, we decided to focus only on the most important and controversial clauses. We have concentrated, therefore, on the new proposals for:

- rape and consent (Clauses 1, 77 & 78)
- exposure (Clause 70)
- sexual activity in public (Clause 74—which has now been removed from the Bill)
- to create a new offence of ‘meeting a child following sexual grooming’ (Clause 17); and
- the new civil orders to protect those considered to be at risk of sexual harm (Clauses 110-116).

Finally, we have looked again at the question of whether anonymity should be afforded to defendants in sex cases. Although this issue is not dealt with in the Bill in its present form,

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1 Home Office, *Protecting the Public*, Cm 5668, November 2002, Foreword by the Home Secretary

2 Home Office, *Setting the Boundaries: Reforming the Law on Sexual Offences*, July 2000, Vol I; Home Office/Scottish Executive, Consultation Paper on the Review of Part I of the Sex Offenders Act 1997, July 2001

3 Home Office, *Protecting the Public*, Cm 5668, November 2002, p 9, para 8. In the same paragraph, the Government describe the existing law as “archaic, incoherent and discriminatory”.

4 Home Office, *Setting the Boundaries: Reforming the Law on Sexual Offences*, July 2000, Vol I, p 1, para 1.1.2

it is an issue which continues to be debated and which we touched briefly upon during our earlier inquiry into *The Conduct of Investigations into Past Abuse in Children's Homes*.<sup>5</sup>

5. Since our inquiry began, many of the clauses which we have considered have been subject to amendment in the Lords. Throughout this report, references to clause numbers relate to the Bill as originally introduced, unless otherwise stated.

## Conduct of our inquiry

6. During the course of this inquiry, we have heard from nine witnesses over two evidence sessions. These included the Minister who was then in charge of the Bill, Hilary Benn MP<sup>6</sup> and Home Office officials, the Criminal Bar Association, the Rape Crisis Federation of England and Wales (giving evidence jointly with Campaign to End Rape), the Police Federation, JUSTICE and British Naturism. All of the oral evidence is published with the report. In addition, we have received written evidence from 47 individuals and organisations, for which we are most grateful. In particular, we received a large number of submissions on Clause 70 (exposure) from individuals or organisations representing the interests of naturists, a representative selection of which has been published. A full list of witnesses and those who have provided written evidence appears on pages 29–31.

7. Finally, we would like to extend our thanks to Professor Jennifer Temkin<sup>7</sup> for providing a valuable and informative briefing at the start of our inquiry. We benefited, in particular, from her insight into some of the complex issues surrounding rape and consent, to which we now turn.

## 2 Rape and consent

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8. Rape has been described as “the most serious, the most feared and the most debated” of all sexual offences.<sup>8</sup> During the Bill’s progress through Parliament, strong opinions have been expressed both for and against the proposed reforms on rape. In this section, we concentrate on the three major issues. First, the proposal to extend the definition of rape to include penetration of the mouth; secondly, the introduction of an element of reasonableness into the ‘defence’ of mistaken belief in consent; and thirdly the use of presumptions against consent and mistaken belief in consent. It is important to start, however, by setting the context. Part of the purpose of these provisions is to address the high rate of attrition in rape cases.

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5 Fourth Report of Session 2001-02, *The Conduct of Investigations into Past Cases of Abuse in Children's Homes*, HC 836-I, paras 98–99

6 At the time that he gave his evidence to the Committee, Hilary Benn MP was a Parliamentary Under-Secretary in the Home Office.

7 Professor Temkin is a Professor of Law at Sussex University and was also a Member of the External Reference Group of the independent Sexual Offences Review, which was established in 1999 and reported in July 2000.

8 Home Office, *Setting the Boundaries: Reforming the Law on Sexual Offences*, July 2000, Vol I, p 9, para 2.1.1

## Statistics

9. During the debate in Committee, the Minister of State at the Home Office, Lord Falconer of Thoroton QC, said that there were 9,008 alleged rapes recorded in 2001. In only 5.8% of these cases was there an eventual conviction. Of the 1,267 persons actually charged and tried, 41.2% were convicted. He went on to say, by way of comparison, that the general conviction rate for trials by jury was 73.4%.<sup>9</sup> Giving a broader picture from the post-war statistics, Professor Temkin states that:

“the number of recorded offences of rape has radically increased, but the prosecution rate is dropping, as is the committal rate and the conviction rate. Thus, the attrition rate in rape cases after recording by the police is increasing.”<sup>10</sup>

## The definition of rape

10. The proposal to extend the definition of rape to include forced penile penetration of the mouth follows a recommendation of the Sexual Offences Review committee.<sup>11</sup> At present, forced oral sex is regarded as an indecent assault and the offence of rape is confined to penile penetration of the vagina and anus. However, rape was historically limited to penetration of the vagina before it was redefined in 1994 to include anal penetration.<sup>12</sup>

11. Peter Rook QC, Chairman of the Criminal Bar Association, told us that his organisation was opposed to the proposal because “juries might be less inclined to convict of rape itself” in a case which involved forced oral sex. He suggested that Clauses 3 and 4, concerning assault by penetration, “would be a more natural home for it”, particularly given that the penalty (life imprisonment) was the same as that for rape.<sup>13</sup>

12. In response, Cathy Halloran, who spoke on behalf of the Rape Crisis Federation and Campaign to End Rape, argued that to distinguish forced oral sex from rape downgraded the seriousness of this form of assault. She said that people’s experience of this assault was “as degrading and traumatic and horrific as penetration of the vagina or of the anus”.<sup>14</sup> Furthermore, she doubted whether juries would be any less likely to convict, given that judges will direct the jury on the new law.<sup>15</sup> In her view:

“The law adapts to cultural changes and we have a different perception now of rape in that rape can now be rape of a male and rape of a female, it can be vaginal and it can be anal. In my view, it [can] become...penile penetration of the mouth and it will be accepted just as anal penetration has been accepted as rape.”<sup>16</sup>

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9 HL Deb, 31 March 2003, col 1098

10 Jennifer Temkin, *Rape and the Legal Process* (OUP, 2<sup>nd</sup> Edn), p 30

11 Home Office, *Setting the Boundaries*, July 2000, Vol I, p 15, para 2.8.5

12 Criminal Justice and Public Order Act 1994, s 142, substituting s 1 of the Sexual Offences Act 1956

13 Qq 3-4

14 Q 5

15 Q 6

16 Q 7

13. Janet Arkininstall, from JUSTICE, said that “as a matter of logic, I would prefer that it be in Clause 1 simply because that is dealing with penile penetration of an orifice of a person.”<sup>17</sup> By contrast, Clauses 3 and 4 deal with penetration by other body parts or objects.

**14. We have no difficulty with the proposal to extend the definition of rape to include forced oral sex. We see the logic of grouping all forms of non-consensual penile penetration—including penetration of the mouth—within the same offence. The law on rape has adapted successfully to changes of definition in the past and we find no reason to suspect that juries will be reluctant to convict on the new definition.**

### Belief in consent

15. The proposal, in Clause 1(3), to change the mental element of the offence of rape has been the subject of extensive debate in the House of Lords. We do not propose to repeat those arguments here.<sup>18</sup> As the law currently stands, to be guilty of rape a man must know, or be reckless as to whether, the other party is not consenting.<sup>19</sup> If he honestly believed that the other party consented, he does not have the necessary ‘guilty mind’ for this offence. ‘Mistaken belief in consent’ can therefore be used as a ‘defence’ to a rape charge. At present, the test—which was established in *DPP v. Morgan* (1975)<sup>20</sup>—is a subjective one, which does not require the defendant’s mistaken belief to be objectively reasonable.<sup>21</sup> If implemented, Clause 1(3) will change the law on mistaken belief by introducing a “reasonableness” requirement.

16. In support of the reform, the Minister of State at the Home Office, Lord Falconer of Thoroton QC, has said:

“The unsatisfactory elements of the current position are, first, that it implicitly authorises the assumption of consent regardless of the views of the victim. Secondly, it is easy for the defendant to seek consent—the cost to him is very slight and the cost to the victim of forced sexual activity is very high indeed. We believe that it is not unfair to ask any person to take care to ensure that their partner is consenting and for them to be at risk of a prosecution if they do not...So we take a strong view that there should be an objective element in the matter.”<sup>22</sup>

**17. We welcome the proposal to adopt a more objective test for determining whether the defendant held an honest but mistaken belief in the complainant’s consent. In our view, it is not unreasonable to require a person to take care that the other party is consenting. As the Minister has said, “the cost to him is very slight and the cost to the victim of forced sexual activity is very high indeed”.**

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17 Q 9

18 For more detail on the background to this issue, see Ev 63–69 (JUSTICE). For the key debates in the Lords, see HL Deb, 31 March 2003, cols 1061–1110 (Committee Stage) 2 June, cols 1049–1077 (Report stage) and 17 June, cols 669–678 (Third Reading).

19 Sexual Offences Act 1956, s 1

20 [1976] A.C. 182, HL

21 Following the decision in *Morgan*, legislation was introduced to require that when a jury consider whether a belief was genuine, they have regard to the “presence of absence of reasonable grounds for such belief”: Sexual Offences (Amendment) Act 1976, s 1(2).

22 HL Deb, 2 June 2003, col 1060, Lord Falconer of Thoroton QC

18. Much of the debate on this Clause has focussed on the question of how the test should be formulated. In the Bill as introduced, Clause 1(3) proposed to replace the *Morgan* test with a two-stage test. This required the jury to consider first, whether a reasonable person would, in all the circumstances, have doubted whether the complainant was consenting. If there *was* room for doubt, then the jury were required to consider, secondly, whether the defendant “acted in a way that a reasonable person would consider sufficient in all the circumstances to resolve such doubt”.

19. This formulation was criticised on two grounds. First, it was feared that it would lead to injustice in some cases because it (arguably) failed to take account of the defendant’s particular characteristics, for example a learning disability.<sup>23</sup> Secondly, it was said to be unnecessarily complex and made more difficult by its operation in connection with the presumptions in Clause 78 (now Clauses 76 and 77). As a result, it was believed to be in danger of confusing juries and generating appeals.<sup>24</sup>

20. On the first point, the Chairman of the Criminal Bar Association suggested to us that the test be amended to require the jury to consider “what a reasonable person ‘sharing the characteristics of the defendant’ would have thought”.<sup>25</sup> The Government opposed this, however, on the grounds that it would require the jury to consider *all* the characteristics of the individual defendant. This, it believed, would be inappropriate because some characteristics “should not absolve [the defendant] of guilt: for example, the fact that he has a quick temper or that the sight of a girl in a miniskirt will always turn him on and make him unable to resist her”.<sup>26</sup> Hilary Benn, Parliamentary Under-Secretary in the Home Office, indicated that the drafting in Clause 1(3) already took sufficient account of the individual defendant because the jury were invited to look at “all the circumstances”.<sup>27</sup> Against that, however, Viscount Bledisloe QC argued that “‘circumstances’ means surrounding facts...not the peculiar characteristics of the individual” defendant.<sup>28</sup>

21. The Government agreed, in view of these concerns, to reconsider the formulation of Clause 1(3). On Third Reading, it introduced a set of consensual amendments, which received the support of the Opposition Front Benches in the Lords. If implemented, the amended test (now set out in Clause 1(1)(c)) will require the prosecution to prove that the defendant did “not reasonably believe” that the other party consented. In addition, new Clause 1(2) provides that:

“Whether a belief is reasonable is to be determined having regard to all the circumstances, including any steps A [the defendant] has taken to ascertain whether B [the other party] consents.”

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23 Q 14, Peter Rook QC

24 See, for example, HL Deb, 31 March 2003, col 1065, Lord Lloyd of Berwick

25 Ev 45

26 HL Deb, 2 June 2003, cols 1073–1074, Lord Falconer of Thoroton QC

27 Q 129

28 HL Deb, 31 March 2003, col 1107

22. When introducing the amendments, the Minister of State in the Home Office, Baroness Scotland of Asthal QC,<sup>29</sup> said that:

“...the revised version of the reasonableness test moves away from the concept of the “reasonable person” and requires the prosecution to prove that the defendant did not have a reasonable belief in consent. The test is supported by an explanation of the type of criteria to be used to determine whether the defendant’s belief in consent was reasonable in relation to the alleged offence. The jury is directed to have regard to all the circumstances at the time, including any steps taken that the defendant may have taken to establish that the complainant consented to the sexual activity.”<sup>30</sup>

**23. In our view, the revised ‘reasonableness test’ for a defendant’s belief in consent is both clearer and simpler than the original drafting. More importantly, it also addresses the concerns about the potential injustice of applying a “reasonable person” standard to all defendants, regardless of their individual characteristics. By focussing on the individual defendant’s belief, the new test will allow the jury to look at characteristics—such as a learning disability or mental disorder—and take them into account. For these reasons, we support Clause 1.**

## Presumptions against consent and belief in consent

24. This leads us on to the presumptions in Clause 78, relating to consent and belief in consent.<sup>31</sup> As originally drafted, Clause 78 was probably the most confusing provision in the whole Bill. The Clause provided for two different kinds of presumptions—rebuttable presumptions (which shift the burden of proof onto the defendant) and conclusive presumptions (which determine an issue conclusively). The same clause was also drafted for two purposes: first, to guide the jury on the issue of consent and, secondly, to restrict the use of mistaken belief in consent as a defence to a charge. As a result, the drafting was cumbersome and attracted much criticism from judges and lawyers.<sup>32</sup>

25. During the course of this inquiry, Clause 78 has also been amended substantially and the presentation of the provisions is now much improved. In particular, the original Clause has been split into two (now Clauses 76 and 77) to separate the rebuttable from the conclusive presumptions.

### *The rebuttable presumption against belief in consent*

26. If implemented, the presumptions will apply only in circumstances where the defendant used violence or threats of violence against the complainant or a third party, where the complainant was unlawfully detained, asleep or otherwise unconscious, or where

29 Baroness Scotland replaced Lord Falconer as Minister of State in the Home Office on the 13 June 2003, following the Government re-shuffle.

30 HL Deb, 17 June 2003, col 669

31 The presumptions will apply to the offences of rape, assault by penetration, sexual assault and causing a person to engage in sexual activity without consent (new Clause 78).

32 HL Deb, 31 March 2003, col 1129, Lord Falconer of Thoroton QC. See also Ev 46 (Criminal Bar Association) and Ev 103–104 (Professor Jennifer Temkin).

the complainant was unable, because of a physical disability, to communicate consent (new Clause 76(2)).

27. As originally drafted, the presumptions in Clause 78 placed an ‘evidential’ burden on the defendant in relation to the issue of consent and a ‘persuasive’ burden on the issue of belief in consent. The difference between these two concepts is explained in *Cross and Tapper on Evidence*:

“The evidential burden has been defined as the obligation to show, if called upon to do so, that there is sufficient evidence to raise an issue as to the existence or non-existence of a fact in issue. The persuasive, ‘legal’, or ‘probative’ burden has been defined as the obligation of a party to meet the requirement of a rule of law that a fact in issue must be proved or disproved.”<sup>33</sup>

28. Therefore, under the original drafting, the defendant was required to rebut the presumption against a *belief* in consent by *proving* that he did believe in the other party’s consent. This was far more onerous than the ‘evidential’ burden which applied in relation to the issue of consent. Furthermore, the task of proving a belief in consent was said to be made more difficult by the operation of the complicated test of reasonableness which (then) existed under Clause 1(3). Some argued that the combined hurdle was “insurmountable”.<sup>34</sup>

29. Following a sequence of amendments, new Clause 76 now gives rise to an evidential presumption only, which applies both to consent and belief in consent.<sup>35</sup> Introducing the amendments, the Minister of State in the Home Office, Baroness Scotland of Asthal QC, explained that:

“In order for these presumptions not to apply, the defendant will need to satisfy the judge from the evidence that there is a real issue about consent [or belief in consent] that is worth putting to the jury. The evidence relied on may be, for example, evidence that the defendant himself gives in the witness box, or evidence given on his behalf by a defence witness, or evidence given by the complainant during cross-examination. If the judge is satisfied that there is sufficient evidence to justify putting the issue of consent to the jury, then the issues will have to be proved by the prosecution in the normal way.

If the judge does not think the evidence relied on by the defendant meets this threshold, he will direct the jury to find the defendant guilty, assuming the jury is sure that the defendant did the relevant act, that the circumstances in subsection (2) applied and that the defendant knew that.”<sup>36</sup>

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33 Colin Tapper, *Cross & Tapper on Evidence* (Butterworths, 9<sup>th</sup> Edn), p 111

34 During the debate in the Lords, Earl Russell said the test was “completely insurmountable and it is unreasonable to ask anyone to try to conduct it”. HL Deb, 31 March 2003, cols 1073–1075.

35 At the time that we took evidence from Hilary Benn, Parliamentary Under-Secretary in the Home Office, the clause had been amended so that the rebuttable presumptions applied *only* to belief in consent and *not* to consent. See Qq 132 & 141. This was subsequently reversed by further amendment and the clause now applies (once again) to *both* consent and belief in consent.

36 HL Deb, 17 June 2003, cols 670–671

30. During our inquiry, some organisations argued that the list of circumstances giving rise to the presumption should be non-exhaustive or, alternatively, extended to include other situations, such as where the complainant is too drunk or drugged to give consent.<sup>37</sup> Others criticised the provision—and its interrelationship with Clause 1(3)—as complex, unfair and unworkable.<sup>38</sup> However, Hilary Benn, Parliamentary Under-Secretary in the Home Office, told us that the presumptions will be “an assistance to the jury in guiding them through the process”.<sup>39</sup> He added that they are intended to “send out a very clear message that does shift the balance in favour of the complainant”.<sup>40</sup>

**31. We support the amended Clause 76. In our view, the circumstances which will give rise to a rebuttable presumption against consent or a belief in consent are all situations in which consent is generally absent. Accordingly, we do not find it unreasonable to require the defendant—in those circumstances—to show sufficient evidence to raise a real issue about consent, or his belief in consent, before the matter can be put to the jury.**

### *Conclusive presumptions against consent and belief in consent*

32. New Clause 77 sets out two circumstances in which it will be conclusively presumed that the complainant did not consent and the defendant did not believe in consent (Clause 77(2)). These arise where the defendant has induced submission to sexual activity, first by deceiving the complainant about the nature and purposes of the act<sup>41</sup> and, secondly, by impersonating another person known to the complainant (such as a husband or partner). In support of the (amended) Clause, the Minister of State in the Home Office, Baroness Scotland of Asthal QC, stated:

“The conclusive presumptions are based on existing statute and case law and we are satisfied that it is right that the new legislation should reflect that position.”<sup>42</sup>

33. As originally drafted, the Bill also provided that it would be conclusively presumed that the defendant did not act in a reasonable way to resolve a doubt about consent (under Clause 1(3)) if he formulated his belief on the basis of something said or done by a third party. This gave rise to particular concerns, for example, Liberty believed that it would 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”.<sup>43</sup> In addition:

“The noble Lord, Lord Carlile [of Berriew QC] suggested that it would be unfair to impose a conclusive presumption in relation to the reasonableness test where the

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37 See for example, Ev 100 (Rape Crisis Federation of England and Wales and Campaign to End Rape)

38 See for example, Ev 46 (Criminal Bar Association) and HL Deb, 31 March 2003, col 1132, Baroness Noakes (commenting on submissions by the Criminal Bar Association).

39 Q 142

40 Q 140

41 Lord Falconer explained that “for example, it applies when a doctor digitally penetrates the patient, telling her it is necessary for medical reasons when in fact it is for his own sexual gratification.” HL Deb, 31 March 2003, col 1130.

42 HL Deb, 17 June 2003, col 672

43 Ev 81

defendant was a person with a mental disorder or learning disability, who could not be expected to understand that a third party was deceiving him as to the truth.”<sup>44</sup>

The Government has responded positively to these criticisms by removing this provision from the Bill.

**34. We support the amendment to Clause 77, which we believe has addressed the key concerns about the conclusive presumptions. The amended Clause is now confined to two very specific (and indeed unusual) situations involving deception and impersonation, both of which reflect the existing law.**

### 3 Exposure

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35. The new offence of exposure has been criticised heavily, particularly by naturist organisations and those who practice naturism. When we took evidence, it was feared that Clause 70 (now Clause 68) would criminalise legitimate activities such as naturism.<sup>45</sup> There was also some confusion about whether it would catch those who work as nude models,<sup>46</sup> or the unfortunate individual who gets “caught short...on the way home” and exposes himself to “spend a penny”.<sup>47</sup> In response, the Government said that it did not expect, nor intend, to criminalise such activities.<sup>48</sup> However, since our oral evidence sessions, the Government has amended the Clause, to alleviate the concerns of naturists, by removing the “lesser requirement” of recklessness.<sup>49</sup>

36. As a result, an offence will be committed only where an individual “(a) intentionally exposes his genitals, and (b) knows or intends that someone will see them and be caused alarm or distress” (Clause 68(1)). On moving the amendment, the Minister of State at the Home Office, Lord Falconer, explained that:

“we are removing the recklessness requirement, so that the naturist will be guilty of an offence only if he knew or intended that what he did would cause alarm or distress. It will not be an offence because he knows...that there is a proportion of the population who, to use the phrasing of the opinion poll, find such actions disgusting. That would not, as a matter of law, make it a criminal offence, because he would not know in the circumstances that ‘alarm or distress’ would be caused—which is the wording of the offence. ‘Recklessness’ is about a risk. Knowing or intending that alarm will be caused is about actually knowing the facts.”<sup>50</sup>

37. In evidence to our Committee, Mick Ayers (Chairman of the Central Council for British Naturism) indicated that the offence should require a specifically *sexual* motivation. He suggested the insertion of the words “for the purpose of sexual gratification” (which

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44 HL Deb, 17 June 2002, cols 671–672

45 See for example, Ev 33–34, British Naturism

46 HC Deb, 19 March 2003, col 833W

47 HL Deb, 19 May 2003, col 560, Lord Campbell of Alloway

48 Q 144. See also HC Deb, 19 March 2003, col 833W

49 HL Deb, 19 May 2003, col 555

50 HL Deb, 19 May 2003, col 566

appear elsewhere in the Bill).<sup>51</sup> However, Hilary Benn, Parliamentary Under-Secretary in the Home Office, indicated that this would create “real difficulties” because it would “require proof of the motive behind the exposure and that could be quite difficult”. He also highlighted that it “would miss other motivations that may lead people to do this”.<sup>52</sup>

38. On the issue of intent, the *Setting the Boundaries* report states:

“We thought that any...offence [of exposure] needed to be carefully but broadly defined...We also thought that the degree of intent for this offence, which may involve compulsive as well as overtly intentional behaviour, needed careful thought. A purely subjective test has its difficulties. Proving intention to cause fear, alarm or distress could be difficult even when that outcome occurred. A more objective test that he knew or should have known that it would cause fear, alarm or distress provides an appropriate lower threshold whereby certain types of exposure (such as to an individual woman or a child in a lonely place), which would undoubtedly cause fear, alarm or distress, would be clearly criminal.”<sup>53</sup>

**39. In our view, it is neither appropriate nor desirable to criminalise legitimate activities, such as naturism. We therefore welcome the removal of the ‘recklessness’ element from the offence of exposure (Clause 68). We do not, however, accept that the offence should be further restricted by a requirement for a sexual motive. In our view, this may create more difficulties than it solves and runs of the risk of undermining the very purpose of the offence, which is to protect individuals from distressing—and potentially dangerous—types of behaviour.**

## 4 Sexual activity in public

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40. Clause 74 no longer appears in the Bill, having been removed by a Government amendment after heavy criticism in the House of Lords.<sup>54</sup> It was introduced, on a recommendation in *Setting the Boundaries*, to establish a new offence of engaging in sexual activity in a public place.<sup>55</sup> Although it was thought widely to be too broad in scope (by extending its reach into people’s private gardens and remote locations in the countryside), much of the criticism focussed on its perceived failure to cover sexual activity in public toilets. The Government’s solution was to withdraw the clause, but this has not alleviated concerns that the Bill may legalise sex in public toilets. Consequently, on 9 June, the Lords passed an amendment to insert a new clause (Clause 67), which will prohibit—in express terms—“sexual activity in a public lavatory”.<sup>56</sup>

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51 Q 49. The offence of ‘engaging in sexual activity in the presence of a child’ in (new) Clause 12(1) of the Bill is one example of an offence which refers to ‘sexual gratification’.

52 Q 147

53 Home Office, *Setting the Boundaries*, July 2000, Vol I, pp 120-1, para 8.2.7

54 HL Deb, 19 May 2003, cols 585–588

55 Home Office, *Setting the Boundaries*, July 2000, Vol I, p 126, para 8.4.11

56 The amendment was passed by 133 votes to 95. HL Deb, 9 June 2003, cols 64–80.

41. The Government accepts that “people do not want public toilets used in a way that upsets, outrages, offends and distresses people of a reasonable disposition”.<sup>57</sup> The question is simply how to achieve the common objective of preventing such behaviour. Many believe that the Bill will create a loophole in the law because it will repeal offences (such as buggery and gross indecency) which apply very specifically to consensual acts committed in public toilets,<sup>58</sup> without any adequate replacement. Clause 74 required the person engaging in sexual activity to know (or be reckless as to whether) someone in a public place would “see any part of him or another participant”. On this drafting, it was argued that a person who engaged in sex behind a closed cubicle door—and was screened from public view—would not commit the offence.

42. The Government says that the common law offence of outraging public decency “is capable of dealing with the problem”.<sup>59</sup> It has also said that section 5 of the Public Order Act 1986 “adds further protection in that it covers sexual activity within the sight or hearing of a person likely to be caused harassment, alarm or distress”.<sup>60</sup> Furthermore, the Government has proposed to make the common law offence more flexible by allowing it to be tried either as a summary offence in the Magistrates’ Court or on indictment in the Crown Court.<sup>61</sup> (At present, it is triable only on indictment).

43. Others are not convinced and much debate has ensued about the precise scope of these offences. Before the Bill was amended, Jan Berry (Chair of the Police Federation) told us that:

“From a police point of view, there are public toilets which members of the public do not feel able to go to because of the use to which they are put. I think that is unwarranted. I think the law, if it goes through in this way, will actually make that lawful...Our view is that what goes on behind closed doors between consenting adults of the right age is appropriate, but that should not be in public toilets...it is not an appropriate use of public toilets...I think the law needs to make that very explicit.”<sup>62</sup>

44. The Government, however, has opposed new Clause 67 (Sexual activity in a public lavatory), on the basis that it “specifies that certain activities have to be committed”. During the debate in the Lords, the Minister of State in the Home Office, Lord Falconer of Thoroton QC, explained that:

“In the law as we see it operating, if something were to happen behind a cubicle door, for example, it would not be necessary to identify precisely what act had occurred, it

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57 HL Deb, 9 June 2003, col 75, Lord Falconer of Thoroton QC

58 See sections 12 and 13 of the Sexual Offences Act 1956 and section 1 of the Sexual Offences Act 1967, which will all be repealed by the Sexual Offences Bill, cl 132 and Sched 5.

59 HL Deb, 9 June 2003, col 75, Lord Falconer of Thoroton QC. The case of *R v Mayling* [1963] 2 QB 717, CA has been cited as an example of how the common law offence has applied to an act of indecency in a public toilet. However, *Mayling* appears to suggest that the offence would *not* apply if the act had been committed behind a closed cubicle door because “more than one person must at least have been able to see the act complained of”. See HL Deb, 9 June 2003, col 66, Baroness Noakes.

60 HL Deb, 19 May 2003, col 586, Lord Falconer of Thoroton QC

61 An amendment to this effect has been made to the Criminal Justice Bill (cl 290).

62 Qq 68–69

would be enough, if looking at all the circumstances, people using the toilet were outraged, offended or distressed by what happened.

As regards...[new Clause 67], specific acts have to be identified. I fully understand the motive behind the amendment, but I can assure noble Lords that it is not going to have the [intended] effect...because of the specific problems of proof.”<sup>63</sup>

45. In *Setting the Boundaries*, the Sexual Offences Review recommended that a new public order offence be created to deal specifically with sexual behaviour:

“We thought that the present Public Order Act 1986 provided a useful model for the kind of offence we envisaged. Offensive behaviour under section 5 of the Public Order Act is only unlawful when there is a third person present who is (or is likely to be) distressed by it. Section 5 also gives the police a special power to warn a potential offender before arresting him. In most cases this will be a more appropriate and effective way of dealing with indecency; the aim except for those who are persistently causing nuisance is to resolve the problem on the spot. If the warning is ignored then there is the option for prosecution. We thought that this was a useful model, but that rather than rely on the existing tests in the Public Order Acts we should recommend the creation of a new offence. This should not only apply to open displays of sexual acts in public, but also behaviour leading up to it.”<sup>64</sup>

46. At present, section 5 of the Public Order Act 1986 covers (among other things) “threatening, abusive or insulting words or behaviour, or disorderly behaviour” which is likely to cause harassment, alarm or distress. Although it may be possible—and the Government argue that it *is* possible—to apply this to sex in public toilets, we believe that it should be made more explicit.

**47. There is much concern and disagreement as to whether this Bill will legalise sexual activity in public toilets. We recommend that sexual activity in public toilets should be a criminal offence and suggest that this could be dealt with by an amendment to section 5 of the Public Order Act 1986, which makes it clear that “insulting” behaviour includes sexual behaviour. This would dispense with the need to prove specific sexual acts and also has the advantage of empowering the police to give a warning before making an arrest. We believe that it is appropriate for this offence to be dealt with in the Magistrates’ Court, rather than in the Crown Court.**

## 5 Meeting a child following sexual grooming

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48. Clause 17 will create a new offence of ‘meeting a child following sexual grooming’. It is “intended to cover situations in which an adult establishes contact with a child—for example through meetings, telephone conversations or communications on the internet—

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63 HL Deb, 9 June 2003, col 76, Lord Falconer of Thoroton QC

64 Home Office, *Setting the Boundaries*, July 2000, Vol I, p 126, para 8.4.9

with the intention of gaining the child's trust and confidence so that he can arrange to meet the child for the purpose of committing a sexual offence against him or her".<sup>65</sup> There are two key parts to the offence. First, the adult (A) must intentionally meet, or travel to meet, a child (B) with the intention of committing one of the specified sex offences and, secondly, A must already have met or communicated with B on at least two previous occasions.<sup>66</sup>

49. Sexual 'grooming' of children is recognised to be a very real problem<sup>67</sup> and Clause 17 "stems from work undertaken by the Government's Internet task force on child protection".<sup>68</sup> The clause has received broad support from the police, as well as a number of organisations involved in child protection.<sup>69</sup> Childnet International explain that "the new...offence would enable the police to arrest the predator before the child was physically or sexually abused."<sup>70</sup>

50. However, others fear that we are creating a "thought crime"<sup>71</sup> which could criminalise innocent communications with children. Peter Rook QC (Chairman of the Criminal Bar Association) suggested that the clause be amended to require that the defendant has "the appropriate intention...on the previous two occasions", as well as in relation to the actual or intended meeting.<sup>72</sup> Against this, Childnet International states that the "thought crime" argument "ignores the fact that the contacts and communication are linked incontrovertibly to arrangements for a meeting with the purpose of committing a sexual crime in order for the new grooming offence to have been committed." In their view, "the intent would be drawn from a course of conduct, either the communication itself...or other circumstances, such as going to the meeting with pornography, condoms or lubricants for example."<sup>73</sup>

51. Hilary Benn, Parliamentary Under-Secretary in the Home Office, has also said that:

"We do not think in any way that it will criminalise innocent communication with children because, in order for the offence to be proved, whilst previous contact has to take place, it has to be shown that, at the point of meeting the child, there was intention to commit a sex offence. I am the first to acknowledge that it will not be easy to prove that, but the argument for this offence...was...to plug a gap in the law."<sup>74</sup>

**52. We accordingly support the new offence of 'meeting a child following sexual grooming'.**

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65 HL Deb, 1 April 2003, col 1256, Lord Falconer of Thoroton QC

66 Cl 17(1)(a)

67 See the case examples given by Childnet International, Ev 40–41.

68 HL Deb, 1 April 2003, col 1256, Lord Falconer of Thoroton QC

69 See, for example, Ev 38–43 (Childnet International), Ev 83 (Metropolitan Police) and Ev 90 (Police Federation)

70 Ev 42

71 See, for example, Ev 45 (Criminal Bar Association) and Ev 78 (Liberty)

72 Q 82

73 Ev 42

74 Q 172

## 6 Preventative civil orders

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53. As well as reforming the law on sexual offences, the Bill also deals with sexual offenders. We have focussed on the proposal to create three new civil orders: ‘Sexual Offences Prevention Orders’, ‘Foreign Travel Orders’ and ‘Risk of Sexual Harm Orders’. Our attention was drawn, in particular, to the Risk of Sexual Harm Orders (RSHOs), which—unlike the other orders—may be obtained against persons who have no previous convictions for sexual, or any other, offences.

54. If implemented, it will be possible for “the police to apply to a Magistrates’ Court in respect of a person over the age of 18 who has on at least two occasions engaged in sexually explicit conduct or communication with a child or children and there is reasonable cause to believe that the order is necessary to protect a child or children from harm arising out of future such acts by the defendant”.<sup>75</sup> The court order will be able to prohibit the defendant from doing anything described in the order, but only so far as it is necessary to do so “for the purpose of protecting children generally or any child from harm from the defendant” (now in Clause 121(6)).

55. Liberty has described these orders as “an affront to any notion of traditional British justice,” in that they “permit the badge of paedophilia and accordingly broad and ill-defined ‘prohibitions’...to be placed upon a person who has never been convicted of any criminal offence. No criminal offences need even be anticipated”.<sup>76</sup> The Joint Committee on Human Rights (JCHR) has also expressed concern, highlighting the point that such orders “would be very likely to have a catastrophic effect on people’s lives and reputation”.<sup>77</sup>

56. We note, however, that the Guidance on Risk of Sexual Harm Orders, which has been published in draft, confirms that whilst these are civil orders the burden of proof will be to the criminal standard of ‘beyond reasonable doubt’.<sup>78</sup> In addition, the guidance states that:

“The RSHO should not be used as a substitute for the criminal offence, but applies in circumstances where the behaviour of the adult gives reason to believe that the child is at risk from the defendant’s conduct or communication and intervention at this earlier stage is necessary to protect the child.”<sup>79</sup>

57. When we asked whether these new orders were necessary, Jan Berry (Chair of the Police Federation) told us that:

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75 Explanatory Notes, referring to the introductory print of the Bill.

76 Ev 82

77 Joint Committee on Human Rights, Seventh Report of 2002–03, *Scrutiny of Bills: Further Progress Report*, HC 547/HL 74

78 Home Office, *Provisional Draft Guidance on Risk of Sexual Harm Orders*, March 2003, para 24. This is in line with the House of Lords’ decision in *R (McCann) v. Crown Court of Manchester* [2002] UKHL 39; [2002] 3 WLR 1313, relating to Anti-Social Behaviour Orders.

79 Home Office, *Provisional Draft Guidance on Risk of Sexual Harm Orders*, March 2003, para 12

“There must be some occasions where this would be an extremely useful order but I think there are probably other avenues which can be taken to produce exactly the same thing. I tend to think it may well be classed as overkill. I can think of a few occasions when that might be useful, but, when you start looking at human rights legislation and the like for people not having any prosecution and conviction, to have an order of this nature I think would probably be against human rights legislation.”<sup>80</sup>

**58. Whilst we accept the need for Risk of Sexual Harm Orders (RSHOs), we recommend that their use be carefully monitored by the Home Office and the numbers reported annually to Parliament.**

59. One point that puzzled us was why it was felt necessary to require that these orders be made for a fixed period of *at least* five years (now Clause 121(5)(b)). We put this to the Minister and his officials during our oral evidence sessions. A Home Office official first explained that “the orders can be varied or they can be discharged or appealed against. If you could convince the court that the risk of causing serious sexual harm had gone then somebody could apply for the order to be discharged”.<sup>81</sup> When we pressed the issue, by highlighting that the onus would be on the defendant to apply for a variation or discharge, Hilary Benn, Parliamentary Under-Secretary in the Home Office, said:

“That is true as far as the way the order works is concerned. There is a right of appeal if circumstances change.”<sup>82</sup>

**60. We recommend that Clause 121(5)(b), which requires a RSHO to be made for a fixed period of at least five years, be deleted from the Bill. The courts should be given discretion to make whatever length of order is needed to protect a child or children from harm.**

61. The JCHR has also expressed concern about the criteria for making an interim order,<sup>83</sup> which does not require the court to satisfy itself that “it is necessary to make such an order for the purpose of protection” (as required for a full order). Consequently, it will be possible under Clause 113 (now Clause 124) to make an interim RSHO simply on the basis the “court considers it just to do so”.

**62. We also believe that the grounds for making an interim RSHO should match more closely the grounds for a full order and recommend that the Bill be amended accordingly.**

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80 Q 91

81 Q 183, David Ford

82 Q 184

83 Joint Committee on Human Rights, Seventh Report of 2002–03, *Scrutiny of Bills: Further Progress Report*, HC 547/HL 74

## 7 Anonymity

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63. In contrast to the position of complainants in sex cases, defendants currently do not enjoy the benefit of anonymity.<sup>84</sup> We therefore asked, at the start of this inquiry, whether this was a significant omission from the Bill. So far, the Government has said that, whilst it is willing to listen to the arguments on this issue, it has no plans to extend anonymity to the accused.<sup>85</sup> However, in a recent development, the House of Lords have passed an amendment which will give “the defendant in rape etc. cases... the same right to anonymity as is enjoyed by the complainant” (new Clause 2).<sup>86</sup> We understand that the Government will seek to reverse this in the Commons.<sup>87</sup>

### Background

64. Our interest in this question was first raised during an earlier inquiry into the conduct of investigations into past cases of abuse in children’s homes, often carried out on the basis of slender evidence. In some cases the allegations dated back 20 or 30 years. During that inquiry, we became concerned about the potentially ruinous impact of publicity on those accused of past sexual abuse of children. We therefore suggested that anonymity be extended to the accused in those cases.<sup>88</sup> However, it was beyond our remit in that inquiry to consider whether anonymity should be extended more generally to *all* sexual offences and it is this question that we now seek to address.

### *Anonymity for complainants*

65. Anonymity was first introduced in 1976 for complainants in rape cases<sup>89</sup> and was subsequently extended to complainants in other sex cases.<sup>90</sup> At present, the restriction on publication applies from the moment that an allegation has been made and it continues for the rest of the complainant’s lifetime.<sup>91</sup> The protection, however, is not absolute as there are circumstances in which the court can lift the restriction, for example to induce other witnesses to come forward. In addition, the judge has a broad discretion to lift the restriction if satisfied that it would “impose a substantial and unreasonable restriction upon the reporting of the proceedings at trial and it is in the public interest to remove or relax the restriction”.<sup>92</sup>

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84 In this context ‘anonymity’ refers to statutory restrictions on the publication of matters relating to a person, in order to protect that person’s identity.

85 Q189. See also, Home Affairs Committee, Second Report of Session 2002–03, *Criminal Justice Bill*, HC 83, Q 440 (Lord Falconer of Thoroton QC, Minister of State, Home Office)

86 The amendment was moved by Lord Ackner and passed by 109 to 105 votes. HL Deb, 2 June 2003, cols 1084–1097.

87 It has been reported that the Home Office will seek to reverse in the Commons: ‘Lords defy Labour on rape case anonymity’, *Daily Mail*, 3 June 2003; ‘Blair Rape Name Defeat’, *The Mirror*, 3 June 2003.

88 Fourth Report of Session 2001–02, *The Conduct of Investigations into Past Cases of Abuse in Children’s Homes*, HC 836-I, paras 98–99

89 Sexual Offences (Amendment) Act 1976, s 4

90 The Sexual Offences (Amendment) Act 1992, s 2 now makes provision for anonymity in relation to a full range of sexual offences, including rape.

91 Sexual Offences (Amendment) Act 1992, s 1

92 *Ibid*, s 3

66. The rationale for granting anonymity to complainants in rape cases was set out in 1975 by the Heilbron Committee:

“public knowledge of the indignity which [the complainant] has suffered in being raped may be extremely distressing and even positively harmful, and the risk of such public knowledge can operate as a severe deterrent to bringing proceedings...The balance of argument seems to us to be in favour of anonymity for the complainant other than in quite exceptional circumstances. While fully appreciating that rape complaints may be unfounded, indeed that the complainant may be malicious or a false witness, we think that the greater public interest lies in not having publicity for the complainant. Nor is it generally the case that the humiliation is anything like as severe in other criminal trials: a reprehensible feature of trials of rape...is that the complainant’s prior sexual history...may be brought out in the trial in a way which is rarely so in other criminal trials.”<sup>93</sup>

67. Whilst there have been developments in relation to prior sexual history evidence,<sup>94</sup> anonymity has been retained (and is widely supported) as a policy for encouraging victims to come forward.

### *Anonymity for the accused*

68. Anonymity for the accused is not a novel concept. Defendants on rape charges were protected by a reporting restriction for a period of some 12 years, from 1976<sup>95</sup> to 1988.<sup>96</sup> The restriction was introduced at the Commons Report Stage of the Sexual Offences (Amendment) Bill in 1976, as a concessionary Government amendment. The Bill as introduced had made provision for the anonymity only of complainants, in line with a recommendation of the Heilbron Committee.<sup>97</sup> However, when the Bill went to Standing Committee, the Committee voted by a large majority to extend anonymity provisions to the defendant in rape cases.<sup>98</sup> Consequently, the Act brought in reporting restrictions for both the complainant *and* defendant in rape cases.

69. The reasons for extending anonymity to defendants in 1976 appear to have been two-fold. First, it was seen to be necessary to ensure equality in the law between complainants and defendants. Secondly, it was argued that potentially innocent defendants needed to be protected from the social stigma of a rape allegation, which often remained for life, notwithstanding an acquittal.

70. Anonymity for defendants was repealed in 1988 on a recommendation of the Criminal Law Revision Committee. The Committee argued that there was no reason to distinguish rape defendants from defendants of other crimes (e.g. an acquittal of homosexual soliciting

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93 Home Office, *Report of the Advisory Group on the Law of Rape*, Cmnd 6352, December 1975, p 27, para 153–157

94 See the Youth Justice and Criminal Evidence Act, s 41

95 Sexual Offences (Amendment) Act 1976, s 6

96 When it was repealed by Criminal Justice Act 1988, s 158(5).

97 Home Office, *Report of the Advisory Group on the Law of Rape*, Cmnd 6352, December 1975, pp 27–31. The Committee recommended that anonymity should be introduced for complainants in rape cases, but not for defendants.

98 Stg Co Deb, Standing Committee F, Sexual Offences (Amendment) Bill, 7 April 1976

may be no less damaging than one on a charge of rape). It also suggested that the argument about equality between the parties was not a valid one “despite its superficial attractiveness”.<sup>99</sup> These reflected the views expressed, almost a decade earlier, by the Heilbron Committee, which had said that:

“it [was] erroneous to suppose that equality should be with [the complainant]—it should be with other accused persons and an acquittal will give him public vindication.”<sup>100</sup>

71. During this inquiry, we found strong arguments both for<sup>101</sup> and against<sup>102</sup> the restoration of some degree of anonymity for the accused, and it is to this question that we now turn.

### Should anonymity be extended to the accused?

72. We have identified four arguments against any extension. First, we were reminded that the general principle is that justice should be open, “with free and full reporting of what happens in our criminal courts”.<sup>103</sup> This implies that anonymity should be the exception rather than the rule. Secondly, it is said that, whilst there are strong public policy reasons for granting anonymity to complainants in sex cases (i.e. to encourage victims to come forward), the same reasoning does not apply to the accused.<sup>104</sup> It is therefore suggested that there is no strong case for extending the restriction any further. Thirdly, it is argued that persons accused of sexual crimes should not be treated any differently to those accused of other crimes.<sup>105</sup> On this point, Professor Liz Kelly states:

“The idea that those accused of sexual crimes should be privileged can only be sustained if one takes a position that either these crimes are of an entirely different order than any other and/or that there is a far higher rate of ‘false accusations’.”<sup>106</sup>

73. Fourthly, it is suggested that anonymity for the accused would undermine the police’s ability to investigate sexual crimes.<sup>107</sup> Several witnesses said that one of the advantages of publicising the identity of the accused is that other victims, of similar offences by the same

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99 Fifteenth Report of the Criminal Law Revision Committee, *Sexual Offences*, Cmnd 9213, April 1984

100 Home Office, *Report of the Advisory Group on the Law of Rape*, Cmnd 6352, December 1975, p 31, para 177

101 Those in favour of some form of anonymity included the Metropolitan Police (in favour of a limited form only), the Criminal Bar Association, False Allegations Support Organisation and JUSTICE.

102 Those against included Professor Liz Kelly, the Police Federation, Liberty and Victim Support.

103 Ev 32, Joel Bennathan. See also Ev 96, Police Federation: “Against anonymity is the argument that justice must not only be done but be seen to be done”.

104 Ev 75, Liberty

105 Ev 38, Professor Liz Kelly; Q 108 Cathy Halloran (Rape Crisis Federation/Campaign to End Rape)

106 Ev 38

107 Ev 38, Professor Liz Kelly. In her book, *Rape and the Legal Process*, Professor Temkin cites an instance in 1986 when the Wiltshire Police felt inhibited by the anonymity rules from publishing the name of a man who was wanted for rape. He subsequently raped another woman before being caught. Jennifer Temkin, *Rape and the Legal Process* (OUP, 2<sup>nd</sup> Edn) p 308.

person, will often come forward to give evidence.<sup>108</sup> Witnesses to our inquiry have also argued that the concept of achieving equality between the parties is superficial.<sup>109</sup>

74. Other witnesses, however, were in favour of extending anonymity to the accused in sex cases. This included the Metropolitan Police who expressed support for a limited anonymity provision in cases involving children.<sup>110</sup> We identified four arguments in support of the principle. First, there is the equality argument. It is said that we have an uneven playing field because the complainant has anonymity but the accused does not.<sup>111</sup> The implication is that the accused is placed at a disadvantage. Secondly, it is suggested that because of the prejudicial nature of sex offences, the accusation alone can have a devastating effect on the accused—whether or not it is proved to be true. Publicity can therefore be ruinous to the individual, even though he may be acquitted of the charges.<sup>112</sup> The Metropolitan Police believe that publicity is particularly damaging in sex cases involving children. It states (without further explanation) that “current research indicates that between 5% and 7% of persons arrested for child abuse related offences commit suicide”.<sup>113</sup> The third argument is that publicity can inflame public outrage and disorder, which sometimes leads to threats or attacks against the accused.<sup>114</sup> Fourthly, it is suggested that anonymity for the complainant increases the risk of false allegations<sup>115</sup>—a danger which was also recognised by the Criminal Law Revision Committee back in 1984.<sup>116</sup>

75. In addition, the Criminal Bar Association provides a counter-argument to the concern about undermining police investigations. It points to the fact that the anonymity provision for complainants does not offer absolute protection because the restriction can be lifted by the court in appropriate circumstances. A similar proviso could therefore be incorporated into the reporting restriction for the accused (as was the case in 1976).<sup>117</sup>

**76. On balance, we are persuaded by the arguments in favour of extending anonymity to the accused. Although there are valid concerns about the implications for the free reporting of criminal proceedings, we believe that sex crimes do fall ‘within an entirely different order’ to most other crimes. In our view, the stigma that attaches to sexual offences—particularly those involving children—is enormous and the accusation alone can be devastating. If the accused is never charged, there is no possibility of the individual being publicly vindicated by an acquittal.**

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108 See for example, Qq 98–99, Cathy Halloran (Rape Crisis Federation/Campaign to End Rape) and Ev 38, Professor Liz Kelly

109 Ev 31, Joel Bennathan

110 Ev 86

111 Q 195, Peter Rook QC (Criminal Bar Association),; Q 102, Janet Arkinstall (JUSTICE)

112 See for example, Ev 51–53, Ivan Geffen

113 Ev 86

114 Ev 86, Metropolitan Police

115 Ev 47, Criminal Bar Association

116 Fifteenth Report of the Criminal Law Revision Committee, *Sexual Offences*, Cmnd 9213, April 1984, p 27, para 2.92

117 Q 96, Peter Rook QC (Criminal Bar Association)

### *The scope of anonymity for the accused*

77. There are three levels of protection which could be afforded to the accused in sex cases. First, anonymity could be limited to the pre-charge period, as favoured by the Metropolitan Police. Secondly, it could apply from charge to conviction, as was the position in 1976 for defendants in rape cases.<sup>118</sup> Thirdly, it could apply to both the pre-charge and post-charge period, i.e. from allegation to conviction.

78. In our view, there are obvious limitations with the second option. If, as is often the case, the identity of the accused has been publicised before a charge is brought, then any post-charge reporting restriction would be meaningless. The first option offers only limited protection.<sup>119</sup> For those who are charged, but not convicted, the post-charge publicity may have a devastating and possibly permanent impact. We understand that anonymity for the accused before charge is already recommended in guidance issued by the Association of Chief Police Officers.<sup>120</sup> However, even the Parliamentary Under-Secretary in the Home Office, Hilary Benn, recognised that suspects' names can still find their way into the media<sup>121</sup>—as happened recently in the case involving Matthew Kelly.<sup>122</sup>

79. Only the third option offers full protection to potentially innocent individuals who are accused of sexual offences. This, however, would impose a major restriction on the free and full reporting of criminal proceedings and raises difficult questions about the extent to which the public have a right to know that someone has been charged, but not convicted of a crime. Hilary Benn added that:

“if the person is not named and is then acquitted then no-one will ever know...whether other people might have been able to come forward in those circumstances and provide information which was relevant to the case.”<sup>123</sup>

**80. We therefore recommend that the reporting restriction, which currently preserves the anonymity of complainants of sexual offences, be extended to persons accused of those offences. We suggest, however, that the anonymity of the accused be protected only for a limited period between allegation and charge. In our view, this strikes an appropriate balance between the need to protect potentially innocent suspects from damaging publicity and the wider public interest in retaining free and full reporting of criminal proceedings.**

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118 Sexual Offences (Amendment) Act 1976, s 6(1)

119 Although those who are accused, but are never charged would remain anonymous.

120 HL Deb, 2 June 2003, col 1092, Lord Falconer of Thoroton QC (Minister of State, Home Office)

121 Q 193

122 The television celebrity was arrested in January this year as he came off stage, after a pantomime performance of Captain Hook in Birmingham. His arrest and subsequent investigation was widely publicised in the national and regional press under headlines such as 'Matthew Kelly held over child sex', 'Matthew Kelly accused of sex attacks on boys' and 'Matthew Kelly, the camp entertainer with an unconventional marriage; the weird life of Mr Saturday Night TV'. A month later, the police decided to take no further action on the grounds that there was insufficient evidence to charge.

123 Q 189

## 8 Conclusions and recommendations

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### Rape and consent

1. We have no difficulty with the proposal to extend the definition of rape to include forced oral sex. We see the logic of grouping all forms of non-consensual penile penetration—including penetration of the mouth—within the same offence. The law on rape has adapted successfully to changes of definition in the past and we find no reason to suspect that juries will be reluctant to convict on the new definition. (Paragraph 14)
2. We welcome the proposal to adopt a more objective test for determining whether the defendant held an honest but mistaken belief in the complainant’s consent. In our view, it is not unreasonable to require a person to take care that the other party is consenting. As the Minister has said, “the cost to him is very slight and the cost to the victim of forced sexual activity is very high indeed”. (Paragraph 17)
3. In our view, the revised ‘reasonableness test’ for a defendant’s belief in consent is both clearer and simpler than the original drafting. More importantly, it also addresses the concerns about the potential injustice of applying a “reasonable person” standard to all defendants, regardless of their individual characteristics. By focussing on the individual defendant’s belief, the new test will allow the jury to look at characteristics—such as a learning disability or mental disorder—and take them into account. For these reasons, we support Clause 1. (Paragraph 23)
4. We support the amended Clause 76. In our view, the circumstances which will give rise to a rebuttable presumption against consent or a belief in consent are all situations in which consent is generally absent. Accordingly, we do not find it unreasonable to require the defendant—in those circumstances—to show sufficient evidence to raise a real issue about consent, or his belief in consent, before the matter can be put to the jury. (Paragraph 31)
5. We support the amendment to Clause 77, which we believe has addressed the key concerns about the conclusive presumptions. The amended Clause is now confined to two very specific (and indeed unusual) situations involving deception and impersonation, both of which reflect the existing law. (Paragraph 34)

### Exposure

6. In our view, it is neither appropriate nor desirable to criminalise legitimate activities, such as naturism. We therefore welcome the removal of the ‘recklessness’ element from the offence of exposure (Clause 68). We do not, however, accept that the offence should be further restricted by a requirement for a sexual motive. In our view, this may create more difficulties than it solves and runs of the risk of undermining the very purpose of the offence, which is to protect individuals from distressing—and potentially dangerous—types of behaviour. (Paragraph 39)

## Sexual activity in public

7. There is much concern and disagreement as to whether this Bill will legalise sexual activity in public toilets. We recommend that sexual activity in public toilets should be a criminal offence and suggest that this could be dealt with by an amendment to section 5 of the Public Order Act 1986, which makes it clear that “insulting” behaviour includes sexual behaviour. This would dispense with the need to prove specific sexual acts and also has the advantage of empowering the police to give a warning before making an arrest. We believe that it is appropriate for this offence to be dealt with in the Magistrates’ Court, rather than in the Crown Court. (Paragraph 47)

## Meeting a child following sexual grooming

8. We accordingly support the new offence of ‘meeting a child following sexual grooming’. (Paragraph 52)

## Preventative civil orders

9. Whilst we accept the need for Risk of Sexual Harm Orders (RSHOs), we recommend that their use be carefully monitored by the Home Office and the numbers reported annually to Parliament. (Paragraph 58)
10. We recommend that Clause 121(5)(b), which requires a RSHO to be made for a fixed period of at least five years, be deleted from the Bill. The courts should be given discretion to make whatever length of order is needed to protect a child or children from harm. (Paragraph 60)
11. We also believe that the grounds for making an interim RSHO should match more closely the grounds for a full order and recommend that the Bill be amended accordingly. (Paragraph 62)

## Anonymity

12. On balance, we are persuaded by the arguments in favour of extending anonymity to the accused. Although there are valid concerns about the implications for the free reporting of criminal proceedings, we believe that sex crimes do fall ‘within an entirely different order’ to most other crimes. In our view, the stigma that attaches to sexual offences—particularly those involving children—is enormous and the accusation alone can be devastating. If the accused is never charged, there is no possibility of the individual being publicly vindicated by an acquittal. (Paragraph 76)
13. We therefore recommend that the reporting restriction, which currently preserves the anonymity of complainants of sexual offences, be extended to persons accused of those offences. We suggest, however, that the anonymity of the accused be protected only for a limited period between allegation and charge. In our view, this strikes an appropriate balance between the need to protect potentially innocent suspects from damaging publicity and the wider public interest in retaining free and full reporting of criminal proceedings. (Paragraph 80)

# Formal minutes

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**Tuesday 24 June 2003**

Members present:

Mr James Clappison  
Mrs Janet Dean  
Bob Russell

Mr Marsha Singh  
Mr Tom Watson  
David Winnick

*Resolved*, That, at this day's sitting, David Winnick do take the Chair of the Committee.—  
(*Bob Russell*.)

The Committee deliberated.

Draft Report (Sexual Offences Bill), proposed by David Winnick, brought up and read.

*Ordered*, That the draft Report be read a second time, paragraph by paragraph.

Paragraphs 1 to 79 read and agreed to.

Paragraph 80 read, as follows:

**We therefore recommend that the reporting restriction, which currently preserves the anonymity of complainants of sexual offences, be extended to persons accused of those offences. We suggest, however, that the anonymity of the accused be protected only for a limited period between allegation and charge. In our view, this strikes an appropriate balance between the need to protect potentially innocent suspects from damaging publicity and the wider public interest in retaining free and full reporting of criminal proceedings.**

Amendment proposed, in line 3, to leave out from the word “offences” to the end of the paragraph and add the words “until a conviction.”.—(*Mr James Clappison*.)

Question put, that the Amendment be made.

The Committee divided.

Ayes, 2

Noes, 3

Mr James Clappison  
Mr Marsha Singh

Mrs Janet Dean  
Bob Russell  
Mr Tom Watson

Paragraph 80 agreed to.

Summary agreed to.

*Resolved*, That the Report be the Fifth Report of the Committee to the House.

*Ordered*, That David Winnick do make the Report to the House.

*Ordered*, That the provisions of Standing Order No. 134 (Select committees (reports)) to be applied to the Report.

Several Papers were ordered to be appended to the Minutes of Evidence.

*Ordered*, That the Appendices to the Minutes of Evidence taken before the Committee be reported to the House.—(*David Winnick.*)

Several Papers were ordered to be reported to the House.

[Adjourned till Tuesday 8 July at 9.30 am

## Witnesses

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### Tuesday 8 April 2003

Page

**Mr Peter Rook QC**, Chairman, Criminal Bar Association, **Ms Jan Berry**, Chairman, Police Federation, **Ms Cathy Halloran**, Rape Crisis Federation/Campaign to End Rape, **Mr Mick Ayers**, Chairman, British Naturism, and **Ms Janet Arkininstall**, JUSTICE

Ev 1

### Tuesday 29 April 2003

**Hilary Benn MP**, Parliamentary Under-Secretary, **Ms Michelle Dyson**, Government Lawyer, **Ms Ann Collier** and **Mr David Ford**, Home Office

Ev 16

## List of written evidence

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1	Barnardo's, Childline, The Children's Society, End Child Prostitution, Pornography and Trafficking (ECPAT), National Children's Bureau, NCH, National Council of Voluntary Child Care Organisations (NCVCCO), the NSPCC and National Organisation for the Treatment of Abusers (NOTA)	Ev 29
2	Mr Joel Bennathan, Barrister, Tooks Court Chambers	Ev 31
3	Martin Bowley QC	Ev 32
4	British Naturism	Ev 33
5	Dr Belinda Brooks-Gordon	Ev 34
6	Professor Liz Kelly, Director, Child and Woman Abuse Studies Unit, London Metropolitan University	Ev 37
7	Childnet International	Ev 38
8	Mr John Carr, Children's Charities' Coalition for Internet Safety	Ev 43
9	Criminal Bar Association	Ev 45
10	False Allegations Support Organisation	Ev 47
11	Simon Forbes	Ev 48
12	Mr Ivan Geffen	Ev 51
13	Mr Mark A Nisbet, Editor, <i>H&amp;E Naturist</i>	Ev 53
14	Mr Rick Hobbs	Ev 54
15	Home Office	Ev 57
16	International Centre for the Study of Violence and Abuse, University of Sunderland	Ev 58
17	Internet Watch Foundation	Ev 61
18	JUSTICE	Ev 63
19	The Law Society	Ev 69
20	The Lesbian and Gay Christian Movement	Ev 70
21	Liberty	Ev 21
22	Metropolitan Police Service	Ev 82
23	National Crime Squad	Ev 86
24	Police Federation of England and Wales	Ev 89
25	Mr John Randall	Ev 98
26	Rape Crisis Federation of England and Wales and Campaign to End Rape	Ev 98
27	Dr Helen J Self	Ev 101
28	Stonewall	Ev 102
29	Professor Jennifer Temkin	Ev 103
30	UK Network of Sex Work Projects	Ev 104
31	Victim Support	Ev 106

## List of unprinted written evidence

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Additional papers have been received from the following and have been reported to the House, but to save printing costs they have not been printed. Copies have been placed in the House of Commons library where they may be inspected by Members. Other copies are in the Record Office, House of Lords and are available to the public for inspection. Requests for inspection should be addressed to the Record Office, House of Lords, London SW1 (Tel 020 7219 3074). Hours of inspection are from 9.30 am to 5.00 pm on Mondays to Fridays.

Tom Carroll

Andrew Crawford

Stephen Doerr, British Naturism

Vincent Bethell

Tim Forcer

Dave Storey, British Naturism Southern Region Members Representative

Bob James

Allan C Kidney

Malcolm Boura

Valerie Humfress

Rex Watson

Ian Jenkin

John M Lovatt, Trustee of the Spanner Trust

Gerald and Gwynneth Gale

John Cliffe

Andrew Bodman

## Reports from the Home Affairs Committee since 2001

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The following reports have been produced by the Committee since the start of the 2001 Parliament. Government Responses to the Committee's reports are published as Special Reports from the Committee or as Command Papers by the Government. The reference number of the Government's response to each Report is printed in brackets after the HC printing number.

### Session 2002–03

First Report	Extradition Bill	HC 138 ( <i>HC 475</i> )
Second Report	Criminal Justice Bill	HC 83 ( <i>Cm 5787</i> )
Third Report	The Work of the Home Affairs Committee in 2002	HC 336
Fourth Report	Asylum Removals	HC 654

### Session 2001–02

First Report	The Anti-Terrorism, Crime and Security Bill 2001	HC 351
Second Report	Police Reform Bill	HC 612 ( <i>HC 1052</i> )
Third Report	The Government's Drugs Policy: Is it Working?	HC 318 ( <i>Cm 5573</i> )
Fourth Report	The Conduct of Investigations into Past Cases of Abuse in Children's Homes	HC 836 ( <i>Cm 5799</i> )