Sexual offences act 2003: an analysis

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The questions as posed raises a number of issues concerning the interplay between child and youth sexuality and the criminal law that is not readily resolved. The question shall be addressed using the following analytical approach that is intended to be considered progressively, commencing with the identification of the specific provisions of theSexual Offences Actthat demand the greatest scrutiny in when considering the interests of children.

The analysis then explores the implications of the key terms employed in the question and how each may be interpreted in light of the Sexual Offences Act provisions; ‘ children’, ‘ protection’, ‘ sexual abuse’, ‘ legitimate sexual behaviour’, and ‘ mistake’ are highlighted. The expression ‘ over-criminalise’ is afforded a distinct consideration in view of the breadth of the potential sexual acts that might be prosecuted pursuant to the Act, coupled with the potential reach of both police and prosecutorial discretion in these proceedings.

The analysis includes the review and inclusion of relevant academic commentaries that consider the issues noted above; the paper concludes with the assertion that while the Sexual Offences Act is an imperfect mechanism upon which to construct a protective scheme for children who are exploited or otherwise the victim of nonconsensual sexual activity, the current statute represents a legislative scheme that is clearly rooted in the public interest and one that addresses a number of important societal issues.

The Sexual Offences Act, 2003

The Act provides for the regulation of a broad range of defined types of sexual misconduct. Commencing with s. 5 (Rape of a child), the enumerated Child Sex Offences provisions that are set out at sections 9 through 19 define

the age limits applicable to establishing proof of the various enumerated offences. Section 10 (Inciting a child to sexual activity) is an example of the age definition employed in all of the Child Sex Offences: A person aged 18 or over (A) commits an offence if

- he intentionally causes or incites another person (B) to engage in an activity
- the activity is sexual, and Either: (i) B is under 16 and A does not reasonably believe that B is 16 or over, or (ii) B is under 13

Various acts of sexual touching are criminalised: the offence of ‘ Grooming’ (s. 15) is noteworthy in that the proof of the offence does not require proof of any physical contact directed by the perpetrator to the child victim to establish criminal liability for a sexual offence. The ‘ grooming’ provisions are primarily directed to Internet based contacts (such as by way of Internet chat rooms) or mobile telephone media, such as text messaging between adults and children as defined. Commentators have suggested ‘…that applying the ‘ grooming’ clause in practice is highly problematic given the difficulty of demonstrating ‘ sexual intent’ towards a child…(previous case law) … illustrates the extent to which some sex offenders are prepared to go to secure a child for sexual activity and the overt manner in which ‘ grooming’ occurred.’

The penalty provisions of the Act generally invite one of two types of dispositions. For the more serious offences such as rape, the maximum penalty is 14 years in prison; for the lesser offences the maximum penalty is a 5 year term. Subject to the definitions contained in each section, most offences are also capable of prosecution by summary means and a

corresponding maximum penalty of 6 months in prison, or fine in the alternative. These provisions are considered in the context of the suggested ‘ over-criminalisation’, below.

Key words

As noted in the introduction, five words and phrases extracted from the question are employed to advance the present analysis.

‘ Children’

It is submitted that while the definition of ‘ child’ may be variable and highly dependent upon the context of any particular sexual circumstance, the age parameters set out in the Act are generally appropriate for the following reasons.

While a child aged 13 or under may have the physical maturity and the emotional desire to engage in sexual activity (this varies significantly from person to person), there is strong academic support for the proposition that a young person of this age will generally lack the appreciation of the consequences of sexual activity, coupled with a lack of emotional maturity to necessarily deal with the activity in a safe and socially acceptable manner.

Further when children are provided with the opportunity to use the Internet to make contact with virtual strangers, one comprehensive study revealed that over 60 percent of a sampling of London children aged 10 to 13 had limited understanding of the extent to which others could potentially harm them if they were not discreet concerning their personal identifiers or if they agreed to meet someone they did not personally know.

In many respects the statutory definition may be regarded as a societal approximation. For any critic of the Act who believes that the age bar is set to high, particularly with regard to the 13 to 16 year old age range that involves the additional consideration of the concept of honest and reasonable mistake as to age, there are significant segments of modern UK society that define a child not simply by their biological age but in terms of their status as members of the family household, or as unmarried persons.

Without stereotyping a particular group, the conservative elements of Christian, Muslim, and Jewish faiths all hold strong cultural / religious views that would place the definition of a child above age 13, or above age 16 where the ‘ mistake’ defences are invoked.

An anomaly in the legislation is the disparity between the general age of majority laws in the UK and the sexual offence age provisions – in some circumstances, a person can have consensual sexual intercourse at age 16 but be prohibited from voting, consuming alcohol, or entering into most kinds of contracts. The justification for this anomaly is beyond the scope of this paper; it is acknowledged that a greater measure of uniformity of age limits promotes consistency and social utility. However, it is also to be noted that the provisions are in general accord with the corresponding European Union conventions.

‘ Protection’

It is submitted that one may properly be uneasy when significant consideration is given to concepts of protection when the conduct, such as sexual activity, is generally discovered after the fact. The protection afforded

the public is that of the combined effects of publicity concerning the provisions and deterrence associated with the criminal process.

‘ Sexual abuse’

The Act has properly defined a broad range of sexual touching and physical contact as potentially constituting sexual abuse. The definition must be broad to encompass the psychological and emotional harm that can (but not always does) stem from any kind of assaultive behaviour, no matter how seemingly minor. Further, the risk of long term damage in such occurrences is well documented; ‘…More convincing evidence of the dangers of adult-child sexual activity comes from studies of cycles of sexual abuse … The evidence is much stronger here-penetrative sexual acts by certain sorts of adults are virtually universal in paedophiles‘ childhood.’ Cramer reviewed numerous academic studies in this respect and concluded that ‘…it is not surprising that no measurable harm comes to some teenagers who knowingly consent to an involvement with adults just a few years older than themselves. In some communities with different laws, they might be old enough to be free to engage in sexual relations. .. However, this does not mean that all adult-young person sexual relations are invariably non-damaging-or that it is possible to predict ‘ harmless‘ ones with any confidence.’

The question as posed carries the implicit suggestion that sexual activity involving a ‘ consenting’ child (consent as defined in the Act) is not a risk to the child. Cramer properly identifies the fact that ‘ harm’ is a considerable variable for the reasons noted above.

Further, all considerations of what is abusive behaviour deserving of societal sanction and what is acceptable will engage a number of different perspectives. As mentioned with respect to the definition of a child, the cultural and moral position of the child and their family may be a significant factor in how the activity is characterised. Biological, emotional and psychological considerations are also at stake. Given the passage of the Act by the UK Parliament, there must be some measure of societal acceptance of the statutory regime as one that properly reflects UK societal concerns regarding this activity.

‘ Over-criminalise’

This term must be approached from two perspectives. The first is the effect of the statutory penalty sections. These provisions on their face provide significant latitude for a sentencing judge to fashion a disposition that meets the demands of each case. One would expect the cardinal sentencing rule of ‘ worst offence, worst offender’ to draw the sentences approaching what is unquestionably a significant penalty of 14 years for rape; rape is equally a horrible offence. It is also clear that the mitigating factors of a positive relationship between the offender and child, relative age disparity, and similar issues must mitigate in the favour of the offender.

The concern expressed for over-criminalisation is addressed at least in part through the power to deal with the extremely minor transgressions of this nature by way of the conditional caution provisions, or by virtue of the general powers of discretion vested in the Crown Prosecution Service. There are elements of UK society who may legitimately feel that public legislation that mandates certain proceedings or dispositions is far preferable a public

interest safety mechanism than a discretion vested in the prosecution that is essentially unreviewable.

Conditional cautions have attracted a mixed review in the UK press and legal commentaries; they are perceived in some quarters as a system soft on crime. However, the conditional caution mechanisms address precisely the issue posited in the present question – while the Act may provide significant sentences in the proper case, like all other UK statutes, its effect is ameliorated by the discretionary caution.

The distinctiveness of the administrative structure of the conditional caution has been furthered through the development of the Gravity Factor Matrix, an assessment tool developed by the Home Office to assist police services and prosecutors in the determination of which types of occurrences should be subject to a conditional caution. Police forces throughout the UK have now incorporated the matrix into their internal policy and procedures. The general considerations of both aggravating and mitigating circumstances are set out in detail; the Home Office issued a similarly comprehensive guideline concerning warnings for young offenders in May 2006.

The use of the caution process enjoys a widespread acceptance with prosecutors, with 24 per cent of all UK criminal offences charged resulting in this disposition; 17per cent more conditional cautions were issued in 2005 over the previous year. Given this trend, concerns regarding the risk of over-criminalised youth sex activity are misplaced, provided the prosecutorial discretion remains active in the consideration of sexual offences.

‘ Legitimate sexual behaviour’

The question is one that is loaded with the assumption that ‘ children’ (depending upon the age definition) will innocently engage or perhaps experiment with sexual activity. In a hypothetical occurrence between a 14 year old boy and a 13 year old girl, where consent in the practical sense is alleged, it is difficult to imagine a reasonable person characterising the interaction as ‘ sexual abuse” (subject to the cultural and religious observations noted above). The Act is clearly aimed at circumstances of the prescribed age difference creating a practical presumption of inequality, or the obvious circumstances of harm that are consistent with abuse.

‘ Mistake’

It is contended that there is nothing within the framework of the Sexual Offences Act, 2003 that creates a potential deviation form the now well developed legal principles in support of the defence of mistake. Due statutory deference is paid to the fact that sexual offence circumstances are often emotionally charged, carrying the potential to affect recollection and perception,. For these reasons reasonable mistake of fact as to age must remain an available defence; wilful blindness and recklessness are relegated (as they should be) to the category of mitigation, if any. It seems doubtful given all of the factors noted above that the UK courts would embrace the de facto reverse onus now imposed upon an accused in these circumstances by the Supreme Court of Canada. The availability of mistake in the statutory regime is consistent with the European Convention provisions regarding the assurance of a fair trial.

Conclusion

The present question does not recognise the strengths of the Sexual Offences Act as they pertain to children who are victims of sexual assault. The act strikes an appropriate balance between individual rights and societal protection.