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Ferguson, Rachel (2024) *The emergence of the child as an object of sexual protection in Scots criminal law c. 1919-present.* PhD thesis.

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University of Glasgow

The Emergence of the Child as an Object of Sexual Protection in Scots Criminal Law *c.* 1919-Present

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Submitted in fulfilment of the requirements for the degree of Doctor of Philosophy

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August 2023

Abstract

In Scotland, and across many Anglo-American jurisdictions, governments are committed to the ever-increasing improvement of the criminal law and policy to prevent and protect against child sexual abuse. However, criminal law scholarship typically assumes that the sexual protection of children in the criminal law is derivative of the law of sexual offences against adults. As a result, there has been a relative lack of critical attention devoted to the study of child sexual offences, which might ground an evaluation of the law and provide a basis for future reform.

This thesis contributes to the critical understanding of sexual offences against children by developing an account of the emergence and endurance of the child as an object of sexual protection in the criminal law. It traces the emergence of this area of criminal law from the interwar period, when sexual offences against children first arose as a distinct category of the criminal law, until the present day. It shows how different understandings of the child and childhood, as objects of protection, have shaped the development of the criminal law. From 1919, female and working class children were the object of protection to prevent the spread of sexual disease and sexual licentiousness in the future. In the mid-twentieth century, the thesis shows that the protection of the law was extended to male children as a result of the distinctive homosexual threats that adult male sexual conduct posed to the masculine ideal of heterosexuality. In the contemporary period, the category has expanded to include all children below 16, and in some circumstances those below the age of 18, in order to protect the child's vulnerable lack of autonomy to engage in sexual activity with autonomous adults. It argues that this construction operates to re-inscribe the dependency of children and young people; and inculcates a sense of responsibility upon adults for the care, protection, and safety of children.

In developing its argument, the thesis undertakes a socio-historic approach to the criminal law. It shows how the aims of the criminal law have changed as a consequence of changing ideas about childhood and its relation to adulthood. The understanding of sexual harms to children in the criminal law thus reflects these wider social and institutional conditions. It is on the basis of this understanding of sexual offences against children that further scholarship, and reforms, can be grounded. The thesis concludes that its findings offer critical insights into the past, present, and future of sexual offences against children.

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Acknowledgements

I cannot account for the many personal and professional debts I have accrued in the process of undertaking this work. That is presumably no surprise given the consuming and bemusing nature of a doctoral project, however the particular circumstances of the pandemic made for an even greater need for the support and patience of my family, friends, and colleagues.

In particular, I am extremely grateful to my supervisors, Professor Lindsay Farmer and Professor Sarah Armstrong. Their thoughtfulness, persistence, and generosity throughout this project was an unparalleled model of support. I benefitted immeasurably from their direction and will forever carry the skills I have gained through their engagement with me.

The encouragement, and toleration, of my friends and family has been essential. My mum and dad, Rhona and Andy, and sister, Suzanne, showed great love for and pride in me at all times; especially when I forgot to do so myself. I would also like to acknowledge my friend, Michael Connor, whom I adored, admired, and lost in 2013. I think in some way or another his talent and the injustice of his death have always been a source of motivation for me on behalf of us both.

Over the past years, I gained and strengthened friendships that not only enriched my life but also my work. For the late nights and long conversations, I am grateful to (now Drs) Rebecca Mason and Hannah Telling; to Kristina McEvoy and Lisa Carter for reminding me to talk about something else; to Ruby Cairney for her dedication; Elly Nowell for her peerless observations; and Jade Kinchella and Naomi Lawson for their humour and insight. I would not be in the position I am today but for the inspiration of Anthony Convery. This list is, of course, incomplete but I am sure to thank those above and many more with something other than that which I can convey on a word processor.

I commenced this project with the funding of the Economic and Social Research Council and I still count myself lucky for their financial support. Most significantly, the sponsorship provided to me for a research exchange at the University of New South Wales immediately prior to the jarring consequences of pandemic restrictions. Those I met altered my perspective and enthusiasm for this work and the wider context within which it sits. In the same respect, the wonderful community at Glasgow Caledonian University has played a part in my progression and I am truly appreciative for the many role-models I have found there, particularly Seonaid Stevenson-McCabe and Andrew Tickell, alongside many more.

Finally, for everything, I am and always will be endlessly thankful to Bethany, to whom this work is dedicated with all my love.

Author's Declaration

I declare that, except where explicit reference is made to the contribution of others, that this dissertation is the result of my own work and has not been submitted for any other degree at the University of Glasgow or any other institution.

Printed Name: Rachel Ferguson Signature:

1. Introduction: The Child as an Object of Sexual Protection

This thesis explores the emergence and endurance of the sexual protection of children in the criminal law. Sexual offences against children occupy an important place within the cultural and legal landscape today. Calls to address child abuse, child sexual exploitation, or grooming are repeated throughout policy documents,[1] sentencing decisions,[2] campaign group materials, academic commentaries, and news reports. There is no complete definition of these concepts in the criminal law but a range of crimes now known as child sex offences target adult sexual behaviour with children in Scotland and a number of jurisdictions across the world. This includes the criminalisation of physical sexual acts between adults and children[3] in addition to specific offences addressing sexual activity when in a position of trust with a child.[4] There are also a host of non-contact offences such as communications and exposure to, or voyeurism of, children[5] and arranging or facilitating sexual offences.[6] These offences are accompanied by a nexus of regulations that broadly seek to reduce the risk of sexual offending against children. Perhaps the most notable example being civil orders that can attach to individuals considered at risk of committing sexual offences against children[7] and require subjects to adhere to

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[1] "Child sexual exploitation (CSE) is a form of child sexual abuse in which a person(s) of any age takes advantage of a power imbalance to force or entice a child into engaging in sexual activity in return for something received by the child and/or those perpetrating or facilitating the abuse" Scottish Government, 'Child Protection/ Child Exploitation Action Plan' <https://www.gov.scot/policies/child-protection/child-sexual-exploitation/.> [Accessed 13 March 2023].

[2] Grooming is typically integrated into an assessment of the gravity of offending see: *Robertson v HM Advocate* 2004 JC 155 "…the appellant's account of events demonstrated elaborate grooming of the complainer and her mother"; Sentencing Council for England and Wales "Sentencing Guidelines for use in Crown Court" Sentencing Council, 'Sentencing Guidelines for Use in Crown Court' <https://www.sentencingcouncil.org.uk/crown-court?s&collection=sexual-offences> [accessed 13 March 2023]; in Commonwealth jurisdictions see, for example: Sentencing Advisory Council, 'Sentencing Sex Offences in Victoria: An Analysis of Three Sentencing Reforms'.

[3] Sexual Offences (Scotland) Act 2009 asp 9 ss18-20 and 28-30 criminalising rape of children, intercourse with children, and child sexual assaults. Additionally: 2009 Act ss21-23 and ss31-33 criminalising inciting or causing children to participate in sexual acts. Comparative offences in England and Wales are in Sex Offences Act 2003 c42 ss5-7, ss8-10 and ss11-12. Offences that address both physical and non-physical sexual activity with or towards children are present in other jurisdictions, see, for example: Royal Commission into Institutional Responses to Child Sexual Abuse, *Consultation Paper: Criminal Justice* (Commonwealth of Australia 2016), pp22-26 "Child Sexual Abuse Offences".

[4] 2009 Act ss42-43 criminalises adults in a position of trust over a child under the age of 18 to engaging in sexual activity with them and a comparable offence is found in 2003 Act ss16-24A.

[5] 2009 Act ss24-26 and ss34-36 and 2003 Act s15A.

[6] Protection of Children and Prevention of Sexual Offences (Scotland) Act 2005 asp 9 s1 criminalises "meeting of a child following certain preliminary contact"; similar offences are found in the 2003 Act ss14-15 criminalising "arranging or facilitating a child sex offence" and "meeting a child following grooming".

[7] Abusive Behaviour and Sexual Harm (Scotland) Act 2016 asp 22 ss10-40 creating Sexual Harm Prevention Orders and Sexual Risk Orders and Sex Offences Act, 2003 s103A-K. For further commentary on these orders

behavioural conditions. This legal settlement to date is not only wide-ranging but it is by no means complete. For successive governments across the liberal democratic world, the ever-improving detection, prevention, and punishment of sexual offences by adults against children has been a central policy commitment. This commitment is one reason why, throughout the past two decades, a number of committees of inquiry have benefited from the support and funding of central states in order to investigate historic allegations of child sexual abuse. The aim of many of these inquiries is not only to account for past abuses, but also to recommend reforms to practice, policy, or legislation.[8]

The prominence and importance of sexual offences against children is part of a broader contemporary trend in the relationship between criminal law and sex. Since the mid-nineteen-nineties, sexual offences have been developed and debated within Scotland and across common law jurisdictions[9] at a greater intensity and pace than previous generations. At the core of these reforms is the increasing centrality of sexual autonomy as a value to be promoted and protected by the criminal law. Sex is no longer an experience firmly bound to marriage or reproduction but, in the twenty-first century, it is recognised as a form of social interaction between individuals that is entered into on the basis of free choice.[10] Consent to sexual activity, and capacity to provide that consent, is presented as a means of giving effect to the value of autonomy in the criminal law and delineating between criminal and non-criminal sex. The concept of consent is also furnished with definitions that establish the need for free agreement or voluntariness of choice.[11] These reforms across Anglo-American jurisdictions aim to ensure

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see: Peter Ramsay, *The Insecurity State: Vulnerable Autonomy and the Right to Security in the Criminal Law* (Oxford University Press 2012) ch 7.

[8] For example, the Scottish Child Abuse Inquiry (2015-ongoing); the Independent Inquiry into Child Sexual Abuse in England and Wales (2014-22); Royal Commission into Institutional Responses to Child Sexual Abuse (2013-17) and the list of similar commissions in New Zealand, Ireland, and Canada from 2002-13: The Royal Commission into Institutional Responses to Child Sexual Abuse, 'Institutional Child Sexual Abuse inquiries' <https://aifs.gov.au/resources/short-articles/institutional-child-sexual-abuse-inquiries-2002-2013> accessed 4 May 2023

[9] For an overview of trends in the development of sexual offences see: David John Frank, Bayliss J Camp and Steven A Boutcher, 'Worldwide Trends in the Criminal Regulation of Sex, 1945 to 2005' (2010) 75 American Sociological Review 867.

[10] Scottish Law Commission, 'Report on Rape and Other Sexual Offences (No 209)' (2007) para 1.25. For common law developments see: Vanessa Munro and Clare McGlynn, *Rethinking Rape Law: International and Comparative Perspectives* (Routledge 2010) pt III National Perspectives. Further: Julia Quilter, 'Re-Framing the Rape Trial: Insights from Critical Theory about the Limitations of Legislative Reform' (2011) 35 The Australian Feminist Law Journal 1, 23-56.

[11] Munro and McGlynn (2010) (n 10) ch 1.

that sexual contact that is freely entered into by individuals is not, broadly,[12] subject to criminal regulation, but instances where autonomous choice is undermined - because of an absence of such agreement - are proscribed in law.[13]

For legal scholarship, sexual offences against children derive from and are explained by the protection and promotion of complete, adult, sexual autonomy that has developed in the criminal law. Thus, distinct offences express the incapacity of, typically younger, children to consent to and therefore experience sexual behaviour. Alternatively, for typically older children who may have the capacity to offer consent, the criminal law nonetheless seeks to prohibit sexual activity in recognition that their cognitive and emotional state is underdeveloped.[14] Older children in this latter grouping have a recognised capacity to make autonomous choices but are protected because of their relative immaturity, which makes them vulnerable to exploitation by adults.[15]

Sexual autonomy in the criminal law, and the consent-based models used to give it expression, have attracted significant debate; yet these debates have unfolded primarily in relation to the degree and nature of protection that criminal law reform has achieved for adult women. Specifically, a large volume of debate relates to whether sexual autonomy should be the central organising principle for sexual offences[16] or whether the conception of sexual autonomy protected by the criminal law, and the related nature or quality of consent, is adequate.[17] While reform has been partially welcomed for recalibrating previously private

[12] There remains debate as to the correct operation of consent in BDSM and whether it is a matter of sex or violence see, for example: Alexandra Fanghanel, 'Asking for It: BDSM Sexual Practice and the Trouble of Consent' (2020) 23 Sexualities 269.

[13] Nicola Lacey, 'Beset by Boundaries: The Home Office Review of Sex Offences' (2001) Jan Criminal Law Review 3.

[14] "Report on Rape" (2007) (n 10) para 4.8.

[15] See: Home Office, 'Setting the Boundaries: Reforming the Law on Sex Offences Vol 1 (2000) para 3.3.6.

[16] For an overview and criticisms of sexual autonomy an organising principle for sexual offences see, for example: Jonathan Herring, 'Relational Autonomy and Rape' in Shelley Day Sclater et al. (ed), *Regulating Autonomy: Sex, Reproduction and Family* (Routledge 2009); Jed Rubenfeld, 'The Riddle of Rape-by-Deception and the Myth of Sexual Autonomy' (2013) 122 The Yale law journal 1372; Mary Childs, 'Sexual Autonomy and Law' (2001) 64 Modern Law Review 309; Catriona Mackenzie and Natalie Stoljar, *Relational Autonomy Feminist Perspectives on Autonomy, Agency, and the Social Self* (Oxford University Press 2000); Jack Vidler, 'Ostensible Consent and the Limits of Sexual Autonomy' (2017) 17 Macquarie Law Journal 104.

[17] There are arguments that do not support a consent model as a means of protecting sexual autonomy. For example, Victor Tadros argues that consent should not be a central concept and instead a differentiated model based on violation of sexual autonomy should be adopted for rape: Victor Tadros, 'Rape Without Consent' (2006) 26 Oxford Journal of Legal Studies 515. Tadros nonetheless observes "[m]uch discussion of rape involves the nature of consent and the conditions under which consent is effective" 518.

harms as matters of public concern,[18] and marking a move away from offence definitions based on force or resistance on the part of women,[19] potent arguments note the essential ambiguity of the concepts of consent and reasonable belief in it.[20] Despite statutory definitions, the language of freedom, choice, and capacity have been subject to variable interpretations by courts and parliaments.[21] How sexual autonomy is understood, and therefore what it actually means to consent, remains uncertain and salient problems attributed to this uncertainty are the increasing evidence of gendered and social stereotypes during jury deliberations and cross-examination[22] or the continuing importance of violence, injury, and resistance as evidence of absence of consent that operate to construct and maintain gendered differentiation within the law.[23] The point is that consent presupposes a conception of sexual autonomy that can exclude many of the factors that affect an individual's capacity to agree to sexual behaviour, such as the structural inequalities of gender or material considerations, from legal assessment.[24]

Recently, Vanessa Munro has identified a more contextualised approach to consent in sexual offences policy, which notionally aims to address the structural and personal

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[18] Nicola Lacey, *Unspeakable Subjects: Feminist Essays in Legal and Social Theory* (Hart 1998) 147.

[19] Vanessa Munro, 'From Consent to Coercion: Evaluating International and Domestic Frameworks for the Criminalization of Rape' in Munro and McGlynn (2010) (n 10) 20.

[20] For further criticisms as to the nature and quality of consent in the criminal law see: Joseph J Fischel, *Screw Consent: A Better Politics of Sexual Justice* (University of California Press 2019); Vidler (n 16); Sharon Cowan, '"Freedom and Capacity to Make a Choice": A Feminist Analysis of Consent in the Criminal Law of Rape' in Vanessa Munro and Carl Stychin (eds), *Sexuality and the Law: Feminist Engagements* (Routledge-Cavendish 2007); Joseph J Fischel and Hilary R O'Connell, 'Disabling Consent, or Reconstructing Sexual Autonomy' (2015) 30 Columbia Journal of Gender and Law 428; John Danaher, 'Could There Ever Be an App for That? Consent Apps and the Problem of Sexual Assault' (2018) 12 Criminal Law and Philosophy 143.

[21] Vanessa Munro, 'Constructing Consent: Legislating Freedom and Legitimating Constraint in the Expression of Sexual Autonomy' (2008) 41 Akron Law Review 923, 942.; Aya Gruber, 'Consent Confusion' (2016) 38 Cardozo Law Review 415.

[22] Jacqueline Horan and Jane Goodman-Delahunty, 'Expert Evidence to Counteract Jury Misconceptions About Consent in Sexual Assault Cases: Failures and Lessons Learned' (2020) 43 UNSW Law Journal 707; Louise Ellison and Vanessa Munro, 'Of "Normal Sex" and "Real Rape": Exploring The Use of Socio-Sexual Scripts in (Mock) Jury Deliberation' (2009) 18 Social & Legal Studies 291; James Chalmers, Fiona Leverick and Vanessa Munro, 'The Provenance of What Is Proven: Exploring (Mock) Jury Deliberation in Scottish Rape Trials' (2021) 48 Journal of Law and Society 226.

[23] Munro (2010) (n 19) 19. See also the continuing relevance in Australian states: Julia Quilter, 'From Raptus to Rape: A History of the Requirements of Resistance and Injury' (2015) 2 Law & History 89.

[24]As Catharine Mackinnon has argued the hinge mechanism of consent that differentiates between intercourse and violence is a fiction that presupposes the equal exercise of sexual choice without exposing underlying constraints or disparities between women and men. Also, Catharine MacKinnon, *Toward a Feminist Theory of the State* (2nd edn, Harvard University Press 1989) 174. "…by adopting reasonable belief as a standard without asking, on a substantive social basis, to whom the belief is reasonable and why-meaning, what conditions make it reasonable is one-sided: male-sided" ibid 179.

circumstances of individuals that shape or limit their autonomous ability to make choices or enter into free agreement.[25] Initiatives thus aim to identify the vulnerabilities of victims to sexual exploitation. Munro argues that, rather than empower or assist in addressing sexual offending, by adapting to the specific material and social circumstances of gender, the broad categories of vulnerability and exploitation are subject to wide-ranging and politically expedient definitions that are potentially over-inclusive or under-inclusive of real experience.[26] In one respect, the ascription of vulnerability increases the surveillance of those deemed precarious, attributes childlike qualities upon them, and alternatively excludes those who resist or oppose these qualities. In another, the emphasis on vulnerabilities justifies the "responsibilitisation" of women, who are expected to identify the features of their vulnerability and manage the risk of sexual harms arising.[27]

Vulnerability and exploitation may be more recent ideas in relation to adults but, as this thesis demonstrates, vulnerable sexual autonomy has been a dominant lens through which the sexual offences against children have been viewed in law and policy of the past two decades. It is an unsurprising criticism, then, that the use of the terms renders adults to be childlike.[28] But the meaning and operation of vulnerable sexual autonomy within sexual offences against children has been underexplored. A primary focus on the causes and consequences of the contemporary definitions of consent has provided no comparable critical appreciation of the criminal law related to children where consent, and the sexual autonomy it symbolises, is presumed to be deficient.

It is the central task of this thesis to explore why and how sexual offences against children have come to be justified and defined in terms of vulnerable sexual autonomy. To do so, it develops an account of the way in which the criminal law addressed sexual behaviour between adults and children[29] in the jurisdiction of Scotland from the interwar period, when

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[25] Vanessa Munro, 'Shifting Sands? Consent, Context and Vulnerability in Contemporary Sexual Offences Policy in England and Wales' (2017) 26 Social & Legal Studies 417, 419. See also: Eithne Dowds, 'Redefining Consent: Rape Law Reform, Reasonable Belief, and Communicative Responsibility' (2022) 49 Journal of Law and Society 824; Eithne Dowds, 'Towards a Contextual Definition of Rape: Consent, Coercion and Constructive Force' (2020) 83 MLR 35.

[26] Munro (2017) (n 25); Sharron A FitzGerald and Vanessa Munro, 'Sex Work and the Regulation of Vulnerability(Ies): Introduction' (2012) 20 Feminist Legal Studies 183.

[27] FitzGerald and Munro (2012) (n 26).

[28] Munro (2017) (n 25) 426.

[29] There are important studies that look at issues of consent in sexual relations between older children see, for example: Isla Callander, 'Regulating Consensual Sexual Behaviour between Older Children: The Case against the Current Approach under the Sexual Offences (Scotland) Act 2009' (2019) 23 The Edinburgh Law Review 177.

child sexual offences were first recognised as a distinct category in the criminal law, until the present day, where offences seek to protect the vulnerable sexual autonomy of children as the inverse of full, adult, sexual autonomy. It therefore contributes to the wider critical engagement with sexual offences in the present by providing a richer account of sexual offences against children as they have developed in the past.

It does so specifically by providing an historical account of the emergence of the child as a category of protection in the criminal law. What follows is therefore a critical analysis of the way in which the child was constructed as an object of sexual protection within the institution of Scots criminal law between approximately 1919 and the present. The work outlines what characteristics of the child were protected at given times by the criminal law and how this shaped the wrongs that the law protected against. This is a different focus from tracking the changing concept of consent and the age at which it can be given.[30] Furthermore, the work does not seek to assess whether, and what, concept of sexual autonomy or consent in the law is more or less desirable. Instead, it is an assessment of the changing ideas related to children and sexual wrongdoing against them in offence definitions and rules of evidence. While the age of consent is a relevant feature of the foregoing analysis, attention to the category of the child within the criminal law sheds light upon the characteristics, conditions, and motivations that have developed within the law and underly the construction of consent that may otherwise be excluded.

This approach is both important and illuminating. First, because it presents a challenge to the implication that child sexual offences are largely derivative of, and can be explained by, wider sexual offences against adults. The work does this by evidencing that the protection of children from sexual wrongdoing by adults followed a distinctive trajectory until the latter part of the twentieth century that was enmeshed with ideas related to gender, sexuality, class, and the racial strength of the population. It secondly sheds light upon the current conception of the child in the criminal law, and the aims of the criminal law in this area, that has been otherwise excluded by the predominant focus on adult sexual autonomy. Thirdly, in doing so, the findings in this work assist understandings of the ongoing issues of vulnerability, responsibilitisation, and surveillance within sexual offences against children in the present scheme of sexual

Further, JR Spencer, 'The Sexual Offences Act 2003: Child and Family Offences' (2004) May Criminal Law Review 347.

[30] On this see: Matthew Waites, *The Age of Consent: Young People, Sexuality and Citizenship* (Palgrave Macmillan 2005).

offences. The concepts of vulnerability and responsibilitisation have been subject to wider critical appreciation.[31] However, by investigating the changing construct of the child in the criminal law, this work demonstrates that ideas and discourses relating to vulnerability and responsibilitisation have changed over time. Contemporary discourses about responsibilitisation and vulnerability have come to shape the protection of children in the criminal law from the late twentieth century, and these changes are made clear in the chapters and individual cases that follow.

Furthermore, it should also be noted that the primary focus of this thesis is the construction of the child in relation to adults. As a result, sexual offences that do not primarily involve the commercial exploitation of children and those that deal with sexual behaviour between children fall outside of the scope of this work in order to support the focus and detail of the argument developed. In respect of the former, the work does not, therefore, develop an account of child prostitution or child pornography. The commercial element of these offences makes them worthy of distinct study, and there is a substantial and growing body of literature about child prostitution, child sex trafficking, and child pornography that is not addressed in this thesis but may be enhanced by its findings.[32] In respect of offences between children, while this is an interesting and important area of study,[33] it cannot be subsumed into the foregoing argument, which primarily seeks to understand the relation between the category of the child and that of the adult, without detriment to the objectives of this work and the need for detailed analysis of the specificities of sexual behaviour between children and the criminal law.

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[31] For example, on vulnerability see: Jonathan Herring, 'Vulnerability, Children and the Law' in Michael Freeman (ed), *Law and Childhood Studies; Contemporary Issues* (Oxford University Press 2012); Bryan .S Turner, *Vulnerability and Human Rights* (Pennsylvania University Press 2006); Martha Fineman, 'The Vulnerable Subject: Anchoring Equality in the Human Condition' (2008) 20 Yale Journal of Law and Feminism 1; David Chandler and Julian Reid, *The Neoliberal Subject: Resilience, Adaptation and Vulnerability* (Rowman and Littlefield 2016); Barbara Misztal, *The Challenges of Vulnerability: In Search of Strategies for a Less Vulnerable Social Life* (Palgrave Macmillan 2011); Joel Anderson, 'Autonomy and Vulnerability Entwined' in Catriona Mackenzie, Wendy Rogers and Susan Dodds (eds), *Vulnerability: New Essays in Ethics and Feminist Philosophy* (Oxford University Press 2013); Robert Goodin, *Protecting the Vulnerable: A Re-Analysis of Our Social Responsibilities* (Chicago University Press 1985). For critical insights into responsibilitisation see: David Garland, *The Culture of Control: Crime and Social Order in Contemporary Society* (Oxford University Press 2002). and Chapter 5 of this work.

[32] See, for example: Alyson Brown and David Barrett, *Knowledge of Evil: Child Prostitution and Child Sexual Abuse in Twentieth-Century England* (Willan 2002); Alisdair Gillespie, *Child Pornography: Law and Policy* (Routledge 2011).

[33] Callander (2019) (n 29).

1.1. Historicising the Criminal Law

In order to construct a novel account of how the child has emerged as an object of protection, this thesis documents some of the dominant institutional, social, and ideological conditions external to the criminal law. It explores how these conditions were realised within offence definitions and rules of evidence in order to construct the category of the child. In so doing, it explains why children were understood to require protection from sexual wrongs, what characteristics of children were protected in the criminal law at given times, what objectives were pursued in protecting the child, and with what consequences for our understanding of the institution of the criminal law.

What follows is therefore an historicised account of sexual offences against children in Scotland. This approach draws from an established intellectual context of socio-historical criminal law scholarship. These approaches start from the assumption that the criminal law is a complex social practice that neither derives its aims from punishment nor purely reflects external moral and political values.[34] Instead, the conceptual structure of the criminal law and the values, interests, and objectives that are realised by it are formed by the institutional and social conditions of the law itself.[35]

This work aims to provide an interpretation that connects the normative developments of sexual offences against children to the ideas, institutional arrangements - both within and outside of the criminal law -, and wider social circumstances that rendered the criminal law intelligible and possible at given times.[36] It illustrates that the definition of the child was not only framed by substantive offence definitions but also developed through criminal evidence and procedure, particularly in relation to the doctrine of mutual corroboration.[37]

This form of historical examination not only offers insights into the changing qualities of the criminal law, but it can also evidence the preconditions and dynamics that shape criminal

[34] For an overview of this approach and its relation to political or moral criminal law theory see: Lindsay Farmer, *Making the Modern Criminal Law: Criminalization and Civil Order* (Oxford University Press 2016) ch 1.

[35] Nicola Lacey, *In Search of Criminal Responsibility: Ideas, Interests, and Institutions* (Oxford University Press 2016) 22; Farmer (2016) (n 29) ch 1.

[36] Nicola Lacey, 'Periodisation, Pluralism and Punishment' (2019) 10 Jurisprudence 85; Lacey (2016) (n 30) ch 1.

[37] For further discussion see Chapter 3, below.

law change.[38] In turn, this offers a novel account of the development of the criminal law, an improved conceptual understanding of the criminal law related to sexual offences against children, and insights into the process of legal change, that can inform further criminal law reform efforts.

Critical and historically informed approaches to the criminal law have previously evidenced both the unitary nature of the criminal law as a social practice in the modern period as well as the simultaneous possibility that different areas of the criminal law follow special aims that are shaped by distinct objectives, ideas, and institutional arrangements.[39] This thesis builds upon those findings and focuses upon an important aspect of the criminal law's relationship to sexual wrongs that has otherwise been underexplored in scholarship.

In his account of the creation of sexual offences within the "special part" of the criminal law, Lindsay Farmer observes that from the Edwardian period legal understandings started to reflect widespread changes in the social and scientific meaning of sex. The science of sex was primarily concerned with "the supervision of children's sexual conduct" alongside the "hystericization of women's bodies…and the psychiatrization of perverse pleasure".[40] Science, then, was relied upon to justify the distinction between normal and abnormal sexual activity.[41] Inappropriate sexual object choice, such as children, was categorised as abnormal and placed within the new descriptive category of "sexual offences" in the criminal law. This nascent category of offences was correspondent with the circulation and collection of knowledge about them, such as the creation of official statistics as to their incidence and prevalence; new understandings of the sexual deviant who committed them; and the range of harms they manifested.[42] The analysis that Farmer offers reflects the role of the criminal law in what Michel Foucault has described as the "insertion of sex into systems of utility".[43] Criminal law became

[38] Nicola Lacey, 'Jurisprudence, History and the Institutional Quality of the Law' (2015) 101 Virginia Law Review 919, 921.

[39] See, for example: Farmer (2016) (n 34); Lacey (2019) (n 35) 88.

[40] Farmer (2016) (n 34) 282.

[41] Developments mirrored in Louise Jackson, *Child Sexual Abuse in Victorian England* (Routledge 2001) 12.

[42] Farmer (2016) (n 34) 282.

[43] Michel Foucault, *The History of Sexuality: 1* (Penguin 1998) 24.

a means of governing sexually abnormal practices in order that normal and procreative sex was practised as required for the "greater good" of the social body.[44]

That sex generally developed as a specific and temporally constructed concern for the criminal law is an important finding. Farmer's account emphasises the role of external institutional conditions beyond the criminal law that facilitated the development of sexuality as a specific site of regulation within it. The relationship between scientific knowledge and developments in the regulation of sex, as well as the objectives that this relationship fabricated, are evidenced throughout this thesis. But Farmer's study of sex is a justifiably partial account and the investigation of sex as an object of the criminal law is a necessary but not sufficient explanation of why sex with children specifically came to be institutionally addressed by the criminal law of Scotland as it did. It does not examine whether the emergence of the child as an object of sexual protection is or has been distinguishable from the protection of adults.[45] Consequently, the account does not elaborate upon why, at the turn of the twentieth century, official understandings of sex specifically implicated the sexuality of children or how the regulation of sexual activity with children was, and has subsequently been, realised in structures and practises of the criminal law.

Conversely, the study of the institutional regulation of children and sex from the beginning of the nineteen-hundreds has typically been the focus of social historiographies.[46] Social historians have focussed upon institutions in the narrow sense of the term, that is, physical internment institutions. From the nineteenth century until the second part of the twentieth century, a mass of residential industrial schools, Lock Hospitals,[47] borstals, Magdalen Homes, and training ships housed children "saved" from perceived juvenile delinquency.[48] These were working class males and females who had either offended or been

[44] ibid.

[45] A similar treatment of sexual offences against children as explained by adult sexual offences is found in: Stuart P Green, *Criminalizing Sex: A Unified Liberal Theory* (Oxford University Press 2020).

[46] See, for example, Christine Kelly, 'Reforming Juvenile Justice in Nineteenth-Century Scotland: The Subversion of the Scottish Day Industrial School Movement' (2016) 20 Crime, Histoire & Sociétés 55; Linda Mahood, *Policing Gender, Class and Family: Britain, 1850-1940* (UCL Press 1995); Lynn Abrams, *The Orphan Country: Children of Scotland's Broken Homes from 1845 to the Present Day* (John Donald 1998).

[47] These were hospitals dedicated to the treatment of venereal disease in women. There is evidence that many young women sent to the Glasgow Lock Hospital were inmates of the Magdalen Homes: 'They Called It a Fate Worse than Death' *The Scotsman* (5 February 2002) <https://www.scotsman.com/arts-and-culture/they-called-it-lock-and-it-was-fate-worse-death-24639889> accessed 3 August 2019.

[48] Mahood (1995) (n 46) 35.

offended against, with the latter category including a "significant minority of girls who had been sexually assaulted"[49] or who had participated in precocious sexual activity.[50] From the early twentieth century until the late nineteen-fifties, young women and female children suspected of practising prostitution, suffering from venereal disease, or having experienced inappropriate sexual activity in Scotland were consistently placed in Magdalen Homes in Glasgow or Edinburgh.[51] However, institutional responses to sexual activity with children, did not start and stop with the physical space of the reformatory or industrial school. Linda Mahood alludes to as much when she argues that the objectives of institutional confinement from the Victorian era until the mid-twentieth century embodied laws, regulations, rules, and policies that differentiated between normal and abnormal family life and justified the intervention of "child-savers".[52]

Beyond physical institutions, sexuality and children have also formed an important feature of Jacque Donzelot's influential study of the family as a social institution.[53] In his genealogical study of the development of the family throughout the modern period, it is shown to be a site that is constituted by, and constitutive of, wider power relations in liberal states.[54] The law operates alongside other sectors of society, such as the economy and ideas, to inculcate sexual relations within the family, including sexual relationships and the care of children.[55] In this sense, the family and sexual relationships of the family have become "social" in that they have been administered over time and across populations by state strategies to further the vitality, prosperity, or strength of the nation state.

As will be evidenced in this thesis, the criminal law was part of a network of practices through which some children were defined, selected, and governed, partly through their incarceration.[56] Furthermore, the family and the discourses and strategies that create and

[49] ibid 80.

[50] ibid.

[51] ibid 83.

[52] ibid 9.

[53] Jacques Donzelot, *The Policing of Families* (Pantheon 1979).

[54] Donzelot describes the strategies and power relations that have produced and shaped the family as "the social", which is "a set of means which allow social life to escape the material pressures and politico-moral uncertainties" ibid xxvi.

[55] Giles Deleuze, 'Foreword: The Rise of the Social' in Jacques Donzelot, *The Policing of Families* (Pantheon 1979) xi.

[56] This is explored in Chapter 3, below.

reproduce it, from the administration of public health to the changing role of psychological knowledge in official bodies, play an important role in the discussion of how sexual behaviour of adults towards children came to be understood and regulated within the criminal law. While the role of the criminal law echoes within histories and analyses of the family, childhood, of homes and reformatories; the creation, nature, and function of that role is to date unexamined in detail. It is submitted that the emergence of the child as an object of protection in the law cannot be reduced to the study of the family, childhood,[57] or the physical interment institutions that were implicated in the protection and management of children.

The work that follows therefore fills a notable silence by investigating how the categories, structure, and rationality of the criminal law altered to expand criminal control over certain generational classes and sexual conduct undertaken toward them at different times. It is intended as a history of the present and, like some of the significant literature that has informed the focus of this thesis,[58] its methodological approach is guided by Foucauldian genealogical scholarship, albeit it is not a strictly Foucauldian analysis.[59] The value of drawing upon Foucault's theoretical and methodological insights for the present thesis lies in his approach to the forms of problematisation of objects, ideas, and categories over time. Thus, in his work on the *History of Sexuality,* Foucault observed that there was an essential discontinuity in ideas and understanding of sexual behaviour from the past until the modern period.[60] He used this observation in order to reconstruct an account of why and how some forms of sexual behaviour came to be categorised and understood as an object of reflection, and concern, in the modern period.[61]

Significantly, Foucault evidenced that the modern problematic of sexuality was shaped by technologies and discourses that developed from and, in turn, shaped new forms of

[57] Alongside Donzelot, there are further histories of childhood that have drawn attention to the changing role of the child in social and family life, see for example: Harry Hendrick, *Children, Childhood and English Society, 1880-1990*, vol 32 (Cambridge University Press 1997); Philip Ariès, *Centuries of Childhood* (Cape 1962).

[58] For example, Mahood (1995) (n 46); Donzelot (1979) (n 53); Lindsay Farmer, *Criminal Law, Tradition, and Legal Order: Crime and the Genius of Scots Law : 1747 to the Present* (Cambridge University Press 1997).

[59] On Foucauldian analysis, genealogical method, and key concepts such as governmentality and biopolitics in greater detail see: Colin Gordon, 'Governmental Rationality: An Introduction' in Graham Burchell, Peter Miller and Colin Gordon (eds), *The Foucault Effect: Studies in Governmentality* (University of Chicago Press 1991); François Ewald, 'Norms, Discipline, and the Law' (1980) 30 Representations 138.

[60] See: 'Forms of Problematization' Michel Foucault, *The History of Sexuality: 2* (Penguin 1985) 14–24.

[61] ibid.

understanding of the social world and new strategies to administer it.[62] In particular, he pointed to key discourses and technologies such as the rise of the scientific study of populations, the emergence and growth of professional expertise, and the attendant change in administrative strategies of liberal states over the social body shaped by these discourses and technologies.[63] This changing nexus of discourses, technologies, and state strategies altered both the government of the population as a whole and the individual, self-government, of individuals within the population through sexuality.[64] But beyond sexuality, these theoretical insights can also be used to critically investigate the classification, and regulation, of objects in the law. Drawing on Foucauldian theory, François Ewald has identified the law as an important technology in the modern period and demonstrated that the classification of objects and situations in law, as well as the logic of reasoning deployed to regulate these objects and situations, are also shaped by changing strategies of governance to regulate and administer the social body.[65]

Foucauldian method therefore offers significant insights for understanding why and how the criminal law came to form the category of the child and regulate sexual behaviour between children and adults at different times. The work that follow seeks to understand how certain discourses, administrative practices, and technologies coalesced in different periods in order to shape the object of the child, the problems associated with adult-child sexual conduct, and the structure and function of the criminal law in regulating it. To do this, it critically investigates the internal and external conditions of the criminal law: re-constructing the institutional conditions, social relations, ideas, as well as the political and administrative circumstances that made the regulation of sexual conduct between adults and children in the

[62] Foucault (1998) (n 43); Foucault (1985) (n 60); Jacques Donzelot and Colin Gordon, 'Governing Liberal Societies – the Foucault Effect in the English-Speaking World' [2008] Foucault Studies 48.

[63] Foucault, *The History of Sexuality: 1* (n 43).

[64] Michel Foucault, 'Questions of Method' in Graham Burchell, Peter Miller and Colin Gordon (eds), *The Foucault Effect: Studies in Governmentality* (University of Chicago Press 1991). In his work on sexuality, Foucault observes that governance transformed in the modern period. While previously associated with limitation, repression, or seizure modern governance sought to enhance the productive capacity of populations by administering life, see the concept of biopolitics developed in: Foucault (1998) (n 43) 235.

[65] Ewald (1980) (n 59).

criminal law intelligible and possible from the beginning of the twentieth century until the present.[66]

1.2. A Note on Terminology

This work tracks the creation of the category of the child in the criminal law and how this category included and excluded individuals within the population at different times. There is no innate, stable, or consistent, category of "the child" that can be, or is, used throughout the work. Instead, throughout this thesis, terminology is used that reflects contemporaneous understandings of different age groups at different times and how some groups came to be classed as children in the law. The changing terminology is explained throughout the body of work.

1.3. Outline of Argument by Chapter

The substantive argument of this work begins in Chapter 2. It provides a critical account of the conditions that led to the initial recognition of sexual offences against children as a category within the criminal law from 1919. It argues that, prior to the interwar period, the criminal law increasingly sought to regulate sexual behaviour by adults towards children and distinct provision in law, generally, for children was more common than previous decades. This reflected a wider conceptual shift in the cultural meaning of childhood in British society, as children were considered to be qualitatively different from adults and therefore required distinctive care and protection. However, prior to the First War, the range of common law and legislative offences involved in regulating sexual behaviour with children was not organised around a shared sexual interest that they protected against.

The chapter argues that this changed from 1919 when the range of offences involved in the regulation of sexual behaviour between adults and children gained an increased coherence within a distinct category of sexual offences against children. As the chapter demonstrates, this coherence was symptomatic of a wider range of ideological, administrative, and institutional conditions in the period. In the immediate post-war era, an expanded franchise, enlarged state-bureaucracy, and new ideas related to sexual disease and social health coalesced to shape the emergence of a new understanding of sexual conduct between adults and children as a problem

[66] "And one has to bear in mind that the further one breaks down the processes under analysis, the more one is enabled and indeed obliged to construct their external relations of intelligibility." Foucault, 'Questions of Method' (1991) (n 64) 77.

for the criminal law. It is this coherence that justifies the scope of the thesis, which commences at the interwar period and investigates the initial creation of the category of sexual offences against children, as well as the nature and scope of the protection of the child in the period, and the subsequent changes throughout the twentieth and twenty-first centuries.

Chapter 2 therefore details the first stage in the formation of this coherence, when the criminal law was amended to increase the age of consent for young women to lewd and libidinous practices in the Criminal Law Amendment Act 1922. It evidences that the impetus for the 1922 Act arose out of a concern about "amateur prostitution" amongst young women,[67] which was considered to be a cause for the spread of venereal disease in the population as a whole. Young women between the ages of 13 and 16 were therefore constructed as children in order to subject them to protection in the criminal law, and disincentivise male sexual activity with them. The chapter illustrates how the ideas underlying the Criminal Law Amendment Act in 1922 also drove the creation of the 1926 Committee of Inquiry into Sexual Offences Against Children and Young People. This was the first official inquiry that combined pre-existing offences in the criminal law into a single category of crimes, bound by the mutual sexual wrong that they addressed, and sought to investigate their causes; incidence; prevalence; and therefore prevention. The chapter argues that the child who emerged as the primary object of protection in the criminal law during this period was both working class and female, and the danger that sexual contact between adults and female children posed was the disease and behavioural impropriety that premature sexual contact between female children, in particular, and adults could result in.

Chapter 2 further argues that the importance and meaning of sexual wrongs against children during the period arose as a result of the unique institutional conditions that constructed the problem of adult sexual behaviour against children as a problem for public health. It evidences that the organisation and activism of recently enfranchised women during the period was important in shaping the problem of sexual offences against children. Upper- and middle-class women, in particular, were able to communicate ideas about the regulation of sexual behaviour with children within official bodies that were receptive to their ideas. These ideas framed moral ascriptions about the appropriate regulation of sexual conduct in a manner that

[67] This term is used in reference to those between 13-16 years of age in this period as a reflection of their relative responsibility and independence at the time. This included, for example, their ability to leave education and enter employment. For an example of this language in respect of 14 and 15 year olds in the period, see: Selina Todd, *Young Women, Work, and Family in England 1918-1950* (Oxford University Press 2005).

was conducive to wider state aims to improve the health and therefore prosperity of the nation. However, ideas about public health were underpinned by presuppositions of class and gender. Sexual contact with children was resultantly understood as a danger to the physical health and "hygienic" behaviour of children, which would present a continued public health problem in the future. Young women were particularly vulnerable because they were more likely to become "hyper-sexed" or diseased. This would affect their capacity to procreate and produce legitimate children. Furthermore, sexual behaviour between adults and children was understood to arise from the living conditions and social circumstances of children and families. As a result, the close confined living conditions of the working classes or a lack of appropriate supervision and parenting for children amongst the working classes facilitated sexual offending against children. The child that therefore emerged as an object of protection during the period was working class and female. The protection of these mainly female children from the sexual conduct of adults sought to ensure that they were subject to the appropriate supervision, care, and control that would ensure they could participate in the reproduction of a healthy population within their ascribed gender role and class status.

Chapter 3 builds upon the findings of Chapter 2 and evidences the way in which the new category of sexual offences against children was realised within the practice of the criminal law during the interwar period. It first details the development of the first Scottish Court of Criminal Appeal in 1926. Prior to this time, it was only possible to appeal convictions to the Secretary of State for Scotland, who would exercise a discretionary power of pardon. The chapter argues that the creation of the appellate bench provided a new forum wherein questions of law or fact that arose at trials in the first instance could be determined by the internal institutions of the criminal law, rather than the political will of the executive. As a result, the new Scottish Criminal Court of Appeal increased the institutional opportunities available to challenge, clarify, and amend the interpretation of legal doctrine. Following its creation, it was possible for the bench to make authoritative determinations of unsettled or ambiguous points of legal doctrine, and therefore bind lower courts. It was through this process, and the distinctive judicial rationality of the Scottish legal tradition, that the courts developed a more coordinated legal response to cases of sexual offences against children.

The chapter evidences that this occurred in relation to the common law rules of evidence. In particular, the rules of corroboration in criminal law, which typically require that each essential fact of a crime is proved using two independent and relevant sources of evidence

in order to convict. Thus, the decisions of the Scottish appellate court confirmed the admissibility of testimony from young children, without the need for any specific warning about their reliability to be given to the jury. Decisions of the court found that third party observations as to the condition of a child's clothes, or the fact the child had money, after an alleged sexual offence could form independent sources of evidence to corroborate the charges. Importantly, the Scottish Criminal Court of Appeal also developed the rule of mutual corroboration, which meant that multiple charges against a single defender could corroborate one another if they demonstrated an underlying similarity in time, character, and circumstance. The practical effect of these judgements was to facilitate the number of sexual offences against children that could be tried in the courts. The chapter further argues that these developments were a result of the distinctive rationality of the Scottish judiciary, whereby the bench adapted doctrine in order to reflect the contemporary practice of the criminal law and the bench's own interpretation of the "Scottish community" or "nation". It is argued that this rationality meant that ideas about the child, and the nature of sexual wrongs that could be committed against them, that had developed throughout the official reports, debates, and activism that were evidenced in Chapter 2, were re-interpreted within the criminal law through judicial creativity. The doctrines of evidence therefore evolved to reflect understandings about sexual behaviour toward children by adults that were communicated externally to the criminal law. Sexual offences against children were therefore presented by the court as a new and serious problem in society, typically committed in private, that shared distinctive features and characteristics that connected their wrongfulness.

The final section of Chapter 3 evaluates the evolution of the practice of the criminal law and the legal reform analysed in Chapter 2 in light of the Children and Young Persons Acts of the nineteen-thirties. These Acts established new "approved schools", which intended to place children who had been victims of crime and children who had perpetrated crimes into the same institutions in order to provide them with suitable training to become "ideal citizens" in the future. The chapter evidences that children who had experienced sexual offences, or lived in the same household as a victim or perpetrator of sexual offences, could be subject to "care and control" within approved schools under the provisions of the Act.

It is argued that the expansion of the criminal law in practice and the increased age of consent brought about by the 1922 Act meant that more children could be successfully identified as victims of sexual offences and therefore subject to care and control under the Children and Young Persons Acts. As such, the criminal law was an important conduit between

children who had been subject to adult sexual contact, or shared the same household with relevant adults or children, and the new approved school system. Chapter 3 then evidences that the provisions of the Children and Young Persons Acts and the curriculum of the approved schools were built upon the same ideas and understandings of sexual offences against children that were evident in the development of the criminal law during the period. As such, the administrative scheme they created recognised sexual behaviour between adults and children to be a threat to state aspirations for the health, productivity, and fecundity of the population. The curriculum of the approved school system is examined in the chapter, and it is argued that the training and education provided to male and female children both constructed and reproduced idealised class and gender characteristics in order that children could continue to enhance the prosperity and strength of the British state within their given role and status. It is argued that the developments of the criminal law, taken alongside the provision and operation of the Children and Young Persons Acts, provided clearer routes for children, primarily young women and girls, who had been subject to adult sexual behaviour to be categorised and directed toward the necessary means of rehabilitation. The criminal law therefore operated as one part of a wider administrative scheme of the state to recognise, classify, and control, the threat posed by children who had experienced sexual conduct by adults to the health of the population as a whole.

Many of the central contextual arrangements that had underpinned the development of the criminal law during the interwar period gradually changed from the middle of the twentieth century, particularly in respect of gender, class, and health. However, the child remained an object of protection in the criminal law. Chapter 4 therefore builds upon the approach taken in Chapters 2 and 3 in order to explain the continued development of sexual offences against children in the mid-to-late twentieth century. The chapter first evidences the initial continuity in the regulation of female children. It argues that the Scottish witnesses to the Wolfenden Committee on Homosexuality and Street Offences in the nineteen-fifties continued to regard "amateur prostitution" amongst young women as a problem in Scotland. However, these young women were not a policy priority. Despite the Wolfenden Committee's investigation, the scheme of legislation and common law that had developed during the interwar years in Scotland remained the primary means of regulating sexual activity between adult men and female children in the decades immediately following the Second War. Similarly, the chapter contends that the reform to the Children and Young Persons Acts from the nineteen-sixties, which reformed the juvenile justice system in Scotland, continued to be based on presuppositions

about female children that were identifiable in ideas about health and hygiene in the interwar period. Thus, it evidences that the change brought about by the creation of Children's Panels in the Social Work (Scotland) Act 1968, relied upon the language of the emerging social sciences, rather than the moralised biological science of the interwar years. The problem of sexual behaviour between adults and female children was therefore a problem for the child's healthy development and family relationships. However, it is evidenced that these understandings continued to draw equivalence between child offenders and child victims and social scientific understandings therefore supported the view that, to ensure the proper development of female children who had experienced sexual offences, there was a need for state authorities to direct their care and control. The chapter explains that this continuity of presuppositions about female children, that underpinned the public health knowledge of the interwar years and new social scientific knowledge from 1945, meant that the reform to the juvenile justice system, and relative lack of reform to the substantive criminal law, reflected wider ideals about women and men that were built into the policies and institutions of the welfare state. It evidences that postwar policies sought to encourage the creation of heterosexual family structures, where the male-breadwinner would support a dependent wife who reared children. The regulation of female children was therefore shaped by, and aligned, with the wider state aims for the role of those in the female gender. The regulation of female children sought to manage them in order that they became good mothers and wives within the family structure in the future, and therefore enhanced the strength of the British population as a whole.

However, Chapter 4 argues that this continuity in respect of female children in the mid-twentieth century was not mirrored in relation to male children. It evidences that male children were increasingly classified within the category of the child in the criminal law. It therefore details that the Scottish courts, in the decade prior to the Second War, were more inclined to regulate sexual conduct between men, as well as between men and women. The chapter develops an account of the development of knowledge about male homosexuality that formed after 1945. To do this, it revisits the Wolfenden Committee Report and evidences that the creation and circulation of social scientific and psychiatric ideas about sexual behaviour increased the visibility of male homosexuality as an identifiable sexual behaviour amongst the general public and state officials. Wolfenden drew heavily upon the psycological and psychiatric sciences that had developed in the preceding decades. Of note was the work of Alfred Kinsey, which evidenced that homosexuality was an inherent human trait that was largely fixed by the age of 16. It is argued that these new understandings of homosexuality

rendered it to be a social, rather than moral, problem and this shaped the nature of its regulation in line with the overall state strategy to promote and maintain the heterosexual family as the basic unit of society in the future. For adult homosexuals, whose sexuality was largely fixed, Wolfenden recommended that the law would therefore permit private and consensual homosexual behaviour when both parties were above the age of 21. However, these new understandings of male homosexuality meant that male youth was identified as an important stage in the formation of the sexuality. The protection of young men and male children was identified as an important feature in the regulation, and prevention, of homosexuality. This approach was most obvious in the legislative reforms in England and Wales in the nineteen-sixties, which decriminalised consenting homosexuality in private when both parties were over the age of 21. However, while Scotland did not enact any legislation following Wolfenden, Chapter 4 evidences that the Scottish common law was nonetheless developed by the judiciary from the nineteen-fifties in order to regulate homosexual behaviour, and young men and boys came to be classified as children and protected from homosexual wrongdoing.

Chapter 4 evidences this by analysing the change in the common law offence of breach of the peace and the doctrine of mutual corroboration in cases involving the sexual behaviour of adult men towards young men and boys. It demonstrates that boys and young men came to be classified as children who warranted protection from the harms posed by sexual contact with males. Male children, and the sexual behaviour that they were protected against, was distinguishable from that of females. Male children were protected beyond the age of 16 and homosexual conduct towards male children was more readily mutually corroborated by the courts. It is argued that the scope and structure of the protection for male children in the criminal law was a consequence of the different ideas about the proper characteristics and traits expected of the male child compared to the female child. The development of common law by the courts therefore worked to expand the protection of the male child in order that his heterosexual masculinity, and capacity to enter into heterosexual family relations, were not perverted by adult male sexual contact in youth. This understanding of the sexual harms posed by homosexuality to male children continued to be a feature of Scots law into the nineteen-nineties, despite homosexual law reform, and, further, operated to exclude young men and boys who displayed homosexual characteristics and traits from the ambit of legal protection.

However, as the final part of Chapter 4 illustrates, the legal construction of the child and sexual wrongs against children started to change in the nineteen-eighties. This is evident in the

reform to the law of incest in Scots law through the Incest and Related Offences (Scotland) Act 1986. The chapter argues that this marked a shift in the underlying structure and function of the criminal law regulating adult sexual behaviour toward children. It details the development of the reform to the law of incest from the Scottish Law Commission publications, and indicates that the principal aim for law reform was the protection of children from adult sexual conduct within households. The three new offences that were enacted therefore sought to protect both male and female children from a variety of sexual contact with those who they trusted and depended upon in the household. The child was constructed as dependent upon, and therefore vulnerable within, the family relations in their households. The chapter argues that the sexual harm presented by adult sexual contact with children in families was understood to be the immediate and long-term physical and physiological damage to the child, as well as the overall harm to relations of trust and dependency in the family unit as a whole.

The final section of Chapter 4 evaluates the reform to the law of incest by detailing the formation of child sexual abuse, and the regulation of families, as problems for state officials in the mid-to-late twentieth century. It argues that the changing structure of the family, and the changing role and status of women and children, meant that the male-bread winner model of the family was no longer the basic family unit in society, and policy was increasingly predicate upon diverse forms of family structure in society and knowledge of the longer periods of time that children and young people were financially and materially dependent upon their families. In the wake of economic change, however, the changing structures of family relations in society were accompanied by a new role for the family in society. Policies established that families, in whatever form, shared the main responsibility for the care and security of children as the previous welfare-based model of state provision declined. The chapter evidences the emergence of official knowledge about child sexual abuse, which problematised sexual intercourse within family relations to be a result of the nature of family relationships themselves; rather than the material or social circumstances of families. The result was to cast child sexual abuse as a widespread social problem within family homes that arose out of a perversion of the essential relations of trust and dependency expected of children within families. From this perspective, the chapter argues that the regulation of incest in the criminal law both projected the responsibility of the family as the main source of care and safety for children in society; while also coordinating that responsibility by safeguarding the child against possible abuses to their relation of trust and dependency within the family.

Chapter 5 documents the emergence of the child as an object of protection in the twenty-first century. It first examines the development of sexual offence reform from the turn of the century and argues that sexual offences, in general, and sexual offences against children particularly were increasingly subject to scrutiny and some partial reform in the first years of the devolved Scottish administration. In relation to the law of rape, the criminal law definition changed in order to reflect judicial understandings of the modern status of women; and the right of individuals to freely choose to enter into sexual activity. In relation to children, the law recognised the child's vulnerability in a wider range of relationships than simply the family home and expanded to prohibit a wider range of behaviour by adults in different relations to a child. However, these reforms were only partial, and the overall coherence and scope of sexual offences was still considered to be unsatisfactory by both politicians, activists, and commentators. The ability of the courts to provide the necessary reforms by adapting common law was also doubted, and in 2004 the Scottish Government requested that the Scottish Law Commission undertake a review of the law of rape and other sexual offences.

In the second part of Chapter 5, it is argued that the understandings of adult sexual freedom and vulnerability of children that had emerged in the partial law reform efforts at the beginning of the twenty-first century were developed and expanded upon in the major reform to the scheme of sexual offences brought about by the Sexual Offences (Scotland) Act 2009. The chapter develops an account of the 2009 Act, which codified the criminal law and organised offences around the principle of sexual autonomy. Autonomy was given legal expression by the new rules relating to consent and reasonable belief in consent in the offence definitions. It was understood that this would ensure that individuals who freely chose to engage in sexual activity would not be subject to criminal law regulation; whereas the criminal law would proscribe any sexual behaviour undertaken in absence of consent, because it would be a violation of a person's sexual autonomy.

Chapter 5 evidences that sexual offences against children were therefore premised on the idea that the sexual autonomy of children was either absent, because younger children lacked any capacity to exercise free choice, or underdeveloped, in the case of older children, and therefore vulnerable to adult sexual activity. This was particularly the case in institutions or families, where the trust and dependency of the child was particularly pronounced and the Act therefore created a number of specific offences, with an increased age of protection, for children in these circumstances. The chapter argues that the principle of sexual autonomy upon

which the 2009 Act was organised, meant that the criminal law proscribed a range of sexual conduct of adults towards children – including physical and non-physical sexual conduct, as well as proximate and remote activity – because the central wrongfulness of the behaviour was the violation to the child's absent or undeveloped sexual autonomy, rather than any physical injury or immediate distress to the child that the behaviour manifested. This also justified the removal of gender-based protection and created equal protection for both homosexual and heterosexual conduct. Through this analysis of the 2009 Act, it is contended that the construction of the child's vulnerable sexual autonomy not only derived from the wider idea of adult sexual autonomy, but served to give adult autonomy further content and meaning by indicating when free agreement would be absent. The child was consequently understood to be incapacitated, underdeveloped, immature, and therefore vulnerable to abuse; whereas the adult protected by the Act was mature, developed, and had full capacity to exercise free choice.

Chapter 5 goes on to illustrate how the construction of the vulnerable child and the sexual wrongdoing they are protected from has also developed in the practice of the criminal law. It returns to the evolution of the *Moorov* doctrine of mutual corroboration in the twenty-first century, and argues that the doctrine has developed in line with new judicial knowledge about the nature of sexual offences against children. It undertakes an analysis of case law in the past two decades, and evidences that the courts can now more readily identify patterns of behaviour between multiple charges against the same defender even when there are significant time periods between the alleged behaviour, when there are differences in the physical nature or place of offending, and when the genders of the children differ in each charge. On the one hand, it is argued that this operates to expand the criminal law in practice and at the time of writing a majority of cases involving multiple charges of sexual offences will be capable of being mutually corroborated, and therefore tried, in the courts. Furthermore, it is argued that the development of the *Moorov* doctrine by the courts reflects the contemporary understanding of the child's vulnerable sexual autonomy in relation to adult autonomy and this has affected the nature of its reasoning. It evidences that the dominant approach adopted by the courts contextualises individual instances of sexual offending within the wider relationship context of the child and the adult. In cases of familial or institutional abuse, the obvious relation of trust and dependency of the children upon the adult will therefore frame the assessment of the unity between individual instances of sexual behaviour. In cases of non-institutional or familial abuse, the court will evaluate the relationship between the accused and the children in order to identify the behaviour that led the children to become dependent upon or trusting of the adult. Individual

sexual acts are interpreted by the courts to be connected because they form incremental parts of a wider abuse of the overarching relationship between the children and the defender.

The final part of Chapter 5 evaluates the changing scope and objectives of sexual offences against children in light of the wider state aims for child protection. To do this, it introduces and analyses the Scottish Child Abuse Inquiry. It argues that the inquiry is linked to the wider operation of state agencies and it has both a backward- and forward-looking function. It therefore constructs information about the past using classifications, and underlying assumptions, that are meaningful in the social and political conditions of the present. It is argued that the Inquiry is one way in which the state can create information about society in the present and therefore conduct future political action on the basis of it.

From this perspective, the chapter argues that the construction of the role of the state, the responsibility of individuals in society, and the objectives of child protection can be evidenced through the Inquiry. The chapter evidences that the construction of state responsibility at the Inquiry, alongside the Scottish Government's current policy documents, position the state as the central authority responsible for the protection of children in society. But this state responsibility is premised on the wider responsibility of individuals in society and professionals to work in partnership with the state. It also evidences that the classification of the child and sexual harms against children in the past by the Inquiry align with the contemporary construction of children's vulnerable sexual autonomy in both the criminal law and state policies. Children are therefore understood to be trusting and dependent on adults, who are responsible for their safety, security, and support in society. The objective of modern child protection is consequently two-fold. It first intends to protect children from the long-term physical and psychological harms of child sexual abuse in order that they can grow up to become self-governing, fulfilled, adults in the future. Secondly, child protection policy seeks to establish the responsibility of adults towards children in society and safeguard against the possible harms that can arise as a result of the improper performance of adult responsibility toward children.

Finally, it is argued that the construction, and protection, of the sexually vulnerable child in the criminal law aligns with the wider state aims of child protection. Sexual offences against children thus presuppose the dependency and trust of children upon autonomous adults and now seek to protect them from the possible abuses that can arise as a result of that trust and dependency. The contemporary criminal law therefore upholds the wider responsibility of

adults in society towards children, and coordinates the appropriate way in which adults should fulfil their responsibilities in order that children are protected from harm and can become autonomous, reliable, fulfilled, and responsible adults in the future.

2. Towards Sexual Offences Against Children

2.1. Introduction

Criminal law scholarship has somewhat neglected the interwar period, in general, and even more so the changes that arose in relation to sexual behaviour involving children. However, it was between the years 1919 and 1939 that sexual offences against children emerged, for the first time, as a recognised category within the criminal law. The category primarily combined pre-existing crimes and organised them around a distinctive idea of sexual wrongdoing by adults towards children. By the end of the nineteen-thirties, this category of offences was the subject of public inquiries, prompted legislative change, and necessitated new rules of evidence in the Scottish courts. The following chapter aims to critically reconstruct the initial conditions that led to the emergence of the category of sexual offences against children in the criminal law. It traces the legislative, executive, and ideological developments that rendered sexual behaviour by adults toward children to be an intelligible and important problem for British and Scottish administrations. Its analysis is accompanied by Chapter 3, which details how the nascent category of sexual offences against children was realised within the practice of the criminal law and subsequent legislative developments.

The chapter begins with an outline of the legal settlement prior to the interwar period, in Part 2.2. As detailed, the criminal regulation of sexual behaviour towards children pre-dated 1919. From the nineteenth-century, there was more distinct provision in law for children, and this reflected emerging views that childhood was qualitatively different from adulthood and necessitated different forms of regulation. By the turn of the century, a mix of legislation and common law in Scotland sought to protect children from adult sexual conduct, which was regarded as an increasingly harmful behaviour. These offences provided different protection for girls compared to boys, reflecting ideas about the chastity and corruptibility of female children. However, offences were not bound together by a shared understanding of the interest they protected. It was not until the cessation of the First War that the range of offences involved in regulating sexual behaviour with children came to be organised and articulated around a shared understanding of the child and sexual wrongs that they protected against.

The impetus for change arose in the campaign for, and later enactment of, the Criminal Law Amendment Act 1922,[68] which forms the subject of Parts 2.3 and 2.4. As applied to

[68] Criminal Law Amendment Act 1922 c56. See Appendix I

Scotland, the 1922 Act created a statutory offence of lewd, libidinous, and indecent practices or behaviour[69] against female children between 13 and 16 to accompany a counterpart common law offence addressing the same conduct toward females below the age of 13 and males below 14. Part 2.3 situates the initial impetus for the 1922 Act within its ideological, social, and political context. It argues that knowledge and control of venereal disease became a crucial matter of government concern as the First War progressed and ended. This was linked to the growth of state strategies towards public health, which aimed to improve the physical strength of the nation, and therefore its continued prosperity. The construction of venereal disease as a public health problem meant that the causes and consequences of that disease for the population as a whole came into focus. In particular, the need to improve public health by regulating sexual behaviour and the resultant reproduction of children.

Part 2.4 explores the way in which these ideas moulded the progress of the 1922 Act. It documents the official concern about "amateur prostitutes", who were branded as a source of the high incidence of venereal disease. The parliamentary progress of the 1922 Act indicates that the removal of consent as a defence to the charge of lewd and libidinous practices with females between 13 and 16 was intended to place young women who partook in apparently improper sexual conduct within the category of the child in order that they could be protected and subject to control. The child conjured by the parliamentary process was a symbolic sexless ideal, incapable of properly displaying sexual appetite. Young women who engaged in precocious sexual activity were therefore deviant children, incapable of making rational decisions, and in need of paternalistic protection in the criminal law to improve their own moral and physical health, as well as that of the nation.

Part 2.5 builds upon the progress of the 1922 Act and investigates the specific role of women as primary vectors for criminal law change in the period. It argues that newly enfranchised women and a strong culture of women's associations created a political landscape where the problem of sexual conduct toward children and solutions to it were communicated widely, most importantly within official institutions such as committees of inquiry. There is evidence of an increased receptiveness within both the Executive and Parliament to the views of some women, particularly those who were elected or well-organised, in respect of children's issues. Scottish women's associations were crucial in this regard and worked to lobby members

[69] Hereinafter "lewd and libidinous practices".

of the Scottish administration about sexual offences against children in cohesion with other women's associations in England.

Part 2.6 documents the continued importance of organised female activism in constructing the problem of sexual offences against children, as campaigns drove the creation of two parallel inquiries in Scotland and England. It then undertakes an analysis of the report of the 1926 Scottish Inquiry into sexual offences against children and young persons, which created an official account of the problem of sexual offences against children by organising various common law and legislative offences within a single category bound together by a shared understanding of the sexual wrong they protected against. It evidences that the child protected by these offences was constructed as emotionally and physically vulnerable and in need of protection from the potential emotional and moral corruption that followed adult sexual behaviour. Specifically, from the possible sexual depravity, unwanted pregnancy, and venereal disease that it threatened. This mirrored the ideas that shaped the 1922 Act, and it is argued that the category of the child was primarily constituted by young women and girls, who were considered more vulnerable to the debauchery and disease of adult male sexual contact; and more dangerous as a result of the potential consequences that contact threatened. This official construction of the child was not only suffused with presuppositions about gender, but also class. The circumstances of female working class children, in particular, was found to make them more vulnerable to inappropriate sexual contact.

Part 2.7 investigates the role of public health ideas in forming the problem of sexual offences against children and the solutions to it. It argues that women's campaigns were successful in relation to adult and child sexual contact because the moral claims made by activists were articulated in a manner that aligned with the broader strategy of interwar British administrations to promote the physical capacity and productivity of the nation through healthy sex and reproduction. It finds that these ideas were underpinned by presuppositions of race, class, and gender, which directed the structure and focus of the criminal law as it was developed in the 1922 Act and 1926 Committee of Inquiry. The child that emerged as an object of protection in the criminal law during the interwar period was a working class female, who was more vulnerable to the possible threat and effects of premature adult sexual contact because of her social circumstances. This construction operated to direct the focus of law reform on working class women and girls whose behaviour or circumstances rendered them both

vulnerable, and dangerous, but elided a comparable focus on male children or adult male perpetrators.

2.2. Before 1919

Criminal law was used to regulate sexual activity between adults and children before the First War. By the turn of the twentieth century, there was increased recognition of the need for distinctive provision in law for children, in general, and the importance of regulating sexual conduct toward children by adults, more specifically. The most significant legislative development had occurred some four decades earlier with the passing of the Criminal Law Amendment Act 1885. That Act had been a government response to concerns surrounding "child prostitution", fuelled by widely circulated magazine investigations and the mid-nineteenth century campaigning of charitable child protection groups.[70] Nonetheless, as Louise Jackson has observed on the basis of committee evidence and popular publications, concern about child prostitution also acted as a euphemism, acceptable by Victorian public mores, for broader misgivings about sexual activity between children and "fathers, neighbours, employers as well as by strangers".[71] The 1885 Act increased the age of consent to penetrative intercourse for females from 13 to 16.[72]

In Scotland, it was complemented by a few common law offences that were directed at sexual behaviour with children, the most prominent being that of lewd and libidinous practices toward girls and boys.[73] This included, for example indecently touching children as well as exposure of the private parts to children or inducing children to commit indecent practices.[74] Other common law offences that did not specify age were also relied upon in Scottish courts to address sexual conduct between adults and children, such as incest;[75] rape or attempts to

[70] Jackson *Child Abuse in Victorian England* (2001) (n 41) 53.

[71] ibid 16.

[72] Criminal Law Amendment Act 1885 (48 & 49 Vict. c69).

[73] David Hume, *Commentaries on the Law of Scotland, Respecting Crimes Vol 1.* (Bell & Bradfute 1844) 309–10. Lewd, indecent and libidinous practices "tending to corrupt the morals of the young" was an applicable change in relation to girls below the age of twelve and boys below the age of 14.

[74] JHA Macdonald, *A Practical Treatise on the Criminal Law of Scotland* (R MacGregor Mitchell ed, 4th edn, W Green & Son 1929) 220.

[75] Prohibiting intercourse with near relations irrespective of age, including parent and child or step-parent and step-child, uncles and nieces, brothers and sisters, ibid 217.

ravish;[76] sodomy;[77] or aggravated assaults.[78] These crimes were not typically grouped together in terms of organisation or any sense of shared wrongdoing. Sodomy and incest, for example, were typically understood as unnatural crimes linked to a contravention of protestant religious beliefs, whereas rape and assaults involving sexual behaviour were more firmly related to violence.[79] This framework of law was also marked by gender difference, with most of the offences defined by or typically prosecuted in relation to female children who were presumed to be more corruptible, and therefore in greater need of protection, than males.[80] However, sexual conduct between children and adults was regarded as serious, particularly when venereal disease was transmitted. From 1910 Procurators Fiscal were instructed by the Scottish Law Officers to prosecute cases of rape, attempts to ravish, or lewd and libidinous practices involving female children and aggravated by the communication of venereal disease in the High Court rather than the Sheriff Court, as had previously been the practice, increasing the maximum penalties that could be meted out.[81]

More broadly, legislative enactments directed toward children had proliferated from the nineteenth century. Major legislation such as the Children Act 1908 formalised the creation of specialised institutions for the management of children and young people who had committed crimes as well as children who had experienced cruelty, which were separate from adult prisons and courts.[82] Similarly, compulsory education from the eighteen-seventies,[83] accompanied by the regulation of the age of entry into the workforce through the Factory Acts, which were in place from the early nineteenth century, segmented the activities that could be performed by children and young people from those of working adults.[84] Children necessitated different spaces for work, punishment, and education because of a perceived qualitative difference from

[76] Frequently used in relation to intercourse with a girl below the age of twelve, albeit without the requirement of violence against and resistance as on the part of adult women, ibid 175.

[77] Prohibiting anal intercourse between males irrespective of age, ibid 219.

[78] Assaults could be aggravated by intent to ravish or intent to gratify lewdness, which included upon "girls or boys whether above or below puberty", ibid 165.

[79] Farmer, *Making the Modern Criminal Law* (2016) (n 34) 224.

[80] ibid 273.

[81] Roger Davidson, '"This Pernicious Delusion": Law, Medicine, and Child Sexual Abuse in Early-Twentieth-Century Scotland' (2001) 10 Journal of the History of Sexuality 62, 68.

[82] Children Act 1908 (8 Edw. 7 c67) pts II and V.

[83] See: Nigel Middleton, 'The Education Act of 1870 as the Start of the Modern Concept of the Child' (1970) 18 *British Journal of Educational Studies* 166.

[84] JT Ward, 'The Factory Reform Movement in Scotland' (1962) 41 *The Scottish Historical Review* 100.

adults. One feature of this difference was the need for children to be subject to greater care and protection than adults.[85] These legal changes mirrored a wider conceptual shift in the cultural meaning of childhood in British society as a whole, and historians and cultural scholars have argued that childhood came to be known as a unique temporal period in life prior to, and necessary in preparation for, adulthood.[86]

The late nineteenth and early-twentieth century therefore increasingly sought to regulate sexual behaviour by adults towards children and distinct provision in law for children was more common by the turn of the twentieth century. However, there was no coherent category within the criminal law that bound various statutory and common law offences together around a shared sexual interest that they protected against. It was in the years that immediately followed the First War that various crimes were threaded together by the idea of a shared sexual wrong. One initial and important step towards this development was the legislative reform efforts to increase the age of consent for lewd and libidinous practices towards young women, which arose in the context of renewed administrative efforts to address the health and strength of the nation in the wake of war.

2.3. Health, Wealth, and War: Background to the 1922 Act

In the months prior to the 1918 Armistice, there was enhanced political attention to the regulation of sexual behaviour. It was no novel concern, "venereal disease and promiscuous relations between the sexes"[87] had been regarded as a serious and widespread cause of harm to the public of the United Kingdom and Ireland before the hostilities and administration of the First War dominated the parliamentary agenda.

Commencing in 1913, a Royal Commission on Venereal Disease was tasked by the government to understand the prevalence and consequences of three known infections.[88] The Final Report of the Commission in 1916 recommended the provision of diagnostic and

[85] As Christine Kelly has evidenced, by the early twentieth century children were recognised as a segment of society in need of care and protection and this status subsequently underpinned institutional provisions for juvenile justice, see: Christine Kelly, 'Criminalisation of Children in Scotland 1840-1910' (2012) PhD Thesis ch 1.

[86] Kelly, *Reforming Juvenile Justice* (2016) (n 46).

[87] HL Deb 20 July 1914 vol 17, col 85.

[88] The terms "venereal" applied to the three bacterial infections: syphilis, gonorrhoea, and soft chancre: the former two were considered significant concerns for public health. See: Lucy Delap, 'Cleansing the Portals of Life' in Mary Langan and Bill Schwarz (eds), *Crises in the British State 1880-1930* (Hutchinson 1985) 204.

treatment centres managed by government and accompanied with a focus upon heightened "moral standards and practice of the community as a whole".[89] Thus, the reduction of nonmarital heterosexual intercourse and related sexual activity would, alongside medical facilities, reduce the rate of disease. National Treatment Centres, the first example of a universal free health service funded and organised by the central state, were promptly established throughout the country in 1917.[90] The need to address sexual behaviour in society, and therefore prevent the spread of disease, also called for innovation. Partially under the auspices of preventing venereal disease, Parliament moved to legislate in respect of sexual behaviour between adult males and young women between the age of 13 and 16 that fell short of intercourse. By 1922, the Criminal Law Amendment Act, as applied to Scotland, created a statutory offence of lewd and libidinous practices against female children between the age of 13 and 16, which would accompany a counterpart common law offence addressing the same conduct toward females below the age of 13 and males below 14.

The regulation of sex as a matter of public health was related to the broader concerns of the British state with the strength of the population. At the turn of the twentieth century, the Bishop of Manchester addressed the *Manchester and Salford Sanitary Association* reflecting upon, among other things, the difficulties faced by British troops during the recently concluded Second Boer War.[91] Therein, he argued that the wealth of the nation, and ultimately its resilience to war, ought to be measured by the health of its populous before all else,

> "What is the real wealth of a nation? …It is to be found in the quality of its citizens. If these are strong in body, alert in mind and firm in characters; if they are men of resource, of courage, of self control…the nation that bred them is rich. I call the Boers a rich people, even though they only be poor farmers, small in numbers, and with little knowledge of culture. They are rich in manly and physical qualities…"[92]

[89] Home Office, 'Report of the Royal Commission on Venereal Disease' (cd 8190, 1916) para 219.

[90] David Evans, 'Tackling the "Hideous Scourge": The Creation of the Venereal Disease Treatment Centres in Early' (1992) 5 Social History of Medicine 413, 414.

[91] Between 1899 and 1902 the British Empire participated in war with Dutch settler farmers (Boers) in South Africa.

[92] Quoted in F Scott, *The Case for a Ministry of Health* (Royal College of Surgeons 1903) 98.

The Bishop was not alone in holding these sentiments and his speech is favourably cited in an early study advocating for the establishment of a Ministry of Health in Britain.[93] There was widespread concern in government throughout the first decades of the twentieth century about perceived "racial degeneration". In the aftermath of the Boer War, an Inter-Departmental Committee on physical deterioration had sought, principally from new findings in medical evidence, to inquire into allegations concerning the "physical deterioration of certain classes".[94] A number of recruits who reported for military service during the War had been hindered by ill-health, from poor teeth to venereal disease, particularly in the lower classes. An additional finding that the size of the British population was in decline compounded the apparent problem.[95] With fewer subjects, and even fewer of appropriate levels of health and fitness, the material capacity of the country to staff productive industry or an army, especially compared to then-imperial rivals Germany, was hindered.[96] The solution lay not in the present generation necessarily but also those of the future whose improved health would remedy population decline and racial degeneracy. The focus, then, was upon ensuring that a greater proportion of mothers and thereafter infants survived childbirth and that children met a requisite standard of physical fitness as they matured.[97]

Venereal disease was seen as a major cause of the diminishing physical health of the population. Those disabled by illness as a consequence of extra or pre-marital sexual activity were presented by campaigners for improved public health as unnecessarily enfeebled and inadept for the work or reproduction required for economic and military success.[98] But the scientific understanding and medical management of venereal disease was changing. Studies from the beginning of the century had identified the biological cause of syphilis, testing methods, and potential treatments alongside clearer diagnostic tests for gonorrhoea.[99] The dissemination of these findings fuelled campaigns from within the medical profession for the

[93] ibid.

[94] Report of the Inter-Departmental Committee on Physical Deterioration Vol I. (cd 2175, 1904).

[95] AH Halsey and Josephine Webb, *Twentieth-Century British Social Trends* (3rd edn, Macmillan 2000) 22.

[96] Report on Physical Deterioration para 214.

[97] Sue Innes, 'Love and Work: Feminism, Family and Ideas of Equality and Citizenship Britain 1900-39' (1998) PhD Thesis 99.

[98] Roger Davidson, 'Venereal Disease, Sexual Morality, and Public Health in Interwar Scotland' (1994) 5 Journal of the History of Sexuality 267, 267.

[99] These findings were published in medical journals between 1905-1909. See: Evans (1992) (n 75).

government to address disease more effectively in light of them.[100] By 1916, the Royal Commission on Venereal Disease had reported that gonorrhoea accounted for female sterility in fifty per-cent of cases, concurring with previous assessments of the cause of population decline.[101] It was the exercise of warfare in Europe that raised the greatest and most immediately pressing challenges for the control of sexual disease.

The incidence of venereal disease in troops stationed throughout the country had exponentially increased, so much so, that in 1914 the Home Office considered a recommendation from the president of the Royal College of Physicians to empower police to actively remove prostitutes from areas wherein troops were hosted.[102] It was denied for a number of reasons, one being that professional prostitutes were typically in control of their sexual health; but the more prolific spread of disease came from "amateur prostitutes".[103] So-called amateurs were young women, typically younger than professional prostitutes, who engaged in sexual behaviour without obvious financial benefit.[104] It is evident that, absent of the exchange of money, sexual activity between young women and troops was not perceived to be easily regulated. An initial attempt using the wartime Defence of the Realm Act (DORA) to prohibit women convicted of soliciting from entering, residing or frequenting areas with stationed troops was deemed a failure because amateurs fell outside of the ambit of the ban.[105]

In 1918, a further attempt to manage the spread of the disease by amateur prostitution was made using DORA. This time it was an offence, in those areas inhabited by troops, for a male to engage in sexual activity with any female between the ages of 13 and 16; for any female to participate in sexual intercourse while suffering from a venereal disease; and for a woman to loiter or solicit while suffering from venereal disease.[106] Around the same time, the Home Office introduced the Criminal Law Amendment Bill.[107] The provisions applied to the populous

[100]Adriane Gelpi and Joseph D Tucker, 'The Magic Bullet Hits Many Targets: Salvarsan's Impact on UK Health Systems, 1909–1943' (2015) 91 Sexually Transmitted Infections 69; Malcolm Morris, 'A Plea for the Appointment of a Royal Commission on Venereal Disease' (1913) 181 The Lancet 1871.

[101] Delap (1985) (n 88) 203.

[102] ibid 202.

[103] ibid.

[104] ibid 203.

[105] Defence of the Realm Act 1914 reg-13(a).

[106] 1914 Act reg-40D.

[107] Criminal Law Amendment HC Bill (1917-18)-[25].

at large and stipulated the same offences as those in DORA, with the removal of the gender-specification for the spread of venereal disease.[108] Parliament dissolved in late 1918, but a second replica Bill, the Criminal Law Amendment Bill (No 2) was sponsored by the government following the war, in 1920.[109] In the interim, two further Private Member's Bills had been introduced at parliament with similar provisions.[110] Evidently, the presence and urgency of the problems dealt with in the Bills continued from war into peacetime conditions. The 1922 Act, and its creation of the statutory offence of lewd and libidinous practices with young women between the ages of 13 and 16 originated from the DORA provisions and the replication of those provisions in the Criminal Law Amendment Bill (No 2). It is the passage of the Criminal Law Amendment Bill (No 2) and its later enactment, as the markedly different Criminal Law Amendment Act 1922, that will be the focus of the next section of this work.

2.4. Dangerous Girls and the Joint Select Committee

In 1920, a Joint Select Committee convened to consider the Criminal Law Amendment (No 2) Bill.[111] An unequivocal motivation for the Home Office in introducing the offences was the suppression of amateur prostitution, with the necessity of control justified as a response to the "question of order and decency in the streets and also in the question connected with venereal disease".[112] The Report of the Joint Select Committee is indicative of the forces at play behind, and motivation for, the 1922 Act. The increased age of consent sought to recognise that young women who engaged in sexual activity short of penetrative heterosexual sex were dangers to their own health and the health of those they engaged with. A picture of the "dangerous girl" is constructed throughout the evidence gathered in the 1920 Report. In the words of one Committee Member, Henry Maddocks, while it may have been the case that "a girl of 16 has all the appearance of a girl of 20 and really is the temptress...the object of this [the Home Office Bill] seems to me to give protection to girls as much from themselves as anything else".[113] The perceived need was to regulate sexually precocious young women and the means to do that was

[108] HC Deb 19 February 1917 vol 90, cols 1098-131.

[109] Criminal Law Amendment (No 2) HL Bill (1921-22)-188. Hereinafter the "1920 Bill".

[110] Report of the Joint Select Committee on the Criminal Law Amendment Bill [H.L.], the Criminal Law Amendment Bill (No.2) [H.L.], and the Sexual Offences Bill [H.L.]' (1920) v. (hereinafter the "1920 Report").

[111] ibid.

[112] 1920 Report v (Lord Muir Mackenzie).

[113] ibid para 64 (Henry Maddocks).

to subject them to the protection of the criminal law and render them risky sexual objects to men.

The construction of the female victim as well as the female offender in the 1920 Report evidence that the primary objective of the law was the control of the sexual behaviour of young women in order that they did not undertake inappropriate sexual conduct as adult women in the future. This objective is evident, first, in the construction of the male child in the 1920 Report. Young women dominated Committee and Parliamentary debate on the provisions and while the 1920 Bill was drafted in a manner that "young people" protected by the increased age of consent in England and Wales could include both males and females; young men and boys appeared only as an ancillary concern. In Scotland, the increased age of consent did not apply to males at all. [114] A short and uncontroversial discussion of the evidence from the representative of the Scottish Office in the 1920 Report found that in order to apply the proposals for an increased age of consent to the law of Scotland, it would be necessary to mirror the common law offence of lewd and libidinous practices towards females. The result was to make it an offence to undertake such behaviour toward a girl between the ages of 12 and 16, which if it was committed against a girl below the age of 12, would be a common law offence.[115]

Furthermore, the primary focus on the regulation of female sexual behaviour is also apparent in the corollary construction of possible offenders. The hypothetical offender of the English and Scottish provisions of the 1922 Act was not necessarily a man. Insofar as young men or boys were considered to be at risk of engaging in sexual activity, it was not at the hands of men but women older than themselves.[116] There was also consistent reference to the indecent behaviour of experienced adult females, which was a cause of sexual licentiousness for other young women. This is evident in the subtle and revealing undercurrent of concern about female sexual activity with other females. Matthew Waites study of the "lesbian age of consent" documents previous failed parliamentary attempts in 1921 to regulate gross indecency by females towards other females that may have remained within the minds of witnesses and parliamentarians during the passage of the 1922 Act. The 1920 Report documents evidence from the Metropolitan Police Magistrate for Westminster, Maurice Chapman, who claimed that

[114] ibid 21 (Sir Ernley Blackwell KCB).

[115] ibid.

[116] For example, "[t]here are a considerable number of cases in which quite young boys are either led astray or are encouraged to go wrong by women considerably older than themselves", ibid 438 (Archibald Allen).

it was very well known to the police and students of criminology that "women as well as men corrupt girls" and even though such an offence was barely known to the public there ought to be equality between the sexes as far as humanly possible.[117] The observations appeared to be widely accepted: it passed in both Houses of Parliament with minor reference to the potential for it to address female, as well as male behaviour.[118] Waites explains that the silence as to the reason behind the provision was partly to draw attention away from acts of consensual lesbianism for fear that it would lead to increased practice.[119]

The adult female perpetrator was not only presented as a danger to young women, but an exemplification of why young women required greater protection in the criminal law: to control the possibility that they, too, would become sexually licentious older women. This is evident in the dichotomy drawn up in the 1920 Report between the female child and the female perpetrator that she was protected from. Young women were potentially lustful and tempting, but ignorant. Thus, her sexual appetite was present but too abundant for her own control and, without proper regulation, could lead to sexual licentiousness. This licentiousness, in turn, could spread sexual disease amongst the men that they engaged with. The danger young women posed was to themselves, both morally and physiologically, and also to the wider male population. The young woman who was an "amateur", who had disposable income and congregated in public places amongst men, could appear older and more tempting to men who could be deceived by her: whether by her looks or her tempting conduct. In this light, the increased age of consent operated as a form of guidance, to avoid sexual liaison with young women because of the risk that it posed. The female perpetrator, too, shared many characteristics with that of the female victim, however discussion of the female perpetrator cast her as an older woman. Unlike the young girl, the sexually active woman was no amateur incapable of self-control; but a depraved and concupiscent woman, capable of, and responsible for, deliberate conduct toward younger males and females: as corrupting as she was corrupt. The distinction between the paradigmatic female victim of the provisions of the 1922 Act and the female offender was age and the capacity to undertake reasoned, rational decision-making. Immoral sexual behaviour on the part of a young woman was the manifestation of a dangerous inability and incapacity to behave appropriately, reflected in the term "amateur" itself. The

[117] ibid 1479 (Lord Muir Mackenzie).

[118] Matthew Waites, 'Inventing a "Lesbian Age of Consent"? The History of the Minimum Age for Sex between Women in the UK' (2002) 11 Social & Legal Studies 323, 323.

[119] ibid.

same behaviour from an older woman was not excused by the inexperience of youth as a lewd and incompetent choice but a deliberate and reasoned act of sexual impropriety that threatened to lead young women and men astray.

The need to regulate women, and young women in particular, overshadowed the regulation of the male perpetrator throughout the passage of the 1922 Act. Men were presented as impressionable to sexual temptations, sometimes imprudent in their sexual choices, and sometimes bad. They were not cast as especially dangerous or pernicious when engaging with younger women. By making men criminally liable for participating in a wider range of sexual acts with young women, the intention of the 1922 Act was to make such behaviour riskier and therefore instil a more careful approach to sexual object choice in men. Male sexual activity did not need to be reformed, coerced, or restrained like that of amateur young women, but disincentivised. At once, this understanding implied the status of male entitlement and capacity to actively engage in sexual behaviour with women and the need to further control the behaviour of women in order that the sexual choices of adult men could be pursued without undue risk.

Parliamentary debates lay bare the perceived threat that young women who were improperly sexually aware and active posed to the rightful sexual choices of men, and young men, in particular. When initially introduced, the 1920 Bill contained the provisions to remove the age of consent as a defence for indecent assault with any child or, in Scotland, lewd and libidinous practices with girls between the age of 13 and 16. Pressure from parliamentarians, obviously exerted prior to the introduction of the 1920 Bill, was nonetheless alluded to by then Home Secretary, Edward Shortt, when he remarked that there was opposition because some believed young men would be "tempted by girls who were more to blame than they".[120] To counter the challenge, he recommended a form of defence be negotiated. A proposed, but narrowly defeated amendment, sought to both remove consent as a defence below the age of 16 and also make it a misdemeanour for the other party, between the age of 15 and 16, to participate the proscribed sexual activity.[121] It therefore sought to simultaneously punish young women who engaged in improper sexual activity as well as men who did so.

More significant still was the successful amendment that saw the creation of a defence for young men who engaged in indecent behaviour with females they had reasonable belief

[120] HC Deb 5 July 1922 vol 156, cols 503-458.

[121] Report from Standing Committee D, *Criminal Law Amendment* (HC 1922, 148) 4.

were older. Thus, while reasonable belief as to age was no defence in general, it was available to men under the age of 23 who had not previously been charged with the same offence and had reasonable cause to believe "the girl was over the age of 16 years".[122] The amendment implied that young men ought to be protected from criminal liability when taking sexual risks with young women. In particular, those young women who a judge or jury may find to present as older, would not be "protected". That interpretation is latent within the fears voiced about the potential increase in blackmail as a consequence of the proposals.[123] Sir George Hamilton, during the second reading of the 1920 Bill, summed up that,

> "[a]ny man over the age of 25 who starts cuddling a girl of 15, whatever age she may appear to be, ought to pay for it and go to gaol, but we ought to protect the young man. By this Clause we would put temptations to blackmail in the way of a certain class of the most objectionable criminals in this country, namely, the people who encourage young girls to go about and entice young men into wickedness."[124]

This view was mirrored in other Member's speeches throughout the progress of the 1920 Bill and it reflected a range of important beliefs that moulded the final construction of the 1922 Act. First, that if the increased age of consent was to guide male sexual choice, it ought to do so while traversing a generational distinction between younger and older male sexual conduct. A young man could be expected to exert his sexual energies with young women and therefore, in doing so, would be granted a greater degree of protection from the possibility of being misled as to the age of a young women with whom he conducted himself. By implication, older men were not to be granted the benefit of the doubt and ought to conduct themselves with restraint toward younger women, who were now to be less desirable as a consequence of potential criminal sanction. Second, that the capacity of young women to mislead and seduce young men was not always an example of deviant agency but a result of other criminals who forced them to do so. A third, culminative implication of the interpretation of the problem offered by Hamilton was that improper sexual conduct of young women toward young men was often coerced and involuntary. At once this served as both justification for greater protection for girls and young women falling below a certain age, who were vulnerable to being coerced, and the mitigation of male participation in improper, pre-marital sexual activity with young women.

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[122] 1922 Act s2.

[123] HC Deb 5 July 1922 vol 156, cols 403-458.

[124] ibid col 417.

Young male sexual instinct was naturally lively and keen, it could be cheated by appearances and the law ought to recognise that young men were not culpable in such circumstances.

Successful enactment of the provisions of the 1922 Act rested upon the right of young men to participate in sexual behaviour without it being branded as disorderly or corrupting. Young women were rightfully protected because they were vulnerable, either through improper and unrestrained control of their tempting sexual impulses, or too malleable to others who could manipulate them to act upon those impulses. In both cases, young women posed a danger morally and medically to themselves and others. The defence of reasonable belief was therefore successfully placed within the 1922 Act as recognition of the inherent capacity of young women to be debauched, tempting, and false while bolstering the youthful male capacity to actively pursue sexual activity with them.

By removing consent as a defence to the charge of lewd and libidinous practices with females between 13 and 16, the criminal law classified young women who displayed improper sexual characteristics and conduct as children. The child that is constructed throughout the passage of the 1922 Act could not display sexual appetite, let alone participate in sexual choice; economic freedom; or display bawdiness or indelicacy. The idealised child was docile, delicate, and sexually restrained. The child required guidance, condescendence, and necessitated these through a lack of practical or mental facilities to undertake active, competent decisions like an adult. By casting young women who had sexual experience as uncontrolled, incompetent, irrational, or easily manipulated; the 1920 Report justified the assimilation of the amateur prostitute with that of a wayward child in need of correction. Analyses such as that offered by Waites argue the chief objective of this criminal law reform was to regulate "men having sex with young women and girls", which formed the basis of laws concerning sexual consent since the nineteenth century.[125] While this is perfectly apposite it somewhat misses the point that the law concerning the creation of children as objects of sexual protection, certainly as elucidated by the passage of the 1922 Act, was much more concerned with regulating young women having sex with men. The grammar here matters. That young women were perceived to be behaving as subjects, actively participating in sexual conduct with men, they were deviant. The solution was to restate them into the criminal law as objects of protection: that protection was

[125] Waites *Age of Consent* (2005) (n 30) 68.

given to the young woman irrespective of her consent, condition, or circumstances. It was to be benevolently given as an act of paternalistic protection.

2.5. Women as Vectors for Legal Change

Young women were selected as the primary objects of criminal control in the 1922 Act. But the presence of woman Members of Parliament,[126] doctors, police officers, and activists as witnesses in the progress of the Act is indicative of the complex role of women as agents of criminal law change. The changing status of women in political life, as well as a potential receptiveness to women's views and experience within political institutions, are dynamics that played a significant role in rendering the problem of sexual offences against children as it was understood in the early twentieth century and the criminal law response to it. This is evident in the following analysis, which explores the role of women as enfranchised citizens who were able to shape the final outcome of the 1922 Act.

In addition to the increased age of consent, the 1920 Report recommended that the criminal law contain further offences to tackle both venereal diseases directly and "amateur prostitutes" indirectly. These included soliciting, loitering, or importuning with venereal disease and the deliberate spread of venereal disease (through sexual intercourse or other sexual behaviour). Further provisions recommended that those found in breach of the law be institutionalised.[127] When the final 1920 Bill was presented by the Home Office to Parliament, however, no such offences were included. The Home Secretary remarked that the proposed legislation contained only those provisions that were "least contentious".[128]

Throughout the progress of the 1922 Act, the proposals directly relating to the communication of venereal disease, prostitution, and compulsory institutionalisation could not properly be described as non-contentious. The problems, and the solutions to them, arose most pressingly from the extraordinary electoral politics that altered postwar British political institutions throughout the nineteen-twenties, most significantly the female vote and the activism of those supporting it. In February 1918, the franchise was partially extended to women over the age of thirty and from the age of 21 women gained the right to stand as

[126] Nancy Astor was a member of the Select Committee and first female Member of Parliament to take her seat.

[127] Criminal Law Amendment (No 2) HL Bill (1921-22)-188, s3.

[128] HC Deb 12 April 1921 vol 140, cols 891-1074.

Members of Parliament.[129] The years preceding the reform had involved organised feminist campaign efforts and sacrifice, not only for the vote but also a number of other issues seen as pertinent by women but politically unaddressed.[130] The regulation of venereal disease was one such issue. Feminist organisations had called for the abolition of the state regulation of prostitution, often justified by virtue of preventing the communication of venereal disease,[131] because doing so would abolish the "male double standard":[132] it was male sexual appetites that led to the use of prostitution and therefore the communication of infection, which then spread to otherwise chaste family members.[133] The blame, and therefore the focus of criminal sanction, ought to lie with men.

In 1915, the feminist Association for Moral and Social Hygiene (AMSH) was formed from a campaign group originally dedicated to the abolition of anti-prostitution laws.[134] A matter of months following the enactment of the wartime DORA regulations, pressure from the AMSH; the Women's Freedom League; and other women's groups resulted in an intended government review of the criminalisation and institutionalisation of women who communicated venereal disease through intercourse with members of the armed forces.[135] One prompt for this review is alluded to in the communications from Cabinet Under-Secretary Lord Cecil who had warned the War Cabinet that, in the event of an election, the strength of opposition to the clause was so great that candidates could be placed under considerable pressure.[136] Implicit within Cecil's warning was the requirement for cabinet officials to adapt government positions in response to the potential electoral power that newly enfranchised women would express at the

[129] Parliament (Qualification of Women) Act 1918 c47 s1 meant women could stand as candidates but could not vote for themselves.

[130] Delap (1995) (n 88) 201.

[131] Evident in the Contagious Disease Acts from 1864-86, for example, see: Lise Shapiro Sanders, '"Equal Laws Based upon an Equal Standard": The Garrett Sisters, the Contagious Diseases Acts, and the Sexual Politics of Victorian and Edwardian Feminism Revisited' (2015) 24 Women's History Review 389.

[132] Delap (1995) 197.

[133] ibid.

[134] Opposition to prostitution laws was significant and organised in women's movements in the wake of the late nineteenth century Contagious Disease Acts. This point is made in Julia Ann Laite, 'The Association for Moral and Social Hygiene: Abolitionism and Prostitution Law in Britain (1915-1959)' (2008) 17 Women's History Review 207, 212.

[135] Delap (1995) 204.

[136] Reported ibid 205.

ballot box from 1918. Before any such review was conducted the war ended, and with it the provisions of DORA were repealed.

Yet, Lord Cecil's apprehension was not in vain. The repeal of DORA left the near-identical, but more generally applicable, clauses of the Criminal Law Amendment Act (No 2) open to debate from 1920 and female professionals and activists communicated ideas and objectives for the 1920 Bill throughout witness testimony in the 1920 Report. Thus, female Doctors Gordon, Walker, and Williams opposed the creation of any offence for prostitution, opportuning, or soliciting as well as the proposals to institutionalise young women convicted of the behaviour. In joint and individual evidence and a memorandum of arguments, the doctors maintained that the only recommendation that ought to be carried through in the 1920 Bill was the increased age of consent to lewd and libidinous practices. Their view was that the onus of criminal sanction for activity, such as importuning or soliciting ought to lie with the men who resort to female prostitutes[137] and the compulsory detention of young women participating in either formal or "amateur" prostitution did not improve their conditions in life.

Similarly, representatives of the AMSH, including its then General-Secretary Alison Neilans, called for venereal disease to be dealt with under the public health acts and not in the criminal law.[138] Neilans noted that the wartime regulation of venereal disease through criminal sanction was a "practical failure"[139] because it was impossible to determine which person infected another for the purposes of a criminal trial and more women than men would be subject to accusation and therefore sanction under the proposals.[140] Despite the removal of gender specificity in the proposals of the 1920 Bill, Neilan's argued that, in practice, it would criminalise more women than men for engaging in prostitution and disease transmission. Much the same as the woman doctors, Neilans further argued that the criminalisation of loitering or soliciting and the compulsion of those women to institutions would be undesirable because it would "harden them" and, again, allow men to go comparatively unpunished.[141] A preferred

[137] 1920 Report app A (Dr Mary Gordon).

[138] ibid 736 (Alison Neilans).

[139] ibid 735.

[140] ibid.

[141] ibid.

approach of the ASMH involved the protection of children and improved health, an important feature of which was the increased age of consent to some sexual activity.[142]

The 1920 Report, and the Joint Select Committee proceedings from which it was formed, was therefore an important institutional conduit, amongst others,[143] between the offices of the British state and a section of the new female electorate whose issues were directly relevant to government, but only minimally represented in parliamentary membership. It operated to circulate information and ideas from a circumscribed selection of women about issues regarded as pertinent to women[144] and facilitated agreement regarding the nature of problems to be addressed and the manner that they ought to be addressed.

While there was no explicit Scottish women's interest represented in the 1920 Report, Scottish women's activism nonetheless suggests that Scottish women's organisations played an essential and specific role collecting and disseminating knowledge to political representatives about child sexual offences in coordination with other national associations. In 1920, the Edinburgh Women Citizens' Association[145] established a subdivision: the Child Assault Protest Committee,[146] that was supported by some 27 organisations from across Scotland, including women's citizenship organisations and the National Vigilance Association.[147] It was in regular communication with the English "Six Points Group",[148] which was founded in 1921 and campaigned for greater protection in the criminal law from sexual offences against children and more appropriate administration of the law.[149] As the Joint Select Committee on the 1920 Bill commenced hearings, a deputation of Scottish women's associations coordinated by the Child Assault Committee met with the Lord Advocate of Scotland and communicated with the Scottish Office to seek the removal of consent as a defence to the charge of lewd and libidinous

[142] ibid 2263 (H.W. Bayly) and echoed in Alison Neilan's written evidence in ap A.

[143] There were other campaign efforts that were widely reported in the press, see Laite (2008) (n 134) 215.

[144] Elaine Harrison has noted that women's presence at inquiries was usually a representation of specifically "women's" interests mandated by their social roles such as child and maternal health, see: Elaine Harrison, 'Women Members and Witnesses on British Government Ad Hoc Committees of Inquiry 1850-1930' (1998) PhD Thesis 19.

[145] Innes (1998) (n 97) 52.

[146] It was first named the "Child Outrage Protest Committee" from 1920-21, ibid.

[147] Esther Breitenbach and Valerie Wright, 'Women as Active Citizens: Glasgow and Edinburgh c.1918–1939' (2014) 23 Women's History Review 401, 409.

[148] Sue Innes, 'Constructing Women's Citizenship in the Interwar Period: The Edinburgh Women Citizens' Association' (2004) 13 Women's History Review 621, 623.

[149] Breitenbach and Wright (2014) 411.

practices.[150] The coordination between Scottish and English women's campaigns, as well as the previous articulation of this position to Scottish administrative officials, operated to coordinate ideas about reform to sexual offences against children with other organisations. The resultant similarity in their ideas and objectives arguably explains the ease with which the positions of other women's organisations were taken as applicable to Scotland in the 1920 Report.

Communication between English and Scottish Women's groups regarding their mutual understanding of the problem of sexual behaviour between adults and children and the organised articulation of these shared understandings with respective agencies of the British state further meant that a distinctive Scottish response could be created while achieving a mutual objective of eradicating a shared, national, problem. Scotland retained a separate criminal law administration from that of England and Wales. And rather than mirror the provisions for "child assault" as proposed by and for English legal authorities, the Scottish Office proposed that a statutory offence be modelled as an extension of the distinctive Scottish common law proscribing lewd and libidinous practices. By coordinating with other women's associations and Scottish administrative bodies, the rich associational culture amongst women that Sue Innes describes in her work both facilitated a consensus as to the problem of child sexual harm to be addressed by agencies of the state[151] and, importantly, did so in a manner that was cohesive with the distinctive rationality of the Scottish legal system.[152] That is to say that it was consonant with the autonomy of the Scottish criminal law, establishing a continuity of the law by attaching the greater part of the definition of the offence to a distinct and native common law offence.[153] Equally, Scottish women's campaigning and its interaction with institutions meant that this distinct Scottish solution was developed alongside English reforms to address sexual behaviour with children.

Newly enfranchised women were therefore an essential vector for legal change. The nature of their activism, and their engagement with official bodies and representatives, shaped the objectives and provisions of the 1922 Act. The increased age of consent was therefore

[150] 29 associations were represented at the deputation, as reported in Innes (1998) (n 97).

[151] Innes (2004) (n 148).

[152] Lindsay Farmer, '"The Genius of Our Law.": Criminal Law and the Scottish Legal Tradition' (1992) 55 MLR 25, 47.

[153] ibid.

intended to promote the care and control, rather than criminalisation, of young women who entered into sexual relationships with adult men. More generally, the coordination and engagement of politically active women in relation to the 1922 Act facilitated the construction of the wider problem of child sexual offences beyond its specific provisions. The next section of this work details the women's activism that continued after the enactment of the 1922 Act and argues that it was also salient in the creation of the first official inquiry investigating the wider problem of, and solutions to, sexual offences against children.

2.6. The 1926 Departmental Committee of Inquiry

By the time the 1922 Act had received Royal Assent, a coalition of women's groups had commenced campaigning to address reported cases of sexual conduct toward younger children as well as those between 13 and 16. The initial issues cited were the unknown or possibly increasing incidence of venereal disease in younger children and the leniency of sentencing for offenders who had been convicted of "child assault".[154] The campaigns were assisted by Members of Parliament, including the only two female members at the time, Nancy Astor and Margaret Wintringham. At Parliament, these Members lobbied for money to be allocated by the Home Secretary for a committee of inquiry to investigate the "question of child assault".[155] That question would relate to more behaviour than that dealt with in the 1922 Act. It was argued that an official forum of investigation should be designed to understand child assault as a whole: the men who committed the offences "from a psychological and scientific point of view";[156] the processes in criminal law for dealing with sexual behaviour toward children, a greater understanding of children who were subject to sexual assaults, and the best means of dealing with children and offenders in the future.[157] The request was successful and in 1926, the Departmental Committee into Sexual Offences against Children and Young Persons in

[154] HC Deb 12 July 1923 vol 166, col 1655.

[155] ibid col 1656.

[156] ibid col 1657

[157] See ibid cols 1656-1691.

Scotland,[158] reported a year following its sister inquiry relating to England and Wales in 1925.[159]

In Scotland, the Edinburgh Women Citizens' Association subdivision, the Child Assault Protest Committee, that had previously lobbied government officials in respect of the 1922 Act, was instrumental in campaigning for and establishing the 1926 Inquiry.[160] Most of the evidence heard by and submitted to it was gathered by those in the Child Assault Protest Committee.[161] The 1926 Report of the Committee[162] is an important official record of knowledge about the perceived problem of sexual conduct between adults and children in the period. Like the Scottish provisions of the 1922 Act, while there was some mention of young male victims, the explicit focus of the findings was upon the female victim.[163] Offences that were otherwise and previously recorded within other categories of the criminal law were for the first time officially grouped under the classification of "sexual offences against children".[164] The shared character of the offences being that they pertained to "sexual relation" whether "partial or complete".[165] Of importance was the emphasis placed on correcting a "fundamental misapprehension" that sexual offences against children involved the use of force by an adult man against a child; with the seriousness of the offence being determined by the age of the child in question and the degree of violence involved.[166] Instead, violence was not necessary in determining whether the conduct was wrong, particularly when many offences could be committed with apparent acquiescence of the child. There was therefore a deliberate distinction made between sexual offences against children, and the wrong they sought to address, and those of other non-fatal and violent offences within the criminal law. Physical harm, when present, was ancillary to the wider social and moral harm presented by sexual conduct between adults and children.

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[158] Scottish Office, 'Report of the Departmental Committee on Sexual Offences Against Children and Young Persons in Scotland' (cmd 2592, 1926).

[159] Home Office, 'Report of the Departmental Committee on Sexual Offences against Young Persons' (cmd 2561, 1925).

[160] Innes (1998) (n 97) 196.

[161] ibid.

[162] Hereinafter the "1926 Report"

[163] 1926 Report para 14.

[164] ibid 2.

[165] ibid.

[166] ibid 4.

However, there were varying degrees of culpability identified within the offences in the 1926 Report. Different age groups were understood to be affected in different ways by adult sexual conduct and the potential risk posed by sexual behaviour toward children varied with age. Age was not a matter of increased physical vulnerability; but "emotional and mental"[167] susceptibility: to moral corruption leading to sexual depravity, unwanted pregnancy, or venereal disease. Sexual acts directed toward older children, who had attained puberty, was less culpable because these were an example of "yielding...to a natural instinct" on the part of the child that was nonetheless prohibited, whereas sexual behaviour directed toward younger children, below the age of puberty,[168] was a violation of "natural sexual law".[169] Yielding, in the former case, suggested that behaviour undertaken with older children was a consequence of a supposedly natural desire for them to participate in sexual acts; owed to the sexual development of young women. The 1922 Act provisions relating to behaviour against children between 13 and 16 were therefore "not true assaults" because the activity prohibited frequently involved a degree of consent.[170]

The 1926 Report mirrored views that had been articulated throughout the passage of the 1922 Act: that young women who engaged in sexual conduct were irrationally acting upon their natural sexual urges despite their incapacity to appreciate the consequences of the behaviour. While highly undesirable, these were not as serious as offences against younger children wherein there was no developed sexual instinct from which to act. Older children who willingly engaged in sexual acts with adults were victims for the purposes of criminal law, but not in any other sense of the word, a point that is explicitly made in the findings.[171] The problem of sexual offences against children was a matter of the impropriety of the conduct itself. That conclusion was justified with reference to contemporary scientific and social understandings of sexual development[172] and the risks of extramarital sex. Specifically, sexual acts with those below 16 presented a danger to children who may become infected with disease, pregnant outside of marriage, or incentivised to conduct improper sexual activity in the future.[173] The harms that

[167] ibid 38.

[168] Accepted as those below the age of 12, ibid 37.

[169] ibid 7.

[170] ibid.

[171] ibid IV (Juvenile Depravity).

[172] ibid.

[173] ibid.

sexual conduct produced were both physical and mental, but the wrongfulness of the conduct was its longer-term effects. By categorising a distinct group of offences "sexual offences against children and young people", the crimes were recognised to have distinct and specific harms that were related to disease, behavioural disorder, and illegitimate offspring. Sexual offences against children were therefore connected by the harm that they posed to the physical and behavioural capacity of children, particularly female children, to engage in healthy procreation in the future; rather than the immediate physical harms or mental injury that they caused.

Having distinguished sexual offences against children within the body of the criminal law, the 1926 Report documented the problems with estimating the incidence and prevalence of the behaviour. It stated that a want of corroboration often undermined prosecutions and, while offending was concentrated in larger towns,[174] "many cases occur which do not come under the notice of the police, and which no mere police machinery can be expected to discover".[175] That which was undiscovered, and undiscoverable, was socially more dangerous because the victim may remain corrupted but undetected. [176] The implication of the finding was that the prevalence of sexual behaviour between children and adults was incalculable; adding to its maleficence and the necessity of means to deal with it. Sexual offending against children was therefore distinct, important, and a more widespread problem than just that behaviour addressed by the 1922 Act.

2.6.1 Prevention and the Shaping of Sexual Wrongs

That which could not be detected was best prevented, and an important feature of the 1926 Report was the emphasis placed upon prevention, which was indicative of both the features of the child who formed the centre of sexual offence regulation and the behaviour that was regulated against. Prevention required an understanding of who committed the offences, upon whom, and in what circumstances. Offenders were characterised as potentially older men with diseased minds or younger men who were in want of self-control. But there was a general reluctance to make broad generalisations and it was concluded that each offender should be considered individually.[177] What the individualised characteristics of offenders might be was

[174] ibid 8.

[175] ibid 14.

[176] ibid.

[177] ibid 21.

not expanded upon. However, one important cause attributed to sexual offending by adults was exposure to sexual perversion as children. It was stated that a "serious amount of sexual depravity" existed between children and young persons, with "hyper-sexuality" more frequent amongst girls than boys.[178] Hyper-sexuality and exposure to perversion could lead to excessive sexual tendencies: a girl may become a temptress or children would have "over-developed" or "perverted" sexual habits. [179] For sexual offenders in the immediate future, the 1926 Report recommended increased penalties; mental examination for, at the very least, repeat offenders and "exhibitionists"; and possibly all offenders if the Government considered it beneficial upon consultation with experts.[180] But, primarily, sexual offences against children were caused by sexual offending against children.

There was substantially less discussion of male offenders in the 1926 Report compared to the child and the circumstances of children as a potential cause of sexual offences against them. This is apparent in the many recommendations that sought to prevent sexual conduct between adults and children by addressing the behaviour and conditions of children and their families.

In terms of behaviour, emphasis was placed on the role of parenting. One finding, that "[m]any of these offences are due to a failure of parents and guardians to take proper care of their children and to control them",[181] led to the recommendation that the Children Act 1908 be amended to extend penalties for parents and guardians who failed to exercise due care of young offenders to include instances where the child was subject to a sexual offence.[182] In addition, it was recommended that the same Act should include provisions to remove children and place them in industrial schools or other care arrangements when a court found them to be, variously, "in moral danger": victims of sexual offences who could not be properly cared for in their own homes; or daughters or young female relatives of a man who had committed incest with his daughter.[183] It was recommended that parents of young women who "consent to repeated

[178] ibid 24–5.

[179] ibid.

[180] ibid 139(4)(11)(c).

[181] ibid 101.

[182] ibid 102.

[183] ibid 139(a).

offences" should be cautioned in order to guarantee the young women's good behaviour, failing which she should be sent to a place of detention.[184]

In terms of housing, the 1926 Report found that there were "a large number of dwellers in slums" who would be able to provide better attention to their children if their housing conditions were improved.[185] This officially documented the connection between bad housing and sexual offences against children; with the habitual conditions of the poorest classes presented as being particularly conducive to adult-child sexual contact. Glasgow was reported to have the highest number of sexual offences against children, and the Inquiry recorded that "50 per cent [of the city's population] live in houses of two apartments" and around twelve per cent in one room.[186] Often tenements, one- or two-bedroom apartments that were common across Scottish towns, frequently had shared lavatories. The lavatories were described as being commonly "set in obscure corners, in a bad state of repair, with broken windows and locks and catches out of order so that doors cannot be closed". [187] The conclusion was that sexual misbehaviour with children and adults in these places was not uncommon practice. [188] But it was within the households of the overcrowded poor that conditions were described as "even more dangerous to morality";[189] with proper decency deemed impossible when parents and children of mixed ages and genders shared close confined living conditions and, often, beds. [190] Overcrowded housing conditions resulted in children being in premature contact with the "gross facts of sex" which left them to contaminate "better-housed sections" of the community with their depravity.[191] A series of examples were relied upon in the 1926 Report that implied sexual relations between family members and lodgers was made possible by confined living.[192] It was suggested that no punishment or precautionary measure could overcome the sexual depravity that arose from housing conditions and until it was possible for separate rooms to be guaranteed for husbands and wives, and children of the respective sexes.[193] The analysis of the

[184] ibid.

[185] ibid 105.

[186] ibid 107.

[187] ibid.

[188] ibid.

[189] ibid 108.

[190] ibid.

[191] ibid 111.

[192] ibid 110.

[193] ibid 112.

primary causes of sexual offences against children assimilated sexual conduct with children as a near-biological contagion that festered and spread from unsanitary living conditions or unclean personal habits.

Sexual offences against children were therefore both a cause and consequence of unhealthy habits and circumstances. This finding reflected but expanded upon discussions of the 1922 Act about the benefits of increasing the age of consent to sexual behaviour from 12 to 16. The 1922 Act had explicitly sought to address sexual habits and resultantly promote sexual health[194] and witnesses, such as the female doctors from the Medical Women's Federation, had argued that sexual contact between young women and adult men hindered healthy development and marriage.[195] They contended that the behaviour could disrupt the minds and habits of young women and lead them to a life of "uncontrolled prostitution, and great misery" as well as spreading venereal disease to the wider community.[196] Increasing the age of consent for young women would therefore prevent "illegitimacy, venereal disease, shattered health, vagabondage, and prostitution in the young". [197] The shared problem of all sexual offences against children studied by the 1926 Report just three years later was that the promiscuity; disease; and illegitimate offspring that the 1922 Act sought to protect against could be attributed as a common problem across a range of offences. The harm associated with these offences gained meaning and importance because of the threat that they posed to good health. Importantly, "good health" in this regard was a matter of good public health: the primary concern was not individual physical or psychological injury to the child but the possible consequences of such injury for the fecundity of the population. Venereal disease could spread to others and maim those infected; early exposure to sexual activity risked creating fatherless children, and improper sexual mores that continued sexual licentiousness in the social body into the future as children grew up. As a matter of public health, sexual offences against children were also determined to have public, social, roots. They occurred because of the opportunities for sexual wrongdoing that unhealthy parenting, housing, and individual habits of the community presented. It naturally followed within the 1926 Report that, to ensure the crimes did not

[194] 1920 Report v.

[195] ibid 25–31.

[196] ibid 455 (Dr Jane Walker).

[197] ibid.

continue, the social circumstances and upbringing of children should be the primary focus of government.

Framing the problem of child sexual offences in this manner had several practical consequences. Despite one of the initial reasons for convening the 1926 Inquiry being to address the apparent variability and leniency of sentencing for offenders, such an extensive focus on the unhealthy conditions and consequences of sexual offending against children overshadowed and obscured any serious investigation of the nature of the adult offender. Male offenders were not categorised or examined to the same extent as children or their circumstances and were not presented to be discernible or predictable in the same manner as victims. Implicitly, adults who sought sexual conduct with children were not dominant threats to children and instead were themselves unfortunate consequences of the unhealthy conditions in which sexual offences against children appeared to thrive and perpetuate. The conclusion was that if conditions and behaviour were to be improved, then sexual offences against children would decline. No new sexual offences against children were proposed and there was no suggestion that the existing crimes should be amended, for example, to expand the offence definitions to include the same level of protection for both males and females. Instead, the criminal law dealing with sexual offences against children was to be bolstered by legal provisions that allowed for children and young people, particularly young women, and their families to be subject to a degree of oversight or, in some circumstances, institutionalisation.[198]

While there were some recommendations for improved housing conditions to be facilitated, many of the recommendations sought to directly address the behaviour of families and children. Providing minimum light, closing doors, covering children, watching them as they played, and the abolition of partitions in ice-cream parlours were amongst the preventative tactics endorsed by the 1926 Report.[199] Children were as much, if not more, of a danger to their health and the health of the population as the offenders themselves. Children, without supervision, instruction, and good upbringing, would incentivise unhygienic sexual misconduct and continue it in the future. They were objects to be directed and watched in order that they did not fall victim to sexual offending and its consequences. The 1926 Report is therefore an official interpretation of sexual offences against children that finds the problem, and its solutions, related more to the care and control of children, their families, their space, and habits,

[198] 1926 Report para 139(a).

[199] As was the abolition of shared bathrooms, ibid VIII (Summary of Recommendations).

than offenders. It did so with the view that unhealthy habits and circumstances perpetuated poor public health. It is not surprising, then, that the conclusion of the 1926 Report in respect of adult sexual conduct with children was that "the evil, grave though it is, is no more than a surface manifestation of the irregular habits and secret moral standards of a considerable section of the community - a mere symptom of a larger disorder. Only partial improvement can accrue from dealing with this symptom as if it were the whole disease."[200]

Both the progress of the 1922 Act and the 1926 Report made an evident connection between healthy, hygienic conditions on the one hand and moral vigour on the other. "Health" was presented as a confluence of biological and social circumstance or personal habit. The sexual health of the child was not purely biological health in the sense of being disease-free or physically unharmed by adult-interference, but a social health. The socially healthy child that would grow to become a useful and procreative member of the adult population did not engage in sex outside of marriage and was not exposed to sexual knowledge or experiences before a certain age. One of the key features of this reasoning is the coexistence of apparently secular scientific or medical views with moral ascriptions of the "correct" or the "right" social behaviour and circumstances. Immoral behaviour was cast as unclean, unhealthy, unhygienic, and contagious. The supposedly unhygienic behaviour that could undermine good health included moral waywardness amongst young women, which was attributed as a cause of poor sexual habits and venereal disease in the future; over-crowded housing that could inhibit moral propriety and spread unhealthy sexual knowledge or behaviour; and the poor moral guidance of children that would degenerate their mental and physical capacities as adults.

The problem of sexual offences against children was therefore bound to this social understanding of health. This necessarily viewed, for example, unlocked bathrooms; confined living; and dark tenement closes as the equivalent of untreated open wounds in the built environment. These spaces presented the ideal conditions wherein disease could manifest through undetected sexual liaisons and intimate contact between adults and children. The harm of such "disease" was not simply venereal disease or physical injury to the child, but the wider social consequences of adult-child sexual behaviour that incumbered the overall productive fitness of the nation.

[200] ibid 140.

These public health ideas, however, had a now obvious foundational bias that presented female children and the poor as more vulnerable to sexual offences. The result was that the behaviour of women and girls, as well as the working classes, came to be an explanation of inappropriate sexual behaviour and justification for its criminal regulation. The following section of this chapter critically examines the nature and growth of these public health ideals. It seeks to explain why the connection between individual health and the overall strength of the nation state gained traction in the interwar period. It further intends to evidence how public health ideas shaped official strategies to address sexual offences against children, and the assumptions that were built into these strategies.

2.7. Moral Health as Public Health

Knowledge and management of public health had expanded in the administration of the British state throughout the nineteenth and early twentieth centuries. In his study of the development of public health policy and government in cities from the nineteenth century, Patrick Joyce identifies the growth of cartography and social statistics as the means through which the "body of the city" was open to view.[201] The creation of knowledge about the causes and cures of disease and the space of the city gave rise to the idea of "public health" and shaped strategies to administer it.[202] Public health had a different rationale from that of individual medical provision. The problem to be addressed was not instances where there was an "absence of health" in individuals; but instead, public health sought to promote the absence of disease in the populous as a whole.[203] Good public health required the material division of public and private space. Joyce attributes the creation of public infrastructure such as drains, sewers, and pipes as a means of indirect government of hygiene through space that also inculcated clean habits in city residents.[204] Hygiene that maintained good health during the period involved, ideally, the creation of "spaces between bodies", protecting them from contact and smells, accompanied by the increasing specialisation of households into distinct private areas for eating, sleeping, and defecating during the Victorian period.[205]

[201] Patrick Joyce, *The Rule of Freedom: Liberalism and the Modern City* (Verso 2003) 67.

[202] ibid 66.

[203] ibid.

[204] ibid.

[205] ibid.

The governance of public health that Joyce examines was not only evident but increasingly bureaucratically organised during the interwar period. National Treatment Centres for venereal disease were created by the wartime administration and signified a culmination of new scientific knowledge about prevention and treatment that was officially constructed and communicated through the Royal Commission.[206]The Treatment Centres were also indicative of the increased availability of funding from the central government for state actions to tackle venereal disease that had arisen during the First World War.[207] By 1919, the Ministry of Health was founded within the British Executive. It was tasked with the prevention of infectious diseases, sanitation (including housing), food supply, research, education, and – significantly – the "sound foundation of physique".[208] The latter category encompassed the healthy maintenance of the race of the population; by preventing "racial poisons" such as venereal disease and improving infant welfare through maternity services. [209] Through the creation of the Ministry, the British state formed a centralised and direct administrative means to address the connection between the health of individuals within the populous and the overall "wealth" of the nation, in the economic and military sense, which had been made in the previous decades and most notably at the end of the Boer War.[210] By regulating and preventing the causes and manifestations of disease and the resultant degeneracy in individuals, the intention was that the productive capacity of the population would be furthered.

Health, as the central focus of the Ministry, had a wider definition than the immediate cure of illnesses in the body for the betterment of the individual: health had social causes. Once these were known, they could be deterred and managed.[211] The causes of poor health were material – in the sense of drainage, ventilation, and light – but also related to the personal hygiene, and therefore habit, of individuals. [212] By the end of the First World War, knowledge and state organisation based upon it was explicitly focussed upon the promotion of healthy

[206] Home Office, 'Report of the Royal Commission on Venereal Disease' (n 89).

[207] GC Peden, *The Treasury and British Public Policy, 1906-1959* (Oxford University Press 2000).

[208] George Rosen, *From Medical Police to Social Medicine: Essays on the History of Health Care* (Science History Publications 1974) 112.

[209] ibid.

[210] An overview of the role of the Boer War in the development of British health policy is developed in Nikolas Rose, *The Psychological Complex: Psychology, Politics and Society in England, 1869-1939* (Routledge 1985).

[211] Rosen (1974) 112.

[212] Rose (1985) 81.

reproduction.[213] The necessary components of that healthy reproduction were disease-free sex, able mothers, and well-reared children. In the wake of scientific findings about venereal disease and administrative efforts to regulate a productive population, sex in the interwar period like the water, food, and excrement in Victorian cities was something in the social world that could be legitimately examined in parliament and committee rooms in order that it might be governed for the benefit of national health. It is from within this context that sexual contact with children and its consequences came to be scrutinised, debated, and regulated.

Sexual contact and the health of children were understood to be directly related to the quality of health and number of useful individuals within the British population in the future. While the Ministry of Health was the bureaucratic epitome of the state strategy toward public health during the period, the passage of the 1922 Act and the publication of the 1926 Report are evidence that the promotion of good health was not contained within the Ministry. Equally apparent in the actions taken to understand and address sexual offences against children was an ethical component within public health ideas related to the "moral hygiene" of the individual. Morally hygienic practices were the proper, healthy, conditions and behaviour attributed to sound public health and both health, and the moral hygiene necessary to promote it, were evident themes throughout the campaigns of the Scottish and English women's movement.

Ideas about moral hygiene proved to be an important means of articulating claims for many women activists and professionals. For those involved in campaigns to address sexual offences against children, scientific facts about health were a means of justifying moral positions.[214] By combining moral and medical assessments of what was hygienic, some women's organisations were able to successfully convey their campaign objectives in a manner that aligned with state aims for better health within the population.[215] Women's campaign groups such as the AMSH and the Child Assault Protest Committee utilised the official concern and action taken to combat venereal disease in the years following the First War. These campaigns ascribed one of the chief causes of venereal disease, and therefore racial degeneration, to sexual licentiousness that arose through extra-marital engagements.[216] But aside from venereal disease, women activists also drew attention to the wider social health

[213] ibid.

[214] Delap (1985) (n 88) 197.

[215] ibid.

[216] Davidson (1994) (n 98)

implications of sexual contact with children, including "over-sexed" behaviour and prostitution. In her evidence related to the 1920 Bill, Dr Helen Wilson claimed "the object of hygienic effort" ought to be to prevent all promiscuous intercourse because it can never be made safe and healthy.[217] Similar sentiments were discernible in the evidence submitted by female professionals and activists.[218] As Delap has observed, previously religious ideals such as self-control and individual will-power, that were visible in women's organisations throughout the late nineteenth and early twentieth century, became entangled with ideals of good hygiene and therefore good health as the interwar period progressed.[219] Women activists and experts presented extra-marital intercourse as a source of moral corruption that also caused social disease[220] and they therefore advocated for good morals in order to improve the social health of the nation. Diagnosing sexual behaviour outside of marriage as a source of ill-health allowed for women's groups to persuasively communicate the problem of adult-child sexual behaviour within official forums in a manner that was both intelligible and important to state officials concerned with public health.

The success of women's campaigns was not, therefore, wholly attributable to the institutional and electoral circumstances of the period, but also the nature of the ideas that were conveyed by a select number of women who could access administrative bodies. The interwar period presented a unique opportunity for some women's opinions and ideas to be officially heard, recorded, and accommodated within British state institutions. Throughout the committees, debates, and memoranda relied upon in the preceding sections of this chapter, the women concerned with sexual offences against children framed their often-differing views in a manner that was nonetheless consonant with state aims for improved health. It is not incongruent, then, that the debates and campaigns leading up to the 1922 Act were dominated by associations concerned with "moral and social" hygiene, such as the AMSH. Nor that, throughout the passage of the 1922 Act and the publication of the 1926 Report, female medical professionals lobbied or worked alongside lawyers, social activists, and government representatives to advance scientific and medical expertise in support of their aims.

[217] 1920 Report para 784 (Dr Helen Wilson).

[218] For example, ibid C (Alison Neilans).

[219] Delap (1985) (n 88) 197.

[220] Davidson (1994) (n 98) 274.

2.7.1 Race, Class, and Gender

It is nonetheless evident that the ideas about personal and public hygiene that moulded the problem of sexual offences against children were underpinned by presuppositions of race, class, and gender. It was these presuppositions that appear to have shaped the classification of who was considered a child for the purposes of the criminal law and the underlying sexual wrong that they were protected against.

In his seminal work on the policing of families, Donzelot describes how different forms of expert authority in the twentieth century operated in the space between the state and individual philanthropists.[221] Donzelot attributes the success of these expert authorities to the degree that they aligned with the aspirations of state authorities for the family.[222] In respect of the 1922 Act and the 1926 Report investigating sexual offences against children, female professionals and activists who gave evidence, were predominately operating as experts. They had unique knowledge and insight into issues of adult-child sexual behaviour, gained from their experience in the professions or activism. Moreover, their expertise was of significant value within state forums because they represented an organised and engaged section of the female electorate. Ideas about public health and moral hygiene that allowed organised and professional women to articulate their positions on adult-child sexual conduct also implied an ideal of "the child" and, implicitly, the sexual relationships they were to be protected from. To improve public health, activist women advanced that it was morally hygienic to ensure that children were not exposed to sexual contact below a certain age in order to prevent venereal disease, prostitution, illegitimacy, and licentiousness. This required sexual relationships to take place solely within heterosexual and procreative marriage. It also implied a relationship of care and control over children by parents until a certain age in order that they were not exposed to sexual behaviour and knowledge. When the views of women activists and professionals about improved public health aligned with those of state agencies, they did so on the basis of ideas about the appropriate familial relationships that should be mandated within society to achieve public health.

What was required to achieve the healthy family for the future production of the British race, however, differed across the genders and classes in the population. This is particularly

[221] Donzelot, *Policing of Families* (1979) (n 53) 89.

[222] ibid 24.

clear in the nuance of the claims made by organised women activists in the period, who sought to enhance the moral hygiene of both men and women, particularly in the lower classes. Many women's organisations were involved in campaigns for equal civil and political rights for women, and sought to alter the criminal law governing adult-child sexual conduct as a subsidiary of these concerns. Sexual contact between adults and, generally female, children was framed as a unhygienic behaviour that was also an example of the "male double standard". [223] What concerned many feminist activists of the period was the apparent double standard of sexual morality between men, who were the primary source of disease in marriage, and women, who were expected to remain chaste or faithful but still fell victim of diseases contracted outside of marriage. The point advanced by, for example, the Edinburgh Women Citizen's Association[224] and the AMSH,[225] was that both men and women ought to remain chaste before marriage and faithful within it in order that good public health could be maintained. Women who engaged with extra-marital sex were therefore problematic in much the same way as men. They acted as carriers of disease into marriage. The "amateur" prostitute emerged as an example of sexually profligate young women who, because of their malleable youth, could be reformed and brought into "normal and profitable existence".[226] This goes some way to explaining why the dominant position taken by women activists in respect of the 1922 Act was to punish older men who sexually engaged with young women by making it a criminal offence to do so; while categorising the young women who engaged with men between the age of 13 and 16 within the category of the "child", regardless of consent. Doing so indicated that such young women were inherently misguided and in need of care and reform.

What was regarded as normal and profitable for young women, however, depended significantly on their social class as well as their gender. Elaine Harrison explains that women's participation in committees of inquiry during the early twentieth century was determined in part by the "special interests", or expertise, they were seen to have because of their gender, such as maternal or children's issues.[227] Most appointments by committees were also made by upper- or middle- class officials informally, by selecting from social or political networks of their

[223] Breitenbach and Wright (2014) (n 147) 404.

[224] ibid.

[225] Davidson (1994) (n 98).

[226] Delap (1985) (n 88) 197.

[227] Harrison (1998) (n 144) 216.

class.[228] The result of this was that many of the arguments and findings of inquiries was from a middle- or upper- class point of view. These perspectives both problematised the behaviour of lower-class individuals and families and ascribed idealised standards of behaviour for them. Women's organisations were by no means entirely constituted by middle class campaigners and professionals.[229] However, it is evident in the creation of the 1922 Act and the 1926 Report that the most significant contributions by women were made by those in the professions, moral hygiene activists, Members of Parliament from an upper- or middle- class class-context that was largely aligned to that of the political and professional world they operated within.[230]

Classed understandings of the child, and sexual wrongs, are also woven through the evidence and reports related to sexual offences against children. In the 1920 Report, in the evidence of witnesses about the benefits of increasing the age of consent for lewd and libidinous practices, there is a strong implication that "amateurs" were working class girls who were not properly controlled. Sir Ernest Blackwell K.C.B, then Assistant Permanent Under-Secretary of State at the Home Office, gave evidence that, "[y]ears ago these assaults generally took place on visits to the girls' homes and places of that sort" but now, "these girls are under no control and nominally respectable girls are out on the streets at all hours of the evening".[231] Blackwell's first observation was that institutional homes for girls, who were either destitute or otherwise not able to live with their families, were previously common places for sexual behaviour between young women and adult men. His second observation suggested that young women of the same nature were to be found outside on the street and were not parentally supervised. Associating amateur prostitutes with activity on the streets throughout the day and night carried

[228] ibid 237.

[229] On the role of working class women see, Innes (1998) (n 97).

[230] The few women who entered higher education and professions, such as law or medicine, for the first time at the beginning of the twentieth century typically belonged to the same upper- or middle-class backgrounds class that dominated those professions. The dominance of middle-class perspectives may be unsurprising; however, it is important to note given the growing role of women within political and professional life during the period that this otherwise significant change did not necessarily affect the ongoing predominance of middle and upper-class individuals within positions of authority and influence. For more on the role of class and the growing role of women in public life, see Lindsay Alison, '"This Fair Lady, in Her Laces": Margaret Howie Strang Hall, the First Woman in Scotland to Try to Become a Lawyer' 29 Women's History Review (2020) 555. Moreover, Mahood and Littlewood have evidenced that Scottish women's activists and "Child-Savers" were typically middle class campaigners who sought to encourage spiritual and physical cleanliness amongst the working classes "without rising above their class", see Linda Mahood and Barbara Littlewood, 'The "Vicious" Girl and the "Street-Corner" Boy: Sexuality and the Gendered Delinquent in the Scottish Child-Saving Movement, 1850-1940' (1994) 4 Journal of the History of Sexuality 549.

[231] 1920 Report para 73 (Sir E. Blackwell).

with it the implications of poor home lives, joblessness, and a lack of parenting in working class homes. Addressing the potential for young women who were subject to sexual behaviour by adult men to be institutionalised, women representatives of the Homes and Associations for Rescue and Kindered Work wrote to the 1920 Joint Select Committee and argued that,

> "[o]ne of the greatest difficulties in dealing with these young girls has been that, as a rule, they have no training of any kind to fit them for an honourable livelihood…. There is too much money to be earned by prostitution and too much fascination connected with the life for a young girl of weak character or vicious tendencies voluntarily to consent to enter a Home for the length of time necessary for the training in the kind of employment for which she would be best qualified."[232]

Young women who were to be protected as children in the 1922 Act were therefore cast as absent of skills and easily persuaded by the money and lifestyle of prostitution that would lead on from their sexual behaviour. The figure of the amateur prostitute was not a child in need of further intellectual development through education or necessarily solely as a future homemaker within marriage; but a working class girl who ought to be suitably trained for work in the labour industry. Moreover, working class girls who engaged in sexual relations with adult men were viewed to be weak or vicious, implying that they lacked self-control and appropriate moral guidance. This, in addition to their material circumstances, made them susceptible to viewing prostitution as a reasonable means of earning a livelihood.

But the most striking connections between class, public health, and sexual offences against children were those made throughout the 1926 Report. It was the working class poor who were presented to be more likely to live in morally unhealthy conditions, and therefore experience adult-child sexual relations. With limited space, light, home maintenance, or the availability of regular home sanitation; sexual activity between children and adults was cast as one symptom of a wider range of issues to do with the conditions and habits of the poor. There were no practical means to address many of the conditions associated with sexual offences against children amongst the working class. While the 1926 Report advocated for improved housing conditions, particularly separate living spaces in over-crowded houses, the recommendation was insubstantial compared to the heavy emphasis placed on individual habits of parents and children. That included the increased surveillance of children at play as well as

[232] ibid F.

the proper maintenance of "hygiene" in the home. The feasibility of continued surveillance, bathroom maintenance, separate living spaces, or even proper clothing for those in impoverished and overcrowded conditions does not appear to have been discussed. Without meaningful or practical solutions to prevent sexual offences against children within the homes of the poor, the burden of responsibility was cast upon mothers as primary child carers and homemakers. Anna Davin has described this as a form of "moral blackmail",[233] where mothers were encouraged to improve their behaviour and home life in order to raise "healthy future citizens" irrespective of their insecurities or difficulties. [234] Child-rearing therefore became a matter of duty for public health. To achieve moral hygiene, the working classes, and particularly working class women, were expected to ensure their children were free from the diseased outcomes of sexual contact or knowledge. Working class families, and particularly mothers, were one of the essential means of preventing sexual offences against children.

Mariana Valverde's study of social purity movements in twentieth century Canada identified a similar constellation of organised female activists and professionals who used knowledge and ideas about hygiene to construct unhealthy sexual morality as an issue that was specifically linked to the conditions of the working class.[235] Valverde argues that the construction of class therein was a dialectical process: the aim was not to address the conditions and behaviour of the poor in order that they enter the middle or upper classes, and thus prevent sexual contact and disease amongst children. Instead, campaigners, professionals, and officials sought to mould the behaviour and conditions of lower classes to facilitate their healthy reproduction *as* lower classes.[236] Alongside heightening the productive capacity of the working classes, doing so was a means of encouraging non-antagonistic class distinctions within British society.[183] From this perspective, the knowledge and ideas that emerged at both the Joint Select Committee on the 1920 Bill and 1926 Inquiry about sexual contact between adults and children in the working class were shaped by class ideals. The recommendations and legal provisions that followed reified the distinction between classes in British society and mandated the behaviour and conditions of the working class. Specifically, public health operated as an apparently scientific justification for why the living conditions and habits of the working classes

[233] Anna Davin, 'Imperialism and Motherhood' (1978) 5 History Workshop 9, 13.

[234] ibid.

[235] Mariana Valverde, *The Age of Light, Soap, and Water: Moral Reform in English Canada 1885-1925* (University of Toronto Press 2008) 12.

[236] ibid 67.

were unhygienic, leading to disease or licentiousness. The requirements of "healthy reproduction" for state agencies during the period therefore depended upon the class that was to be reproduced. The recommendations and legal amendments that were developed in order to improve moral hygiene amongst the poor were a means of facilitating the production of a disciplined working class, the members of which were able to enter disease-free marriages and suitable, useful, employment.

Ideas about the healthy child, family, and living conditions were not only a means of mandating and reifying class distinctions but also gender relations within society. It was young women and female children who formed the primary object of protection in the 1922 Act and were identified as a significant source of concern in the 1926 Report. Young women, who were referred to as "girls" or "amateurs", were those considered to be most in want of protection in the criminal law because they lacked the necessary capacities to understand the consequences of their actions and therefore presented the greatest threat to public health objectives. Young women spread venereal disease and promiscuity. When it came to all children below the age of 16, scientific evidence was presented that both "corruption in childhood" and "hyper-sexuality" were causes of sexual offences against children. [237] Not only were these more likely to occur amongst the working classes, but "hyper-sexuality" involved "excessive sexual tendencies" and appeared to be "more common in girls than boys".[238] Female children of the working classes presented a particularly alarming threat to public health. When exposed to sexual knowledge or behaviour, they were more corruptible than boys or men because they were more likely to be victims of sexual offences and consequently more likely to perpetuate them in the future.

The lack of attention paid to male children was matched by the elision of male offenders from discussions about the appropriate actions needed to prevent sexual behaviour between adults and children. There was a consistent ambivalence as to which men were seen to be threats to children, whether they were ongoing threats at all, or mere opportunists in given circumstances. One implication of the findings in the 1926 Report is that working class men were more likely to be sexual offenders against children in unsanitary circumstances such as shared beds. However, that they should do so was not principally associated with a psychological or perverse proclivity toward sex with children, but an outcome of their unhygienic living conditions and personal habits. Moreover, men who engaged with sexual

[237] 1926 Report para 25.

[238] ibid.

activity with young women between the ages of 13 and 16, likewise, were not "corrupted" and therefore at risk of leading a life of prostitution or sexual licentiousness.

Presuppositions about gender and working class habits not only underpinned the creation and objectives of the criminal law during the period, but infused the evidence used to identify sexual offences against children. Roger Davidson has documented the use of the "virgin cure" as an excuse for sexual activity between adult males and female children in Scottish criminal courts throughout the interwar period. The "virgin cure" was a claim that venereal disease could be cured through intercourse with a virgin, making female children susceptible targets for infected men seeking alleviation from their symptoms.[239] But it is telling that Davidson found almost no reference made to the cure by male defenders within the criminal process as a justification for their behaviour. Instead, it was primarily deployed by counsel and the judiciary as a means, as Davidson states, to "comprehend the crime of sexual assault against children without challenging prevailing ideals of male sexuality and the family".[240] The same lack of cognisance of male sexual deviance was evident in the now striking scientific theories about "fomitic" transmission of venereal disease in children. The work of Carol Smart,[241] Davidson,[242] and Jackson[243] has also gone some way to describing the dominance of these theories, which were relied upon by Scottish police, lawyers, and rescue workers during the period.[244] Most venereal disease in children was ascribed to non-sexual transmission through a lack of clean habits, shared bathwater, or communal towels; rather than sexual contact. Davidson details that the annual reports of the Edinburgh Public Health Department throughout the nineteen-twenties and thirties encouraged clean and well heated homes to prevent accidental infection.[245] Leading Scottish textbooks on forensic medicine listed unsanitary conditions as a cause of venereal disease transmission and these scientific views, as well as those who authored them, were relied upon in Scottish court proceedings as an alternative explanation for the presentation of venereal disease in children.[246] To the extent that sexual

[239] Davidson (2001) (n 81).

[240] ibid 75.

[241] Carol Smart, 'A History of Ambivalence and Conflict in the Discursive Construction of the "Child Victim" of Sexual Abuse' (1999) 8 Social & Legal Studies 391.

[242] Davidson (2001) 67.

[243] Jackson *Child Abuse in Victorian England* (2001) (n 41) ch 4.

[244] Davidson (2001) 66.

[245] ibid 69.

[246] ibid 70.

offences against children were a problem, it was a matter of poor hygiene, which was typical amongst the working classes. Adult sexual contact with children was therefore the primary consequence of poor hygiene and habit that could then lead to venereal disease; but unhygienic conditions and behaviour could also lead to venereal disease from other forms of transmission beyond the sexual conduct of adults towards children.

By attributing poor hygiene and habit as the primary cause and consequence of sexual offences against children, male sexual behaviour was relatively unexplained and unchallenged throughout the creation of the 1922 Act and in the findings of the 1926 Report. While the provisions of the 1922 Act sought to disincentivise men from engaging in sexual behaviour outside of marriage, it was a sparingly discussed and relatively minor impetus underlying the legislation. Both Davidson and Smart have argued that this effectively desexualised[247] sexual offending against children, but that observation is correct only insofar as it relates to the role of male perpetrators. The sexual behaviour of young women and female children, particularly of the working classes, was extensively discussed. Female children below the age of 16 who experienced sexual behaviour were cast as incapable and corruptible, therefore necessitating protection within the criminal law and surveillance from parents, the police, and welfare officers. "Corruptibility" was a description that captured both the physical and moral consequences that arose from sexual behaviour. It was not only the female child's vulnerability to impregnation or venereal disease that would be spread within marriage and to illegitimate offspring, but also her susceptibility to becoming a hyper-sexed, lustful prostitute. The hyper-sexed female child, and subsequent adult, was more likely to participate in extramarital sexual relations and have no recourse to good employment, instead entering a life of prostitution and leading other young women astray.

Beneath these understandings of the causes and consequences of adult-child sexual behaviour were pre-determinations of gender. The "child" that formed the object of protection in the criminal law reflected and perpetuated markedly different gender roles for males and females. Catherine Mackinnon's statement that "each element of the female *gender* stereotype is revealed as, in fact, *sexual*"[248] is substantiated in the criminal control of sexual behaviour with children throughout the interwar period. The child that necessitated protection was female with a recognised sexual vulnerability. Her exposure to sexual behaviour below a certain age

[247] Smart (1999) (n 241); Davidson (2001) (n 81).

[248] MacKinnon *Towards a Feminist Theory* (1989) (n 24) 531.

presented risks to her becoming diseased or morally debased. She was, therefore, ideally sexually passive and restrained. The importance of protecting the female child from sexual interference was directly linked to her childbearing capacity, specifically her ability to produce legitimate and disease-free offspring. The female child at risk of sexual conduct with an adult was more likely to be working class, and the working class female had the additional need to be dutiful as well as passive in order that she enter useful employment alongside being a healthy, procreative mother. The category of the "child" in the criminal law was therefore a legitimate means of prescribing socially determined gendered characteristics and thereafter justifying protection based on these characteristics. The child *was* a weak, infantile, venal, and pregnable female and, as such, she needed care, control, and supervision to prevent inappropriate sexual conduct. The category of the child simultaneously recognised and perpetuated socially determined characteristics of female sexuality. Failing to problematise male sexual behaviour in any meaningful way throughout the 1922 Act and 1926 Report allowed male sexual access to women and their right to sexual agency to be silently reinforced. Men were not lustful, like the prostitutes they resorted to, nor tarnished like the young women they engaged in sexual relations with. The criminal law was presented as a means to simultaneously guide and disincentivise men; while responding to, and controlling, the sexual dangers presented by young women and girls.

2.8. Conclusion

This chapter has argued that the interwar period marked an important change in the relationship between the criminal law and the regulation of sexual behaviour between adults and children. By the mid-nineteen twenties, pre-existing and new crimes in Scots law were officially organised into a single category of sexual offences against children. This new structure of offences reflected the mutual role they played in addressing a shared and identifiable wrong of sexual offences against children.

In making this argument, the chapter has illustrated that the nature of this sexual wrong was characterised by the threat that it posed to the physical and moral health of the child. It has evidenced that the formation of the problem of sexual behaviour between adults and children, as well as its political and social significance, was partly attributable to the wider public health objectives of government during the period. Contemporary knowledge of, and ideas about, public health problematised both sex and children as necessary components for the continued reproduction of a physically and materially strong nation. Sexual contact between children and

adults therefore presented a danger to the physical integrity of the child, particularly in the form of venereal disease, and the moral health of children, in the form of warped sexual attitudes and licentiousness that it could encourage. These harms gained meaning within the state administration because they threatened to undermine the capacity of children to develop as rational, physically fit, and sexually restrained adults; able to enter into marriage and produce legitimate, healthy offspring in the future.

It has further argued that the understanding of children, and the sexual wrongs that they were protected against, was formed on the basis of presuppositions about class and gender. This, in turn, affected the objectives of the criminal law. As evidenced in the development of the 1922 Act, the need to identify and control the sexual behaviour of young women was the driving force behind the increased age of consent. By the time of the 1926 Report, young women and girls as a whole were presented to be simultaneously in greater danger of sexual offending by adults; and greater dangers because of it. Females were more likely to develop inappropriate attitudes towards sex and thereafter spread venereal disease as a result of premature sexual contact. The threat posed to and by female children was heightened in the working classes, whose conditions and circumstances increased the likelihood of sexual contact with adults. The child who emerged as a central object of sexual protection in the criminal law during the period was therefore both female and working class. The criminal law developed with the primary objective of constructing young women and girls as children in order that they could be subject to intervention, surveillance, and control. The preceding argument has indicated that this construction operated to elide detailed understandings about male children who may be subject to sexual contact and male adult perpetrators. And, further, the chapter has argued that this understanding of sexual wrongs against children rested on and reproduced the different status and function of classes as well as the male and female genders in society.

Finally, this chapter has detailed the salient role of women and institutions in shaping the child as a gendered and classed object of protection during the period. It has detailed the growth of coordinated, national, women's activism in the wake of partial enfranchisement following the First War and argued that the changing social and political role of some women meant that they were able to campaign for and communicate knowledge about sexual offences against children within government institutions as expert authorities. It has argued that organised and professional women, typically from the middle class, were able to articulate claims about the proper regulation of adult-child sexual conduct in a manner that aligned with

state objectives related to public health and the moral obligation of individuals to maintain personal, and therefore public, hygiene. These claims were coloured by assumptions about the appropriate social roles for the working classes and female gender. In turn, the influence of women's expertise shaped the creation of a coherent understanding of the primarily female child in the criminal law and the necessity of protecting the child from adult sexual conduct. Sexual offences against children were understood to encourage the appropriate sexual and familial relationships in society required for the strength of the British population as a whole.

The foregoing analysis has introduced the initial stages that led to the official recognition of sexual offences against children as a distinct category of criminal law. It has therefore detailed the underlying institutional and ideological conditions that facilitated this recognition. It has argued that these conditions shaped the structure and function of the criminal law and that this is evident in the legislative and inquiry processes. The next chapter expands upon these findings and constructs an account of how these new understandings of sexual offences against children were realised within the practice of the criminal law, and how this affected the function of the law as the interwar period drew to a close.

3. The Emergence of the Child in the Practice of the Criminal Law

3.1. Introduction

By 1926, sexual offences against children had been recognised as a distinctive group of criminal offences with equally distinctive causes and consequences. Specifically, both the 1922 Act and 1926 Report had indicated that sexual behaviour between adults and children threatened the physical, and resultantly moral, health of the child. Female children in the working classes were in particular danger from inappropriate sexual contact with adults because of the characteristics of their gender, but also their unsatisfactory living conditions. However, the initial emergence of sexual offences against children as a category in the interwar period was not realised through legislation and public inquiries alone. As case reports from the early nineteen-twenties onwards indicate, the criminal law change that arose in the period was also achieved in the practical application of the law. This chapter explains the process through which ideas about children, and the sexual wrongs that could be committed against them, were communicated and adapted within the common law. It further explores how this development of the criminal law by the courts, when considered alongside related legislative change in the nineteen-thirties, affected the function and objectives of the law in the period.

Part 3.2 introduces the creation of the first Scottish Court of Criminal Appeal, established in 1926, which provided the judiciary with a forum to review contested points of law or sentencing. It finds that this new court of review facilitated a process whereby authoritative judicial interpretations about previously uncertain or unsettled points of law could be articulated and communicated throughout the Scottish criminal court structure. This was evident in a series of early cases decided by the appellate bench related to sexual behaviour with children.

Part 3.3 then critically examines these cases and contends that the courts gradually re-interpreted rules of evidence in order to address perceived issues of corroboration in cases of sexual offences against children. In practice, this meant that a greater number of charges involving adult sexual behaviour with children could be tried. Judicial re-interpretation of the rules of evidence, significantly, developed what is now known as the doctrine of mutual corroboration, which allowed for several individual charges against one defender, with only one witness, to be substantiated by one another. It is argued that the creation of this doctrine in cases involving sexual behaviour against children was predicate upon the institutional capacity

of the Scots courts to comprehend and interpret instances of sexual wrongdoing against children as in some way similar: mutually connected as one part of a wider criminal course of conduct.

Part 3.4 analyses the way in which the new Criminal Court of Appeal formed this shared meaning about sexual offences against children. It argues that the interpretative approach taken by the Scottish bench was a means through which ideas about the child and the nature of sexual wrongs against them, that had developed outside of the institution of the criminal law, were communicated and re-calibrated within the interpretation of legal doctrine. Novel interpretations of pre-existing law therefore allowed for legal change to occur alongside the articulation of new ideas about sexual offences against children throughout the interwar period that have been explored in Chapter 2.

Part 3.5 then assesses the practical expansion of the criminal law alongside the reforms in the Children and Young Persons Acts of the nineteen-thirties. These acts enabled the supervision and institutionalisation of children, particularly female children, who were either victims of sexual offences or resident in the same household as them. It is argued that by expanding the number of charges of sexual offences against children that could be tried, the development of the rules of evidence in the appellate court orientated the criminal law towards the wider objectives of state administration during the period.

3.2. Development of the Scottish Criminal Court of Appeal

Prior to 1926, the sole effective means for offenders convicted on indictment at the High or Sheriff Court to appeal their conviction was by petition to the Secretary of State for Scotland, an elected member of the executive, to exercise the royal prerogative.[249] Exercise of the prerogative was a discretionary act of pardon and it did not alter the points of law or fact upon which the defender was convicted.[250] An English Court of Criminal Appeal had been established in 1907, following public campaigns against a series of unsafe and unsatisfactory judgements.[251] By 1925, and in the wake of similar campaigns about possible miscarriages of justice,[252] a Committee of Inquiry recommended that appeal to the Secretary of State for

[249] Scottish Office, 'Criminal Appeal in Scotland' (cmd 2456, 1925) 4.

[250] ibid.

[251] Criminal Appeal Act 1907 (7 Edw. VII c23), see also Ken Whiteway, 'The Origins of the English Court of Criminal Appeal' (2008) 33 Canadian Law Library Review 309.

[252] Most notably the conviction of Oscar Slater, on this see: Lindsay Farmer, 'Arthur and Oscar (and Sherlock): The Reconstructive Trial and the "Hermeneutics of Suspicion"' (2007) 5 International Commentary on Evidence

Scotland was no longer satisfactory as a means of review for criminal convictions.[6] The Criminal Appeal (Scotland) Act 1926[253] subsequently created a right for those convicted on indictment to appeal their conviction or sentence to an appellate bench of the High Court of Justiciary consisting of at least three members of the judiciary.[254] The grounds for appeal could be questions of the law alone, fact, or both[255] and the SCCA was granted the power to review the original verdict.[256] In cases where there was no fresh evidence, the question would be whether the evidence supported the original conviction. This involved an assessment of whether a reasonable man or woman would have reached the same verdict as the trial at first instance if the case was put fairly before them.[257] Additionally, the appellate bench could review the decisions of law at first instance. If, on review, it considered that a question of law was incorrectly decided or that no reasonable man or woman would have reached the same verdict on the basis of the evidence at the first instance, the SCCA could deem the conviction to be a miscarriage of justice and quash it.[258] When the appeal involved fresh evidence, then the SCCA had both the power to admit this and substitute the initial verdict reached if it was obvious that a different conclusion would have been reached at first instance.[259] These decisions were final, with no further appeal to a higher court available.[260] In effect, the creation of the appellate court meant that challengeable convictions handed down at first instance were no longer remitted or upheld on the basis of the discretionary political power of the Secretary of State for Scotland, but subject to internal review by members of the Scottish judiciary.

The SCCA not only altered the institutional architecture of the criminal law, but it presented further opportunities for normative change. An appellant's conviction or sentence was no longer evaluated in accordance with, for example, the political demands or aims of the executive but instead subject to judicial examination of legal doctrine. This created a means for

4. For an assessment of how the automatic right of appeal in the criminal court made judicial innovation possible see: Kay Crosby, '"Well, the Burden Never Shifts, but It Does": Celebrity, Property Offences and Judicial Innovation in Woolmington v DPP' 43 Legal Studies (2023) 104.

[253] Criminal Appeal (Scotland) Act 1926 c15.

[254] ibid s12(1).

[255] ibid s1(a) and (b).

[256] ibid 2(1)

[257] ibid.

[258] ibid. The SCCA could nonetheless dismiss the appeal if they did not consider the miscarriage of justice substantial.

[259] ibid.

[260] ibid s17.

the appellate bench to review existing rules and their application. Disputes arising from a lack of certainty about the correct scope and application of criminal doctrine, then, could be resolved on appeal through the articulation and communication of authoritative judicial interpretations of existing doctrines that would then bind lower courts.

These effects are evident in several of the early reported decisions of the SCCA that involved convictions for sexual behaviour against children. In these cases, points of appeal about otherwise unsettled or ambiguous questions of legal doctrine that related to adult-child sexual behaviour were subject to assessment in the new higher court. The review resulted in an authoritative statement of the law, which was then published, and thereafter bound lower courts. The next section of this work examines these early cases and contends that through the SCCA, the Scots criminal law developed a more coordinated legal response in cases of sexual offences against children.

3.3. The Judicial Re-Interpretation of the Rules of Evidence

Important early examples of the role of the new Court of Criminal Appeal in clarifying and coordinating legal rules related to sexual offences against children arose in relation to the law of evidence and, in particular, the rules governing corroboration. A long-standing rule in Scots law, corroboration requires that each essential fact of a crime is proved using two independent and relevant sources of evidence in order to convict.[261] The rules of corroboration in criminal cases are principally a matter of the common law, and in a series of cases following its creation, the new appellate bench of the SCCA sought to further develop the rules in relation to cases where only one independent and relevant source of evidence was available for the charge. Importantly, these developments arose in relation to issues of corroboration presented in cases involving sexual behaviour between adults and children.

The first such decision of note was in the 1928 case of *McLennan*,[262] an appeal against a conviction for lewd and libidinous practices against a six-year-old boy. Two issues of evidence at the initial trial led McLennan to appeal to the SCCA. First, it was argued that the

[261] While corroboration is used in common law jurisdictions, the approach taken in Scots criminal law differs in that it relies upon a quantitative sufficiency of evidence from at least two independent sources of evidence for each essential fact. For an overview of corroboration and its development as part of the wider rules of evidence, see: Findlay Stark, 'Wiping the Slate Clean: Reforming Scots Law's Approach to Evidence of the Accused's Bad Character' (2013) 76 MLR 346, 350–52.

[262] *McLennan v HM Advocate* 1928 JC 39.

child's statement to his parents about what had happened directly following the incident (known as *de recenti*)[263] should not have been admissible because the jury had not been directed as to the "delicacy of accepting the evidence of a child of such tender years".[264] Additionally, the defence argued that even if the child's statement was admissible, the observations and account of his parents could not corroborate it: this account was simply a repetition of the complainer's evidence rather than an independent statement of fact.[13]

The court was also invited by the defence to consider the case of *Marshall*,[265] a contemporary English appellate decision that had found, in considering the evidence of young children in cases of sexual offences, that a "clear and full warning" ought to be given to the jury as to the nature of accepting witness accounts from children.[266] The implication of that judgement had been that young witnesses were potentially more likely to be unreliable or untruthful. Despite the invitation, the court in *McLennan* held that the general warning to the jury of the need to find the witness credible was satisfactory, without the need for the judge to draw explicit attention to the credibility of young witnesses.[267] The evidence of the child's parents was also found to be corroborative. Their account of the child's statement to them and their observations about his state of dress following the incident could be regarded as independent statements of fact. This evidence supported the testimony of the child because his statement to his parents had conveyed the sexual offence that the appellant had committed against him. Furthermore, his state of dress indicated that the sexual offence had just occurred because his parents observed that he returned home "with his clothes disarranged and in a bodily condition which indicated that he had been subjected to some sort of sexual abuse" even though he had not been crying.[268]

McLennan explicitly recognised the apparent limitations faced by the prosecution when trying to establish two sources of independent evidence for sexual behaviour against a child when the behaviour was typically clandestine. In fact, there was much greater engagement with this point than any possible issues of finding such evidence sufficiently "independent" for the

[263] Statements made following an incident that can be a basis for corroboration, see: James Chalmers, 'Distress as Corroboration of Mens Rea' (2004) 141 SLT (News).

[264] *McLennan* 41.

[265] *Marshall v R.* (1925) 18 Cr. App. R. 164.

[266] ibid 165 (Lord Hewart CJ).

[267] *McLennan* 41.

[268] ibid 41 (LJ-G Clyde).

purposes of corroboration. Lord Justice-General Clyde, dismissing both points of appeal, thus drew attention to the fact that the child was often the most important witness for the prosecution in such cases because he or she would be the only direct witness.[269] Following *McLennan*, irrespective of age or maturity, children could be assumed to be competent witnesses in cases of sexual offending against them, without the need to draw particular attention to their competence or credibility as children. It also allowed the evidentiary threshold for a criminal charge to be met when a child had made an accusation of culpable behaviour against him and then repeated this to a third party in a state that was indicative of the offence having been committed. The surrounding circumstances that could be indicative of the offence did not need to be emotional distress on the part of the child. It could include other factors that indicated something had taken place, such as dishevelled clothing or the child having money that he previously did not have.

The most instructive examples of the role of the SCCA, however, arose in judgements following *McLennan*, which sought to develop the law of evidence with a view to the specific issues presented by, and the wider need to address, adult sexual conduct towards children. Just one month after *McLennan*, the first-instance decision of *McDonald*[270] found that the rules of evidence could allow multiple, similar offences, against different complainers to be corroborated by one another. McDonald was charged under the 1922 Act with lewd and libidinous practices toward his two daughters, both aged between 12 and 16. He was additionally accused of incestuous intercourse with one daughter. However, the only direct evidence for each of the offences was the testimony of the respective children, each of whom could only provide evidence in support of the conduct upon herself. The question that arose at trial was whether the testimony of one daughter could mutually corroborate the testimony of the other and *vice versa*.

In *McDonald*, Lord Blackburn found that a failure to allow such a form of corroboration in the case would be "disastrous" given that the offences, by their very nature, could only be spoken of by each daughter herself.[271] He nonetheless observed that the doctrine was not settled in Scots law and that it might be better assessed and outlined by the new appellate court.[23] The lack of pronouncement on the matter was attributed to the fact that "indecent conduct by an

[269] ibid.

[270] *HM Advocate v McDonald* 1928 JC 42.

[271] ibid 44 (Lord Blackburn).

adult towards little girls" was "a class of crime that has nowadays become very common" but at the time of the institutional writers was little known.[23] The doctrine of mutual corroboration in cases of sexual offences against children was therefore unclear, but legitimate, and a better articulation of the rules relating to it was practically necessary.

McDonald was the impetus for the further, and significant, development of the doctrine of mutual corroboration that it outlined. In 1928, Lord Blackburn sat alongside Lord Justice-General Clyde and five others in the full-bench decision of *Moorov*.[272] Samuel Moorov was a Glasgow-based draper who had been found guilty in 1930 of assaults against seven female employees and indecent assault against nine. The only direct evidence for each charge came from the individual complainer. Two months following conviction, Moorov argued to the SCCA that the general rule, that evidence of a single witness could not corroborate a crime, ought to stand because it was impossible to connect the experience of different women over such a long period of time. The appellate bench dismissed the argument and instead upheld, and clarified, the application of the doctrine previously sketched in *McDonald.* In outlining the doctrine, the SCCA stated that it was "beyond doubt" that mutual corroboration was possible in cases such as *Moorov*, provided that the separate charges were "*sufficiently* connected with, or related to one another".[273]

The basis of the rule was found in the Scottish institutional writers, particularly Hume and Alison, and leading textbooks on the law of evidence, however the decision appeared to go beyond previous writing. Hume had stated that it would be possible for a single witness to corroborate separate acts of the same crime on the same indictment when the acts were related or connected to one another.[274] Both he and Alison had relied on the example of single acts of (then criminal) adultery or incest committed with the same person.[275] Thus, successive acts of theft or forgery would not be sufficiently related to or connected with one another to prove a single unified motive or impulse in the same manner that adultery committed with the same person would.[276] Later textbooks further suggested that several instances of the same crime that were connected could be corroborated by a single witness to each instance, for example,

[272] *Moorov v HM Advocate* 1930 JC 68.

[273] ibid 70 (LJ-G Clyde), emphasis original.

[274] David Hume, *Commentaries on the Law of Scotland Vol 2* (Bell & Bradfute 1819) 371.

[275] See, for example, ibid.

[276] ibid.

multiple acts of housebreaking on the same night with only one witness to each respective house that was broken into.[277] Hume was also of the opinion that it would be possible for a single witness to corroborate separate acts of the same crime on the same indictment committed against different individuals at different times and places.[278] His example was a case involving multiple charges of attempting to suborn witnesses and he reported that while each instance was a distinct crime with only a single witness to it, the crimes were "relative chiefly" to the crime of fire-raising.[279] Hume's passage is brief and appears to suggest that the attempts of the accused "upon the conscience" of several witnesses were all individual attempts to induce false testimony about the accused's participation in another crime. In the examples from previous writers, however, the crimes charged were the same; whereas in *McDonald*, which was upheld by *Moorov*, the court found the two different crimes of incest and lewd and libidinous practices could mutually corroborate one another. Furthermore, the charges in *Moorov* occurred months, and in some instances, years, apart. To the extent that the examples provided by textbook writers or Hume are clear, they appear to have related to crimes that were committed within the same night or, could be found to be connected because of an obvious, external, and overarching explanation - such as the need to induce false testimony in relation to the separate charge of fire-raising. The crimes in these examples were not connected because of an interpretation of the similarity of their internal characteristics. But *Moorov* and *McDonald* indicated that several instances of different crimes, over longer periods of time, could be interpreted to share some underlying and internal motivation that indicated they were constituent parts of a unified course of conduct.

This evolution of the rule is evidenced in *Moorov* as the court outlined how the evidence of different single witnesses to separate acts could be used to mutually corroborate charges on the same indictment. Mutual corroboration required the prosecution to demonstrate that the separate instances of criminal behaviour were similar in "time, character or circumstance".[280] Similarities could not be merely superficial and they had to be shown to be incremental parts of "some ascertained unity of intent, project, or adventure" that lay "beyond *or behind*", but was related to, the separate acts. [281] The recently decided case of *McDonald* was presented as

[277] See, for example, the overview provided in *Moorov* at 72-4 (LJ-G Clyde), 81-3 (LJ-C Alness).

[278] Hume (1819) (n 274) 372.

[279] ibid.

[280] ibid 73.

[281] ibid, emphasis added.

a clear example of such unity. Lord Justice-General Clyde noted that the effect of that decision had been to settle mutual corroboration as part of the law of evidence in cases of sexual offences against children and the underlying unity was evident from the "peculiar and perverted character" of the accused's conduct, which was different from normal human lust or passion.[282] Lord Sands, too, cited *McDonald* as an example of unity owed to the "special peculiarity" of offences against children".[283] In *Moorov*, the charges of simple assault were therefore distinguishable from those of indecent assault because in the latter cases, a similar peculiar sexual habit was thought to connect the offences. For the simple assaults, there may have been some evidence of an "erotic propensity", as they involved tickling and kissing, but the behaviour did not evidence sufficient similarity in character and circumstance and instead amounted to "isolated acts scattered over a period of no less than seven years".[284] In respect of the charges of indecent assault, however, it was possible to attach "different significance to acts savouring indecency, which point to criminal design".[36] Lord Justice-Clerk Alness spoke of the precedent of *McDonald* and argued that while he recognised that there were differences between the assault of young children and young women,[285] the resemblances were "more striking…than the differences"[286] and because all of the indecent assaults were of "sexual character", conducted on women of the same status, in the same manner, and were exceptionally numerous, it was possible to mutually corroborate the charges.[287]

[282] ibid.

[283] ibid 88 (Lord Sands).

[284] ibid 76 (LJ-G Clyde).

[285] The terminology "young women" in *Moorov* relates to those above the age of 16 and therefore not capable of being classified as children within the criminal law.

[286] ibid 81 (LJ-C Alness).

[287] The doctrine developed in *Moorov* can be distinguished from rules governing the admissibility of what is known as similar fact evidence in other common law jurisdictions. Following *Moorov*, multiple charges made out on the same indictment that were similar in time, character, and circumstance could mutually cross-corroborate one another in order that the sufficiency requirement for the Scots law of corroboration was met (see above, pt 3.3 explanation of corroboration). Mutual corroboration can only apply to multiple charges against the accused at trial and it cannot, therefore, be relied upon to admit evidence of the accused's previous convictions or acquittals, nor evidence demonstrating habits, motive, or propensity. The admissibility of these latter forms of evidence are governed by separate common law rules for bad character evidence, which Fiona Raitt has observed are relatively rarely relied upon in Scots law compared to commonwealth jurisdictions. For an overview of distinctions, see: Fiona E Raitt, 'The Evidential Use of "Similar Facts" in Scots Criminal Law' (2003) 7 The Edinburgh Law Review 174; Fraser Davidson, '"Similar Fact" Evidence and Moorov: Time for Rationalisation?' in Peter Duff and Pamela Ferguson (eds), *Scottish Criminal Evidence Law* (Edinburgh University Press 2018).

By 1937, the decision of *A.E.*[288] applied the doctrine outlined in *Moorov* to two separate charges of sexual offences against children. The appellant was charged with committing incest with both of his daughters, beginning when they were eight and ten. The offences against each daughter took place on various occasions over a period of nine and five years, respectively. The defence argued that the lack of specificity as to the dates upon which the offences were committed made those charges irrelevant. Finding on behalf of the Crown, Lord Justice-Clerk Aitchison noted that such a significant latitude in time was unprecedented, and normally disallowed, but nonetheless possible because of the nature of the crime and the age of the two complainers. [289] The behaviour was undertaken over a long period against two young children, and it would not be practical for the prosecution to establish the exact dates upon which offences occurred. [290] Mutual corroboration was, in general, a necessary and justified "relaxation" of the general rules of evidence because without it there would be no guarantee that such crimes could be prosecuted at all. [291] One example used to demonstrate the necessity of the rule was the "not unfamiliar" case of the "degraded man who finds some little girl on the street…gives her a penny and gets her to go up a close, and he does something immoral with her and sends her away. Nobody sees what he has done…[a]nd the same thing happens with another child". [292]

From *McLennan to A.E.*, the re-interpretation of doctrines of evidence facilitated the prosecution of sexual offences against children in practice by overcoming the evidentiary obstacles presented by the law in order to adequately address sexual behaviour between adults and children. Child complainers were thus deemed *prima facie* competent witnesses in criminal cases, without any requirement to explicitly warn a jury that the child's youth could undermine their reliability. A child's appearance, as well as the verbal account given to others immediately after an offence, could corroborate criminal acts. And, most significant of all, mutual corroboration meant that multiple separate charges of sexual offences against children could be prosecuted in the criminal courts. An incident witnessed directly by only one child, which would otherwise fall foul of the general rules of corroboration, could be reinforced when other incidents with only one direct witness were connected in time, character, and circumstance in a manner that pointed to an underlying unity of intent on the part of the accused. Furthermore,

[288] *A.E. v HM Advocate* 1937 SLT 70.

[289] ibid 71.

[290] ibid.

[291] ibid.

[292] ibid.

the prosecution did not have to prove the specific dates upon which multiple offences occurred when relying upon the doctrine. Young children, whose memory of dates in the past may have been uncertain, could nonetheless testify to their experience over a range of time, allowing multiple incidents spanning several years to be prosecuted.

The SCCA was a driving force behind legal change as it increased the institutional opportunities available to challenge, clarify, and amend the interpretation of doctrine. Writing about institutional change in nineteenth-century England and Wales, Lacey has observed that the systematisation of criminal court structures allowed for points of law to be tested and, implicitly, developed which meant formal and popular definitions of crime could become increasingly aligned.[293] This point can be expanded upon in relation to the Scots courts. In the cases outlined, the bench autonomously adapted, amended, and in some instances invented, doctrine in accordance with the perceived problem of sexual offences against children in Scottish society. The institutional architecture of the SCCA was, in this respect, a further means for the judiciary to invoke what Farmer has described as the "pervasive" creativity of the modern Scottish legal system.[294] Throughout the nineteenth and twentieth centuries, the judiciary consistently adapted doctrine to reflect both the contemporary practice of the Scottish criminal law and the bench's own interpretation of the Scottish "community" or "nation".[295] Re-interpretations by the courts sought to develop the law in line with idealised understandings of social change while maintaining the authority of legal sources.[296] Central to this approach was the "ritual invocation" of Baron Hume as an authoritative statement of the Scots law.[297] Judicial assessments of social change could then uphold, amend, or detract from prior authority by evaluating whether it appropriately matched the objectives of the imagined Scottish community in the case at hand.[298]

The next section explores this rationality in the cases of sexual offences against children that have previously been introduced. It demonstrates that ideas about sexual behaviour with

[293] Lacey, *In Search of Criminal Responsibility* (2016) (n 35) 112.

[294] Farmer, *The Genius of Our Law* (1997) (n 58) 27.

[295] ibid.

[296] "The legal institution defines the boundaries of its jurisdiction and renders intelligible the practices within that system, but it is at the same time itself and defined by its capacity to do so…[i]t cannot be reduced to positive law or doctrinal formulations" and "[e]qually it cannot be abstracted from the legal and social practices that shape it." Farmer (1997) 14.

[297] ibid 27.

[298] ibid.

children that were central to judicial creativity were consonant with understandings of sexual offences against children that unfolded in the official reports, debates, and activism detailed in Chapter 2.

3.4. The Idea of the Child and Sexual Wrongs in Criminal Practice

The creative legal rationality of the Scottish courts is first demonstrated by the shared perception that sexual offending against children was a serious, but relatively new, problem for Scottish society that presented a challenge to previously established rules of evidence. *McLennan* was the first to point to the typically covert nature of the offences in order to justify the need for the rules of evidence to be developed.[299] It was therefore necessary and acceptable in that case for *de recenti* statements and witness testimony from children to be admissible because these enabled charges to be brought when there was a lack of other independent sources of evidence. Similarly, when developing mutual corroboration, the bench justified the need to rearticulate the doctrine that had been outlined by institutional and textbook writers because there was now an explicit need to enable prosecutions for the behaviour that had not been present previously. Lord Blackburn alluded to this in his warning of the potentially "disastrous" consequences if there was no remit for mutual corroboration in cases of sexual offences against children.[300] The bench maintained that the sources did provide authoritative statements of the law but that the writers could not, however, have foreseen the need for the rules of evidence to address the particularities of sexual offences against children, which were now "very common" but "previously unknown, or uncommon".[301] This meant the courts had to extract principles from previous authority and apply them to the special circumstances of the cases.

Resultantly, legal authorities were upheld as valid sources of law, while developments in the Scottish community were a justified means for their adaptation. The courts simultaneously invented a consistency with legal authority in their reasoning while amending the rules when faced with the facts of the case at hand. It is this process that Farmer has described as the means through which the Scottish legal tradition has been both created and sustained. Importantly, the rationality of the courts was wholly internal to the system of

[299] "[A] child is often the most important witness for the prosecution [in charges of "indecent assault]" *McLennan* (1928) (LJ-G Clyde).

[300] *McDonald* (1928) 44 (Lord Blackburn).

[301] ibid.

criminal law. It was not directed or instigated by legislative acts, inquiries, or activism. The judiciary alone controlled the selection of information and ideas about the Scottish community that they then relied upon to justify and shape their decisions. In this sense, the common law development of doctrine related to sexual offences against children during the interwar period was entirely autonomous and spontaneous. It was shaped by what was considered relevant by the collective wisdom of the bench and the needs of the case at hand.[302]

While the courts alone controlled legal change, there was a discernible consistency between the interpretation of the courts and other official bodies as to the problem of sexual offences against children. The perception that adult-child sexual activity was increasing or otherwise incalculable was a finding that was echoed in the official reports and parliamentary discussion of the 1922 Act and the 1926 Inquiry.[303] The pressing need for the rules of evidence to allow for more prosecutions, given the apparent secrecy of most sexual offending against children, was an explicit recommendation of the 1926 Report.[304] Moreover, examples of the problem of sexual offences against children, drawn upon by the courts to justify and apply their interpretations, which referred to "degraded men" in larger cities taking advantage of girls "on the street" for pennies in private places, aligned with ideas about overcrowded urban housing and unwatched children as causes of sexual offences.[305] Implicit within this characterisation was the relative diminution of male sexual behaviour as a problem or cause of sexual offending against children and instead, the child was understood to be primarily at to the few distinct men with unusual or uncontrolled lust who took opportunities within poor social conditions.

This point is further demonstrated in the development of mutual corroboration. Mutual corroboration required an evaluation of multiple charges in order to determine whether there were similarities in time, character, and circumstance that pointed toward a connected criminal design. Whether behaviour demonstrated sufficient similarities was therefore a matter of interpretation. The interpretations undertaken by the bench implied an understanding of adult sexual behaviour with children that resembled the coincident understandings expressed in official reports, parliamentary debates, and activism of the period. For example, *McDonald*,

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[302] Farmer (1997) (n 58) 27.

[303] Reflected, for example, in attempts to estimate incidence and prevalence of sexual offences against children in the 1926 Report, see Chapter 2 pt 2.6.1.

[304] ibid.

[305] See, above, (n 292)

Moorov and *A.E.* stressed that sexual behaviour by adults towards children was a distinct class of offences.[306] In *Moorov* the distinguishing features of this class was its separation from "normal lust or passion" and its "peculiar and perverted" character. [307] Lord Blackburn commented that offences involving lewdness against young girls, was "isolated from all others" because the children were easily influenced, and incapable in the eyes of the law of giving either consent or encouragement to the offence.[308] These were the first reported examples of this classification in Scottish case law and it reflected ideas developed in the 1926 Report, where a range of offences had been reorganised to reflect their shared character.

Some of the distinguishing characteristics of sexual offences against children, that made them abnormal, peculiar, and perverted were explored in more detail by the bench in *Moorov.* In the case, the bench found similarities in behaviour against adult women because they demonstrated the same kind of sexual motive, and harm, as previously decided cases involving sexual offences against children. Thus, the charges against the appellant involving behaviour toward adult women were found to have an underlying unity of intent because they exemplified male indulgence at the expense of the dignity, chastity, and respect of the complainers who were each placed in a similar condition of obligation toward the appellant.[309]

The bench further reasoned that Moorov's behaviour had greater resemblances to, than differences with, the sexual offences against children in *McDonald* that had been mutually corroborated.[310] This suggested that a shared "sexual" motive would be demonstrated by adult men who "indulged" - or yielded – to their lusts by engaging in inappropriate sexual behaviour with young women or girls. In referring to the complainer's chastity and dignity, the court in *Moorov* further suggested that the shared sexual wrongfulness of the behaviour, that made it so similar to that in *McDonald*, was the injury it presented to them as sexually uncorrupted and decent young women. This assessment of the shared sexual element of the charges reflected ideas about the harms presented to, particularly female children, by premature sexual contact:

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[306] See, for example *McDonald* (1928) (Lord Blackburn); *Moorov* (1930) 75 (LJ-G Clyde), 92-3 (Lord Blackburn); *A.E.* (1937) 71 (LJ-C Aitchison).

[307] *Moorov* 75 (LJ-G Clyde).

[308] *Moorov* 92-3 (Lord Blackburn).

[309] Evidenced, for example, in the reasoning of Lord Justice-General Clyde, ibid 77.

[310] "The only case which directly bears upon the problem before us is [*McDonald*]…I quite recognise that there are differences between a case of assault on young children and a case of assault on adult women. But, after all, the resemblances seem more striking than the differences" ibid 81 (LJ-C Alness).

the injury to their sexual chastity outside of marriage and the potential to undermine their appropriate social standing. In characterising the appellant in *Moorov* as uncontrolled and lustful, the courts also aligned with understandings of male perpetrators that had been interwoven in debates about the 1922 Act and the findings of the 1926 Report that male sexual choice was inherent; but required to be restrained.

The creative legal rationality of the judiciary meant that criminal law doctrine could evolve in the absence of direct legislative input. The reasoning of the courts, while wholly internal to the system of law itself, nonetheless refracted contemporary understandings that had underpinned legislative change and official inquiries. Common law rules of evidence were resultantly reinterpreted in a manner that was consonant with external classifications and ideas about the distinct sexual wrongdoing presented by adult sexual behaviour toward children. The SCCA therefore increased the opportunities for the criminal law to creatively determine legal change through appeals.

The development of the common law rules of evidence in the interwar period oriented the practice of the criminal law towards the wider understandings, and objectives, of the criminal law that had been articulated by other administrative bodies in the British state. The next section evaluates how the development of the criminal law during the interwar period affected its function. It does so by detailing the role of criminal law within the wider legislative reform that sought to improve the care and control of children.

3.5. The Function of the Criminal Law and the Children and Young Persons Acts

Activists campaigned to enact the recommendations of the 1926 Report in parallel with the development of the common law rules of evidence brought about by the SCCA. From 1927, the Home Secretary and Secretary of State for Scotland were frequently prompted to respond to parliamentary questions about whether the Government intended to introduce new legislation to prevent the causes and consequences of sexual offences against children.[311] However, these questions typically combined reform related to sexual offences against children with the need to address juvenile offending. The explicit and implied views, of both activists and

[311] See, for example, the written questions submitted by Members throughout the late nineteen-twenties: HC Deb 19 May 1927 vol 148, cols 1386-1402W; HC Deb 23 June 1927 vol 207, cols 2065-2076W, HC Deb 28 November 1928 vol 223, cols 424-440W.

parliamentarians, at the time was that the problems posed by children who were the victims of crime were closely linked to the problems of children who perpetrated crime.

This meant that investigations into juvenile offending were typically considered alongside the investigations into sexual offences against children. Official inquiries into juvenile offending had occurred near simultaneously to the Scottish and English inquiries into sexual offences.[312] By 1932, the Children and Young Persons (Scotland) Act was passed,[313] amending the Children Act 1908, with the explicit recognition that offending upon children and offending by children were closely related.[314] This was exemplified by the creation of "approved schools",[315] which replaced reformatory and industrial schools. Reformatory schools, designed as alternatives to imprisonment for young offenders, and industrial schools, designed to house "poor and vagrant children"[316] to prevent them from becoming criminals[317] had been administered by the Home Office. New approved schools were education and training facilities administered by the Scottish Education Department, in an attempt to make the institution seem less punitive,[318] and they were aimed at making "decent citizens"[319] of children and young people. Placing both the victims and perpetrators of crime in the same institution was presented as no great risk because the differences between the child who had offended and the child who had been offended against were "largely accidental",[320] in that neglect, deficient upbringing and bad surroundings typically led to criminal offending in the future.

[312] In 1927, a Departmental Committee of Inquiry for England and Wales had published recommendations related to the treatment of young offenders (Home Office, 'Report of the Departmental Committee on the Treatment of Young Offenders' (cmd 2831, 1927). This was followed in 1928 with the publication of a Scottish Report: Scottish Office, 'Report of the Departmental Committee: Protection and Training' (1928).

[313] Children and Young Persons (Scotland) Act 1932 c47, the provisions were later replicated in the Children and Young Persons (Scotland) Act 1937 c37.

[314] "The underlying philosophy…was that the similarities between the two classes of children far outweighed the differences, that deprivation and neglect are the main causes of juvenile criminality and that tackling the former is the more efficient way to deal with the latter." Kenneth Norrie, 'Report for the Scottish Child Abuse Inquiry into the Legislative Background to the Treatment of Children and Young People Living Apart from Their Parents' (2017) 21 <https://www.childabuseinquiry.scot/media/1892/norrie_legislative-background-to-the-treatment-of-childrenyoungpeople-bmd-181017.pdf> accessed 29 January 2023.

[315] See, 1932 Act sch.I.

[316] Norrie (2017) 19.

[317] ibid.

[318] Mahood *Policing Gender and Clas*s (1995) (n 46) 98.

[319] HC Deb 12 Feb 1932 vol 261, cols 1179-1180, as reported in Norrie (2017) 29.

[320] ibid.

As part of the new institutional structure brought about by the 1932 Act, the criminal courts played an important role as a conduit between children and the new approved schools. Part II of the 1932 Act provided that a juvenile court could order a child or young person,[321] who had not committed a crime, but was in need of "care and protection" to be sent to an approved school, committed to the care of a fit person, or placed under probation.[322] A requirement for care and protection would be demonstrated by instances of child neglect, as it had been in the 1908 Act.[323] But the 1932 Act further provided that care and protection would be required when certain specific crimes had been committed against a child or young person, against a member of his or her household, or committed by a member of his or her household.[324] The specified crimes were those understood to be sexual offences.[325] While children who had experienced sexual wrongs had often been institutionalised under the 1908 Act,[326] the 1932 change made this an explicit ground that was separate from other forms of negligent care. It also emphasised the contagious character of the social harms posed by adult-child sexual behaviour. A child in the same household as an offender or victim was equally in need of care and control as the child who had been a direct victim.

The 1932 Act leaned into many of the ideas about adult-child sexual conduct that preceded it. Removing children from households on the grounds that sexual offences had been committed was not primarily intended to address a risk to the child of future sexual contact by an adult; instead, it was a response to the apparent harm that had already taken place by being subject or proximate to sexual offending. It was the victim, not the offender, who posed a greater danger to be addressed. This harm was a social injury: the child or young person, through improper parenting or homelife, *required* "care and control" to prevent them from becoming a defective citizen living a life of licentiousness and poor sexual hygiene. And the new provisions, like the sexual offences that they were built upon, were gendered despite a

[321] A child was classed as those below 14, which was then the school leaving age, and a young person was between 14-17, 1932 Act .64.

[322] 1932 Act s12.

[323] Children Act 1908 s12.

[324] 1932 Act s9(1)(i)-(iii).

[325] "[a]part from the more general definition of neglect … the main changes proposed in these clause are…(b) that an ordinary court by which a person has been convicted of cruelty or any of the various sexual offences against a child or young person may direct that the child shall be brought before a court as needing care and protection" Explanatory Memorandum to the Children and Young Persons Act 1932, ii enacted in 1932 Act sch 1.

[326] Mahood (1995) (n 318) 96.

formal neutrality. The criminal law recognised female children as the primary objects of protection, it was they who experienced the greatest recognised harm, posed the greatest risk, and therefore would present the greatest need for further education and training.

More can be learned about the ideal citizens that were an objective of the 1932 Act from the approved schools that were created in its wake and the care and control exerted within them. Mahood has written of the "hidden curriculum" found in Scottish social institutions. By the nineteen-thirties, the structure, routine, and practices of approved schools were designed to re-produce pre-existing class and gender divisions within society.[327] Girls and young women were made to learn obedience, punctuality, and domestic training suitable for their entrance into domestic service or a life as mothers.[328] Compulsory uniforms and hair-cuts aimed to turn "sophisticated young women" into "teachable school girls"[329] and sexual teaching was limited to the necessary maternal knowledge for child-bearing and rearing.[330] On the other hand, boys and young men acquired docility and industrial training suitable for entry into the working class labour force as reliable subordinates.[331] The central goal of the institution was therefore to create and maintain the position of working class men and women. Boys were constructed as the primary wage earners and girls were encouraged to become homemakers or, if employed, to have only the skills necessary for a service role that would nonetheless require them to be financially dependent on male earnings.[332]

The developments in the criminal law prior to the 1932 Act were embedded within the programme of social reproduction instituted through it. An increased age of consent for lewd and libidinous practices, and altered doctrines of evidence, provided clearer routes for children, primarily young women, and girls, who had been subject to adult sexual behaviour to be identified, categorised, and directed toward the necessary means for rehabilitation. That rehabilitation, directed and funded by the British state, was inhered with ideas of class, gender, and hygiene that were also interwoven within the judgements of the Scottish courts, legislative reforms, and inquiries into sexual offending against children that preceded it. The criminal law,

[327] ibid.

[328] ibid 87.

[329] ibid.

[330] ibid.

[331] ibid.

[332] ibid.

as it developed throughout the period, emerged as one part of a wider administrative scheme for governing the perceived problems of sexual offences against children. This administrative scheme recognised sexual behaviour between adults and children as a threat to state aspirations for the health, productivity, and fecundity of its population; and thereafter sought to contain and control it.

3.6. Conclusion

This chapter has argued that the initial development of sexual offences against children that was examined in Chapter 2 was also realised within the practice of the criminal law. This occurred because of the institutional opportunities presented by the creation the SCCA and the creative rationality of Scots common law. Specifically, judicial interpretations of the rules of evidence operated to expand the number of charges that could be brought against an accused in cases involving sexual behaviour with children.

It has further argued that the creative rationality of Scots common law meant that the judicial interpretation of the rules of evidence coalesced with external understandings of sexual offences against children that had been articulated in the progress of the 1922 Act and 1926 Report. As such, the Scottish courts maintained the internal authority of legal sources while adapting their interpretation of adult sexual behaviour with children to new understandings. Sexual offences against children were therefore recognised as a distinct category of crimes in the criminal law. Furthermore, the sexual motive and sexual wrongfulness that united crimes within the category aligned with contemporary ideas about the child, particularly the female child, and the harm presented by premature sexual contact with adults. This was not a direct replication of the understanding of sexual behaviour between adults and children that developed throughout the 1922 Act and 1926 Report within the practice of the criminal law. While social conditions, gender, and class were therefore not explicitly used as a basis upon which the judicial development of sexual offences against children unfolded; the reasoning of the bench instead refracted external understandings of sexual behaviour between adults in significant ways within the practice of the criminal law at trial. Therefore, the necessary focus on the accused during trial meant that there was greater discussion of the male offender; rather than the child complainer than had been the case in the 1920 or 1926 Reports. But the characterisation of the male offender nonetheless supported the wider understanding of sexual offences against children that had developed. Reasoning therefore highlighted the relative peculiarity, abnormality, and implicit rarity of men who sought sexual contact with children.

The necessity of changes to the rules of evidence was partially justified by the need to facilitate the prosecution of these peculiar degraded and rare men who may indulge themselves within the private closes and the implication of this reasoning was that children were safe but for the few abnormal men who may be assisted by the privation of secluded and closed living conditions.

It is through this process that the common law aligned with the wider objectives of administrative state bodies that were evidenced in Chapter 2, specifically by relying on an understanding of sexual behaviour against children as a distinct problem that could be used to render individual acts by an accused intelligible as part of a unified form of behaviour. This worked to expand the number of offences that could be sufficiently evidenced at trial and addressed the threat that adult-child sexual behaviour posed. Furthermore, in doing so, it upheld the gendered dynamics that were apparent throughout the progress of the 1922 Act and 1926 Inquiry by constructing the child as generally safe but for the abnormal or uncontrolled passions of a few men.

Finally, this chapter has argued that the expansion of the criminal law in practice affected its wider function. It has evidenced that sexual offences against children became an explicit basis upon which children could be subject to care and control in the Children and Young Persons Acts. Alongside the new offence in the 1922 Act, the rules of evidence developed by the courts during the interwar period facilitated a greater number of children, and particularly female children, being recognised as in need of care and control. The institutional process of care and control recognised children who had been subject to sexual offences as potentially defective and at risk of perpetuating licentiousness and poor sexual hygiene in the future. The approved school regime that sought to institutionalise care and control consequently aimed to create “ideal citizens” through training and education that reflected and reproduced idealised gender and class distinctions in society. As such, the criminal law became part of a wider administrative system that sought to identify and govern children in order that they developed into healthy, productive, citizens.

This chapter, alongside Chapter 2, has evidenced the initial development of sexual offences against children, the traits and characteristics of the child protected, and the sexual wrongs they were protected against. This development was shaped by the institutional and ideational conditions of the period - in government but also in the Scottish common law. Having emerged in the early part of the twentieth century, the following chapters of this work will build

upon the findings and approach in Chapters 2 and 3 in order to explain the way in which this category of offences both transformed and endured as the ideas and institutions of the state and society underwent change.

4. Children in Danger: Boys and Girls in the Mid-to-Late Twentieth Century

4.1. Introduction: Continuity and Change

By the nineteen-forties a second world war had altered the social, economic, and political fabric of the United Kingdom and Northern Ireland. In the decades that followed, new policies, legislation, and institutions formed what is now recognisable as the modern "welfare state",[333] as financial and material provisions, previously available to only particular individuals or classes, were increasingly issued on a universal basis. The subsequent decades have been characterised as an "age of affluence", denoting the improved health and living standards secured by the National Health Service, full-employment, increased leisure time, widened consumer choice, and state income support.[334] For children in this age of improved relative wealth, the "teenager" emerged as a distinctive stage of adolescence marked out by the greater disposable income available to those of, or nearing, school leaving age alongside new patterns of commercial leisure consumption.[335] As the second half of the twentieth century progressed, there was a well-documented shift in societal attitudes towards and the legal regulation of sex, marriage, and gender relations.[336]

Many of the central contextual arrangements that had underpinned the development of the criminal law during the interwar period related to health, women, the family, and class-conditions therefore changed. This chapter builds upon the approach taken in Chapters 2 and 3 and aims to explain the development of sexual offences against children from approximately 1945 until the final decades of the twentieth century. It argues that, while sexual wrongs against children were increasingly separated from the interwar ideas of class and cleanliness, new forms of social and scientific knowledge about sex and children, alongside significant change to official understandings about the role and status of the family and the harms that could occur within families, meant that the child endured as an object of sexual protection in the criminal

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[333] David Garland, 'The Welfare State: A Fundamental Dimension of Modern Government' (2014) 55 European Journal of Sociology. 327.

[334] Matthew Hollow, 'The Age of Affluence Revisited: Council Estates and Consumer Society in Britain, 1950–1970' (2016) 16 Journal of Consumer Culture 279.

[335] Selina Todd and Hilary Young, 'Baby-Boomers to "Beanstalkers": Making the Modern Teenager in Post-War Britain' (2012) 9 Cultural and Social History 451, 452.; Louise A Jackson and Angela Bartie, '"Children of the City": Juvenile Justice, Property, and Place in England and Scotland, 1945-60' (2011) 64 The Economic History Review 88.

[336] See, for example, Gisela Bock and Pat Thane, *Maternity and Gender Policies: Women and the Rise of the European Welfare States, 1880s-1950s* (Routledge 1991); Susan Pedersen, *Family, Dependence, and the Origins of the Welfare State: Britain and France, 1914-1945* (Cambridge University Press 1993).

law. However, the scope and objectives of that protection changed. The criminal law recognised sexual wrongdoing as a matter of psychological and physical harm, rather than social corruption, and the child was increasingly understood to include male children, albeit in a manner that was distinct from females. By the close of the century, child sexual abuse had emerged as a problem of government concern and underpinned initial criminal law reform to the law of incest.

Part 4.2 begins by outlining an initial continuity of the postwar period, evidenced in the observations about prostitution, including amateur prostitution, by Scottish Law Officers and the reforms undertaken to the approved school system that was previously established in the nineteen-thirties.[337] It is evidenced that the "amateur prostitute" that had emerged as a source of concern for criminal law regulation in the interwar period remained the primary, and ongoing, concern in the Scottish political context but did not necessitate significant reform. By the late nineteen-sixties, new understandings of child development from social sciences and psychology re-framed the objectives of the wider system that sought to both care and protect children who were victims of sexual offending. However much of this new knowledge was predicate on presuppositions about female children that had nested within interwar ideas about health and hygiene.

This continuity was not mirrored in relation to male children, who became a new focus for the criminal law in the wake of homosexual law reform in the nineteen-fifties. Part 4.3 therefore details the rise in official understandings of homosexuality that emerged in the postwar period. It illustrates that the subsequent criminal regulation of sexual offences against male children in Scotland unfolded in adaptable common law definitions in lieu of direct legislative change. Throughout this legal development, the male child emerged as particularly vulnerable to sexual contact with adult men because it threatened to undermine their heterosexuality and therefore their capacity to participate in heteronormative family structures in the future. By the nineteen-nineties the male child who evidenced heterosexual characteristics and traits was protected from a wide range of sexual behaviour by adult males; but this understanding of the child and sexual wrongs also operated to exclude those male children that did not evidence obvious heterosexual attributes.

[337] See Chapter 3 pt 3.5.

Part 4.4 introduces a significant shift in sexual offences against children that arose in parallel with the developments related to homosexual offences. It details the reform to the law of incest in the nineteen-eighties and evidences that the regulation of sexual intercourse between family members was principally intended to protect children within families. It argues that this law reform was one means of regulating the emergent problem of child sexual abuse. Finally, it situates the regulation of child sexual abuse within wider social, economic, and political change at the end of the twentieth century and argues that the 1986 Act simultaneously constructed the child as vulnerable within the family while upholding family relationships as essential to fulfil the responsibilities of child care and protection.

4.2. Dangerous Girls Continued: Wolfenden and Kilbrandon

In 1954, Home Secretary David Maxwell-Fyfe commissioned the Wolfenden Committee with a view to assessing whether the law and practice relating to street prostitution and male homosexual offences should be changed. By the time of its publication, the Report of the Committee (Wolfenden Report) sought to assess whether the criminal law should be involved in policing these behaviours at all and, if so, to what extent. The conclusion reached was that it was not the function of the criminal law to intervene in the private lives of citizens unless necessary to,

> "preserve public order and decency, to protect the citizen from what is offensive or injurious, and to provide sufficient safeguards against exploitation and corruption of others, particularly those who are specially vulnerable because they are young, weak in body and mind, and inexperienced…"[338]

The protection of children was therefore a central justification for the shape of the reforms recommended by Wolfenden, which have been regarded by some as the most influential liberal statement of the nineteen-forties and fifties.[339] Wolfenden's recommendations were applicable to both Scotland and England and Wales and it heard from Scottish witnesses. It is within the submissions from Scottish witnesses that a clear continuity of ideas about the sexual behaviour of young women can be found.

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[338] Home Office and Scottish Home Department, 'Report of the Committee on Homosexual Offences and Prostitution' (cmnd 247, 1957) para 13. Hereinafter the "Wolfenden Report")

[339] Jeffrey Weeks, *Sex, Politics and Society: The Regulation of Sexuality since 1800* (4th edn, Routledge 2018).

From the outset, Wolfenden had been regarded as a solution to distinctively English problems, specifically those found in London, rather than relating to the other nations in the United Kingdom.[340] Following internationally publicised postwar events, notably the 1951 Festival of Britain and 1953 coronation, there was parliamentary concern about the extent of "visible prostitution" in London.[341] As Samantha Caslin and Julia Laite have observed, the submissions by the Scottish witnesses were therefore primarily concerned with explaining the differences in the Scots law and policing as well as the ways that practices of prostitution differed north of the border.[342] Scotland, it was said, had no recent indications of public concern with the "social evil" of prostitution and there were no serious problems on the streets, cafés, or public houses.[343] Instead, it was amateurs that remained a problem in Scotland, particularly "very young girls" [344] who were often present when American troops were present or large events took place. This problem, however, did not require the urgent political attention or law reform that street offences in England and Wales had invited. Despite Wolfenden's focus on protecting the young, the Scottish perspectives illustrated an ongoing commitment to the interwar understanding of sexual activity with young women. These young women were derided as a nuisance and danger to themselves as well as others. But, moreover, they were not a policy priority. Wolfenden's recommendations did not result in any changes to the Scottish criminalisation of prostitution or so-called amateur behaviour and the scheme of legislation and common law that had developed during the interwar years continued to be the primary means of regulating sexual activity between adult men and female children in the postwar era.

By the nineteen-sixties and early seventies, the continuity of ideas about sexual offences against young women and girls was evident in the major reforms to the management of children deemed in need of care and control. The focus of these changes intended to ensure that female children were properly identified and reformed. In the wake of concerns related to increased juvenile offending, the Secretary of State for Scotland had commissioned a report into the legal provisions related to juvenile delinquents, juveniles in need of care and protection, or those

[340] Samantha Caslin and Julia Laite, *Wolfenden's Women: Prostitution in Post-War Britain* (1st edn, Palgrave Macmillan 2020) 43.

[341] ibid 44.

[342] ibid.

[343] Stated in, for example, the evidence of L. I. Gordon, Scottish Crown Agent, reported ibid 92.

[344] ibid.

beyond parental control as classified under the Children and Young Persons Acts.[345] The resultant 1964 report, under the chairmanship of Lord Kilbrandon[346] (the Kilbrandon Report) created a new framework of principles that should underpin the policy approach of the state towards children and promoted the creation of Children's Panels to replace juvenile courts as a means of making legally binding decisions about the best approach to be taken towards a child, outside of a courtroom environment.[347] Kilbrandon's recommendations were later enacted in the Social Work (Scotland) Act 1968[348] with the central ideal of amending the family and social environment of children in order to promote education, training, rehabilitation, and prevent future offending.[349]

However, Kilbrandon focussed heavily on offending of, rather than offending against, children. Children who came before the juvenile justice system for care and protection because they were victims of crime, or resided in the same household as victims or offenders, were described as a comparatively less numerous class to those who had offended.[350] The "surprising and radical"[351] character of the recommendations related to the evident departure from the criminal law to address juvenile offending as well as the reliance on findings in psychology, psychiatry, and social sciences to place the specific needs of the child at the forefront of remedial action.[352] But in relation to that smaller group of children who were victims of offences, Kilbrandon did not mark a similarly radical departure from the ideas underlying the Children and Young Persons Acts of 1932 and 1937. Kilbrandon's recommendations and their subsequent enactment in 1968 were premised on the continued equivalence between child offenders and those who had been offended against, with a view that both presented the same

[345] 1932 Act and 1937 Acts

[346] Scottish Home and Health Department and Scottish Education Department, 'Children and Young Persons Scotland' (cmnd 2306, 1964). Hereinafter the "Kilbrandon Report".

[347] Children's Panels are hearings, known as Children's Hearings, composed of voluntary, trained lay-people and aim to make decisions about appropriate legal and welfare arrangements in respect of a child. They are formed following a referral on the established grounds to a Children's Reporter. Children's Reporters first investigate and then determine whether a Children's Panel is necessary. See more: FM Martin and Kathleen Murray, *Children's Hearings* (Scottish Academic Press 1976).

[348] Social Work (Scotland) Act 1968 c49.

[349] John Sturgeon and Elodie Leygue-Eurieult, 'Needs Not Deeds: The Scottish Children's Hearing and the Enduring Legacy of Lord Kilbrandon' (2020) Criminocorpus (Revue).

[350] Kilbrandon Report para 15.

[351] Sturgeon and Leygue-Eurieult (2020) (n 331).

[352] For an assessment of the welfare approach to Kilbrandon in relation to juvenile offending, see: Claire McDiarmid, *Childhood and Crime* (Dundee University Press 2007) ch 7. And Kelly, *Criminalisation of Children in Scotland* (2012) (n 85) ch 5.

obstacles to the child's proper development, happiness, and security in the future. In a 1965 address, later published under the title *Children in Trouble*,[353] Lord Kilbrandon reinforced this similarity. Therein, he implicitly observed the relevance of care and protection proceedings for children who had been subject to sexual offences and stated that the priority for intervention lay in the need to address those who "through neglect, malice or the vice of those whose guardianship they have been confided are turning into some kind of moral and physical danger…"[354] For this reason, the similarities between juvenile offenders and those who had been offended against were "much more striking than any features that distinguish them".[355]

Rather than viewing children as corrupted or contaminated through social circumstance and habit, and removing "moral judgement"[356] from proceedings related to children, the language of social science and psychology that was relied upon by Kilbrandon nonetheless packaged ideas related to the adequate and well-adjusted development of the child, relationships in the family and with the community as a means to prevent immoral behaviour in children and, therefore future, offending. "Social intervention in the family", which was to be the objective of Children's Panels,[357] relied not on the secular ideas of biological science related to cleanliness and behaviour that had been the case in the interwar period but upon a socially scientific view of proper moral and physical development. And within these ideas were familiar presuppositions about gender and the particular difficulty presented by young women and girls when trying to care for and protect them. Thus, Kilbrandon warned against "the distinction which is supposed to exist between the delinquent child and the child in need of care and protection" and the idea that both should not be treated together "lest the delinquent contaminate the child who has been sinned against but not sinning"[358] because such a conclusion would be ill-founded and "in fact, it is the common experience that children in need of care or protection are more difficult to handle than children who have fallen into delinquency, and this, *of course,* is especially true for girls".[359]

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[353] Lord Kilbrandon, 'Children in Trouble' (1966) 6 British Journal of Criminology 112.

[354] ibid 114.

[355] ibid.

[356] ibid.

[357] ibid 116.

[358] ibid 115.

[359] ibid, emphasis added.

Scottish legal responses to sexual offences against female children were therefore muted in the immediate decades following the second war. There was a continuity of the interwar ideas surrounding female "amateur" promiscuity and a commitment to the ongoing scheme of criminal legislation and common law used to address the behaviour. What little attention was directed toward the regulation of sexual activity between adults and female children by official sources did not present it as a priority or in a dramatically different light. Sexual behaviour between adults and female children was, however, no longer regarded as a problem of social hygiene, but postwar social scientific understandings of proper child development and family relationships. But these understandings nonetheless drew equivalence between child offenders and child victims as it had in the decades prior. Both categories of children were similarly at risk of improper development in the future. These scientific findings also supported the view that the proper management of girls and young women presented particular difficulty. To ensure their proper development, female children who had experienced sexual behaviour with adults necessitated care and control and, when required, this was to be directed by state authorities. Through the Children and Young Persons Acts,[360] those children who were victims to sexual offences or within the same household as victims or offenders could now be referred to Children's Panels. The criminal courtroom remained a conduit between the prosecution of sexual offences against female children and their eventual regulation through the recommendations of the new Children's Panels, whether that was within a home or an institution. This image of the girl victim of sexual offences, as both in moral danger and presenting moral danger, continued to rhyme with the ideas related to interwar "vicious girls" who required rehabilitation and reformation.[361]

The continuity of ideas underlying the regulation of female children, and sexual offences against them, between the interwar and postwar period is explained by the remarkable similarity in the status of, and aims for, women as the British state underwent economic, social, and administrative reconstruction. Like the interwar period, there remained significant official concern about population decline. The importance of children and the heterosexual family structure in the management of the strength and size of the population also sustained. Thus, the 1949 Royal Commission on Population reported that it was in the national interest to provide improved state incentives for families to support the voluntary reproduction of more children

[360] See discussion in Chapter 3 pt 3.5.

[361] On this, see Chapter 2 pt 2.7.1.

with a view to enhancing the number of individuals within the population and improving their health.[362] This continued to have a bias toward the increased reproduction of particular classes. The 1949 Commission on Population, and surrounding commentary, grappled with the best way to ensure the "professional classes" had larger families as should be the case "on any eugenic principle".[363] Policies that positively reinforced families with children were therefore central in the decades that followed the Second War. Moreover, the specific family ideal that was incentivised by successive governments from the nineteen-forties maintained ideas about gender and dependence that had existed previously. As much is evident in the report by William Beveridge that formed the blueprint for the social and economic reforms of the welfare state, which affirmed that "housewives as mothers" had "vital work to do in ensuring the adequate continuance of the British race and of British ideals in the world".[364] The status of husbands as breadwinners and wives as non-earning child-carers was built into the structure of many welfare state policies,[365] such as the exclusion of unmarried mothers from universal family allowances and the withdrawal of the alternative means-tested benefit when any unmarried mothers subsequently undertook to co-habit with a male worker.[366]

Official aspirations for female children were therefore infused with gendered ideals about women as wives and mothers. Social scientific knowledge about the moral and physical development of children, that was relied upon and circulated in the policy creation process, for example during Kilbrandon, understood sexual behaviour between adults and female children to be an injury to the capacity of young women to contribute as able-bodied, and socially reliable child-bearers, mothers, and wives. At once, the proper management of young women who were victims of sexual offences would assure that good mothers were created within future family structures and strike at the risk of juvenile delinquency in the future.[367]

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[362] See, General Register Office, 'Report of the Royal Commission on Population - 19944-49' (cm 7695 1949) pt II.

[363] 'The British Family' *The Economist* (25 June 1949) 1170. See also: ibid para 539 and Chapter 14

[364] William Beveridge, 'Social Insurance and Allied Services' (cmd 6404, 1942) 53.

[365] Pedersen (1993) (n 336) 307.

[366] Brown and Barrett *Knowledge of Evil* (2002) (n 32) 122.

[367] "The belief that pressing social problems, for example, juvenile delinquency could be solved by better mothering enjoyed a life long beyond the desires of philanthropic women to promote the fulfilment of family responsibilities and, in particular, was reinforced by mid-twentieth-century professional and academic psychologists", see: Jane Lewis, 'Gender, Family and Women's Agency in the Building of "Welfare States": The British Case' (1994) 19 Social History 37, 54.

4.3. Boys and Homosexual Dangers

The initial continuity that is evident in the response to adult behaviour against female children in the first two decades after 1945 can be contrasted with the development of the criminal law in relation to male children. In the postwar period there was new and more intense concern about male homosexuality that had not formed a comparable focus of government or the legal institutions in the past.[368] The construction of the problem of male homosexuality in Scottish society implicated the criminal law in the protection of male children from adult male sexual conduct to a previously unseen extent and shaped the nature of that protection in the decades that followed.

4.3.1. The Development of Homosexual Offences

As evidenced in Chapters 2 and 3, it was female children who formed the primary focus of criminal protection from sexual wrongs as a more coherent understanding of sexual offences against children emerged and developed within the criminal law. The increased age of consent brought about in the 1922 Act and the development of mutual corroboration in the courts had predominantly involved females and sexual behaviour against them. For male children, the common law offence of lewd and libidinous practices applied to those below the age of puberty,[369] which for males was 14.[370] Other offences could apply irrespective of the age of the parties to a sexual act and had the effect of criminalising all male parties to the sexual activity. The common law offence of sodomy[371] applied to acts of penetration and attached a maximum penalty of life imprisonment.[372] A further statutory offence of gross indecency was applicable to behaviour between males possibly falling short of penetration,[373] which could be punished with up to two years imprisonment. However, perhaps because the statutory offence was not commonly charged in Scotland,[374] Gerald Gordon has remarked that, prior to the case of

[368] The most notable homosexual law reform in the period prior to 1919 had not been directed from government but instead arose out of last-minute amendments by parliamentarians in the late nineteenth century. See: FB Smith, 'Labouchere's Amendment to the Criminal Law Amendment Bill' (1976) 17 Historical Studies (Melbourne) 165.

[369] or "about the age of puberty" see: GH Gordon, *The Criminal Law of Scotland* (2nd edn, W Green & Son 1978) paras 36–09.

[370] Macdonald *A Practical Treatise* (1929) (n 74) 219.

[371] Gordon (1978) paras 34–01.

[372] Macdonald (1929) 219.

[373] Criminal Law Amendment Act 1885 (48 & 49 Vict c69) s11.

[374] s11 of the 1885 Act was subject to definition by courts in England and Wales. See: Gordon (1978) paras 36–18.

McLaughlan v Boyd,[375] it was unclear if behaviour falling short of sodomy between males above the age of 14 was a criminal offence.[376] This legal position was indicative, first, of the relative lack of criminal protection for male children between the age of 14 and 16 compared to female children. It also suggests that there was a wide range of male sexual conduct that may not have been subject to significant regulation.

This position started to change in the decade immediately prior to the Second War as the Scottish courts indicated that they were more inclined to regulate sexual wrongdoing involving men. *McLaughlan,* for example, involved heightened judicial scrutiny of sexual conduct between males. In the decision, the court created a new offence of shameless indecency, previously only detailed in the writer Macdonald's textbook. The appellant was charged with two counts of lewd and libidinous practices towards males by seizing their hands and putting them on his private parts,[377] however the age of the complainers was not stated in the charge. The defence argued that the gravamen of a charge of lewd and libidinous practices was the protection of the young from corruption and therefore could only apply when the complainers were proven to be below the age of 14.[378] The court acknowledged that the legislative offence of gross indecency under the Criminal Law Amendment Act 1885[379] was available to the prosecution but maintained that the common law of Scotland further provided the option to criminalise all shamelessly indecent conduct. It relied on Baron Hume's[380] general statement that "all doleful and wilful offence against society" in relation to "violence, dishonesty, falsehood, indecency, and irreligion"[381] and Macdonald's equivalent principle that "all shamelessly indecent conduct is criminal"[382] to justify the existence of the offence. This selection of statements from institutional writing and leading textbooks effectively provided the bench with the authority to construct crimes when presented with conduct in a case that could be indecent in the given circumstances.

On the one hand *McLaughlan* was an expedient means of curing the initial problem with the Crown's charge of lewd and libidinous practices against adults, rather than children, by

[375] *McLaughlan v Boyd* 1934 JC 19.

[376] Gordon (1978) (n 351) paras 36–17.

[377] *McLaughlan* 19 (LJ-G Clyde).

[378] ibid.

[379] Which applied to all parties to the conduct, irrespective of age or consent: 1885 Act s11. See Appendix I.

[380] *McLaughlan* 21 (LJ-G Clyde).

[381] ibid 22.

[382] Macdonald (1929) (n 370) 221.

relying upon the open and flexible principles of law. But the question arises as to why such a curative approach was required in the case. Following the reasoning, the crime of "shameless indecency" easily subsumed any behaviour that could be described as lewd and libidinous, regardless of age, as well as gross indecency as detailed in the 1885 Act. These pre-existing offences were mere exemplifications of a wider spectrum of behaviour that could be aggravated by age, for obvious but unexplained reasons,[383] but were not necessarily defined by it. The criminal law was thus able to address an expanse of male homosexual behaviour falling short of sodomy within a single criminal offence. The apparent clarification of the law in the case, despite the ambiguity of what specific conduct might fall to be considered "shamelessly indecent" or why, further indicated a move in the criminal law toward the regulation of a wider range of sexual wrongs between men, as well as between men and women.[384]

McLaughlan indicated that shamelessly indecent conduct between men could be aggravated by the age of the complainer and it therefore offered a new offence which could protect male children from sexual wrongdoing. But the approach of Scots law to sexual relations between men would develop further in the years that followed as the problem of male homosexual conduct began to emerge in government policy and communications. As the next section evidences, knowledge about homosexuality, and the apparent problems it posed, shaped official strategies that sought to simultaneously define the nature of homosexual behaviour and the limits of its proper regulation. In doing so, the characteristics of *homo*sexual wrongs against male children emerged as a form of sexual wrongdoing that was separate to comparable sexual wrongdoing against female children.

4.3.2. Wolfenden and the Homosexual Threat to Boys

The most important development in the regulation of male homosexual conduct commenced with Wolfenden in the nineteen-fifties. Despite its dual focus, Wolfenden's most significant

[383] "[I]t has, no doubt, always been a serious aggravation that the victim was near the age of puberty or below it…[n]o doubt there may be in particular cases circumstances of aggravation, but I am not prepared to rule out of the category of crime any shamelessly indecent conduct, and I am not prepared to infer, from the circumstance that section 11 of the Act of 1885 affirmed the proposition that shamelessly indecent conduct by one male adult in relation to another was criminal" *McLaughlan v Boyd* 1934 JC 19, 22-23 (LJ-G Clyde)

[384] Such as the sexual wrongs addressed between adult women and the appellant in *Moorov* (1930) (n 252) See also, the case of *Ogg v HM Advocate* 1938 JC 152 wherein multiple offences between men charged under s11 of the 1885 Act were described as being of a "sexual nature".

debates and its most enduring legacy relate to male homosexuality.[385] The basis for the creation of the Committee is typically related to the high-profile criminal convictions for homosexual acts in England[386] alongside a more general rise in prosecutions of indictable homosexual offences in the postwar era.[387] But the resonance of these events was owed to a wider and more complex range of circumstances that contributed to the identification of homosexuality as a sexuality with particular traits that rendered it explicable and susceptible to regulation. Most notable in this regard was the postwar climate of psychological and social scientific research into sex and the official institutions that sought to rely upon that research. From the nineteen-forties, the popular press commissioned and reported on sexual attitudes and behaviour in the general public. As Adrian Bingham has noted, these widely circulated publications relied upon the social scientific relevancy of surveys, such as Mass Observation's "Little Kinsey", based on similar work undertaken into sexual behaviour in America by Alfred Kinsey,[388] in order to justify the distribution of sexual information in family-friendly media.[389] There were also a number of studies undertaken by state authorities and recently established research institutes. Thus, the report by the Cambridge Department of Criminal Science, published in the same year as Wolfenden, sought to investigate the characteristics of sexual offenders and the incidence of offending as a whole for the first time.[390] In parallel with research, in England and Wales, the creation of the first Sexual Offences Act in 1956,[391] had identified a shared sexual motive between offences previously categorised across the criminal law and collated them into a new criminal category.[392] There was, by the mid-nineteen-fifties, a shift in ideas about - and the management of - sexual behaviour in society.

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[385] Caslin and Laite (2020) (n 340). There was some discussion of female homosexuality however it was not considered a significant problem compared to males and did not form the focus of future debates, see Brian Lewis, *Wolfenden's Witnesses: Homosexuality in Postwar Britain* (Palgrave Macmillan 2016) 121.

[386] Jeffrey Weeks, *The World We Have Won: The Remaking of Erotic and Intimate Life* (Routledge 2007) 53.

[387] Weeks contends that this was probably not owed to an increase in the behaviour but heightened policing, see Weeks (2018) (n 339) 356.

[388] Adrian Bingham, 'The "K-Bomb": Social Surveys, the Popular Press, and British Sexual Culture in the 1940s and 1950s' (2011) 50 The Journal of British Studies 156, 54.

[389] ibid 55.

[390] Cambridge Department of Criminal Science, 'Sexual Offences' (MacMillan 1957). The Department had been established during the war by Sir Leon Radzinowicz as the use of scientific studies for the treatment and prevention of crime became increasingly popular. See also Farmer, *Making the Modern Criminal Law* (2016) (n 30) ch 9.

[391] Sexual Offences Act 1956 c69.

[392] Farmer *Making Modern* (2016) (n 34) 280.

With the circulation of knowledge about sex, and sexuality, came the evolution of ideas about homosexuality. Alfred Kinsey's research into sexual behaviour, published in the decade prior to Wolfenden, had sought to present homosexuality as an inevitable biological trait in humans that could be placed on a wide spectrum of sexual behaviour. Kinsey, who was a witness at Wolfenden, did much to suggest that homosexuality as a problem was possibly more widespread than previously understood.[393]

Wolfenden drew heavily upon the professional field of psychological and psychiatric sciences that had grown during the war alongside medical expertise, albeit with the admission that there was no consensus amongst experts.[394] Nonetheless, many of the themes in the expert testimony were refracted through the problem addressed by the Committee as well as its recommendations. Alfred Kinsey was one of many witnesses and he argued that while sexuality was malleable, it became fixed by the age of 16[395] and as Brian Lewis has evidenced, a majority of the submissions from scientific experts to the committee deferred to this essential finding by Kinsey.[396] The formation of the problem of homosexuality as a largely inherent but changeable human trait had two important consequences. The first was to present homosexuality as principally a social problem to be managed by the state rather than a wholly moral or medical issue.[397] As such, the knowledge about homosexuality that was presented at Wolfenden assisted authorities in determining the regulation of the social problem in a way that was suitable for the objectives of the nation as a whole. A second consequence was to construct youth as an essential stage in the formation of male sexuality and therefore situate it as a front-line defence in the possible prevention of homosexuality.

The construction of homosexuality as a social problem with social solutions is reflected in the final recommendations of the Committee. The issue Wolfenden sought to resolve was whether homosexuality might be better regulated by the criminal law[398] and this focus on regulation, rather than full prohibition on the grounds of immorality or legalisation by way of

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[393] For more on the development of homosexuality in the human and social sciences, see Weeks (2018) (n 339) ch 2; Lewis (2016) (n 385) ch 2.

[394] Lewis (2016) 263; Farmer (2016) (n 392) 289.

[395] Lewis (2016) 103.

[396] ibid 104.

[397] Evident, for example, in evidence by British Medical Association representative Dr E. E Clayton who claimed that "Homosexuality and prostitution are essential social rather than medical problems…[t]here is a potential homosexuality in everyone, it is what happens to that element that is important", reported ibid 103.

[398] Weeks (2018) 309.

acceptance, meant the proper scope and function of that regulation had to be articulated. This is evident in the solutions offered by the Committee, which argued that the prosecution of homosexual acts between males in private "probably made little difference to the amount of such conduct occurring".[399] Wolfenden thus highlighted that there "must remain a realm of private morality and *immorality* which is, in brief and crude terms, not the law's business"[400] and advocated for homosexual relations between consenting males over the age of 21 undertaken in private be decriminalised across Britain.[401] However, it nonetheless deplored the damage to the (heterosexual) family that it "considered the basic unit of society" that homosexuality threatened. Setting the age of consent at 21 was thus intended to ensure that young men were not seduced and debauched into forming firm homosexual tendencies in later life by preventing sexual contact between older men who were, on the basis of evidence, likely to be beyond any remedy to alter their sexual orientation.

The regulation of homosexuality therefore functioned, in part, to preserve the heterosexual family. New ways of knowing about homosexuality allowed Wolfenden to address homosexual behaviours at the point of their formation and fixation. Sexual conduct toward young men was therefore dangerous because it threatened to promote homosexuality and resulted in the decay of heteronormative institutions in the future. In this sense, the criminal regulation proposed by Wolfenden was a means to strategically prevent and inhibit male homosexuality rather than a statement outlining its toleration.[402]

Boys and young men thus became an important target for protection in the category of sexual offences. However, this position was most obvious in the legislative reforms enacted in England and Wales from 1956 into the nineteen-sixties.[403] As evidenced in *McLaughlan*, there was heightened judicial attention to the regulation of homosexual behaviour in Scotland,[404] but

[399] Wolfenden Report para 9. See also, François Lafitte, 'Homosexuality and the Law: The Wolfenden Report in Historical Perspective' (1958) 9 The British Journal of Delinquency 8.

[400] Wolfenden Report para 55.

[401] A motion to institute this into law for England Wales failed in Westminster in 1962 (Sexual Offences HC Bill (1961-62) [26]) but it was later successful in the Sexual Offences Act 1967 c60 s1.

[402] While the effect of the Wolfenden recommendations was greater toleration of some male homosexual activity, the overall framework of its recommendations were based on a general intolerance for homosexuality as a whole, *cf* Farmer (2016) (n 392) 247.

[403] Sexual Offences Acts 1956 Act and 1967 Act

[404] Discussed above pt 4.3.1.

there was no legislative change comparable to the English jurisdiction in the decades that followed. Instead, as explored in the next section, the Scots common law was developed by the judiciary in order to regulate homosexual behaviour. As the law developed, boys and young men came to be classified as children who warranted protection from the harms of sexual contact of adult males.

4.3.3. After Wolfenden: Scots Law and Emergence of Homosexual Wrongs

The relationship between the Scottish witnesses and the Wolfenden Committee warrant more specific attention in this regard. There was no official appetite for the Committee's investigation of homosexuality insofar as it could apply to Scotland. In 1954, the Secretary of State for Scotland, James Stuart, advised the Cabinet that a small rise in prosecutions for homosexual offences in Scotland did not justify the proposed investigation.[405] While recent figures indicated 480 men above the age of 21 in England and Wales were convicted of homosexual offences, in Scotland it was only nine,[406] despite estimates that the prevalence of homosexual behaviour in both jurisdictions was similar.[407] The lower prosecution rate was attributed to the more stringent regulation of confessions, particularly written confessions, in Scots law compared to England and Wales, which tended to be the only corroborating evidence for homosexual conduct undertaken in private.[408] In evidence, representatives of the Scottish Home Department reported that the Lord Advocate's Department had "for many years" adopted a policy that would principally focus prosecutions on public homosexual conduct (such as that in toilets, cinemas, or parks) and those "offences involving the seduction or debauching of the young" rather than consensual acts of adults in private.[409] In short, Scotland managed the problem of homosexuality well without the need for the sort of reforms envisaged by Wolfenden.

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[405] Roger Davidson, *Illicit and Unnatural Practices: The Law, Sex and Society in Scotland since 1900* (Edinburgh University Press 2019) 50.

[406] Wolfenden Report para 142.

[407] ibid 136.

[408] ibid 136–43.

[409] Roger Davidson and Gayle Davis, '"A Field for Private Members": The Wolfenden Committee and Scottish Homosexual Law Reform, 1950–67' (2004) 15 20th Century British History 174, 182. Note in *McLaughlan* (n 349) the non-consensual nature of the behaviour was not material to the charge but appeared to be inferred from the facts on appeal, 23 (LJ-G Clyde).

However, witness testimony at Wolfenden indicates that this approach was a matter of procedural restraint and Scottish exceptionalism rather than any degree of acceptance for homosexual behaviour.[410] Arguing that Scotland had no need to decriminalise homosexuality to any extent, the Scottish Crown Officers highlighted that the prosecutorial policy adopted by the Lord Advocate did not "condone homosexuality or homosexual practices".[411] James Adair, a Wolfenden Committee member and former Procurator Fiscal for Glasgow and Edinburgh,[412] submitted a well-publicised reservation to the Committee's recommendations wherein he argued that homosexuality was contrary to the best interests of the community and the decriminalisation of private acts of homosexuality, as proposed, would result in the corruption of young people.[413] Adair further claimed that the criminal law ought to have moral force in order to avoid "a new field of permitted conduct with unwholesome and distasteful implications" as that would be "contrary to the best interests of the community".[414]

A dominant theme of Adair's reservation was the need for the criminal law to reflect an appropriate moral framework[415] and his statement was interpreted in the Scottish Office and Cabinet as "reflecting wider opposition within Scottish society to any liberalisation of the law relating to homosexual offences".[416] While this suggests that the Scottish legal establishment intended to operate in continuity with the interwar period, in distinction with any equivalent English reforms, cases handed down after Wolfenden indicate an evident shift in the approach taken by the courts toward homosexual behaviour, particularly between adult men and boys, with a greater emphasis placed on the vulnerability of male children than the interwar period.

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[410] As Davidson and Davis have documented, the information furnished to Wolfenden indicated proactive policing of homosexual men, including police observations on public lavatories and the order from the Procurator Fiscal for Glasgow and Edinburgh that such cases be referred to the Sheriff Courts in order to increase sentencing, see ibid 181.

[411] Davidson (2019) (n 405) 51.

[412] James Adair was also a long-serving elder of the Church of Scotland.

[413] "The influence of example in forming the views and developing the characters of young people can scarcely be over-estimated. The presence in a district of…adult male lovers living openly and notoriously under the approval of the law is bound to have a regrettable and pernicious effect on the young people of the community" Wolfenden Report paras 117-122 (Reservation by Mr J Adair).

[414] ibid 119 (Reservation of Mr J Adair).

[415] The debate on the proper role of morality in law famously flourished in the wake of Wolfenden between Lord Devlin and H.L.A Hart, see: Heta Hayry, 'Liberalism and Legal Moralism: The Hart-Devlin Debate and Beyond' (1991) 4 Ratio Juris 202.

[416] Davidson (2019) 50.

The special characteristic of the development of Scots law during this period was a reliance on the interpretation of adaptable common law definitions in lieu of direct legislative change. The most striking examples of this change arise in relation to the common law offence of breach of the peace. Originally thought to have been a general organising title for a range of offences,[417] breach of the peace came to be an indictable common law offence in its own right, principally as a lesser form of rioting.[418] By the nineteen-fifties there was no one case of breach of the peace that could be regarded as a single authority on the law,[419] but it generally included conduct calculated to provoke a breach of the peace and behaviour that caused alarm and annoyance to the lieges, or public.[420] Two years after the publication of the Wolfenden Report, Edward Young, a depute headmaster at a technical school in Edinburgh, appealed his conviction for breach of the peace. His charge related to his behaviour, having conducted himself "in an improper manner" and made "improper remarks" to male pupils in his school "about sixteen years of age".[421] Young had spoken to several male pupils between the ages of 16 and 17, individually, in private conversations. His remarks included, to one 17-year-old male pupil, that "90 per cent of boys "flog" themselves off, and that the 10 per cent who say they don't, do it", that in the Merchant Navy some of the men had "flogged"[422] Young off, and further asking whether the complainer himself "could deny ever having done anything like that?".[423]

Young's defence stated that there was no precedent that private acts, that did not disturb a wider neighbourhood or public, would be sufficient to constitute a charge of breach of the peace. Because none of the complainers had reacted negatively to the statements and, further, that no one other than the two parties to each conversation had heard it take place, the facts did not constitute a breach of the peace because they did not pose actual or potential threat of alarm in the minds of the public.[424]

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[417] M.G.A. Christie, *Breach of the Peace* (Butterworths 1990).

[418] Macdonald (1929) (n 370) 137.

[419] Gordon (1978) (n 371) para 41–01.

[420] ibid 41–04.

[421] *Young v Heatly* 1959 JC 66.

[422] The terms "flogged off" and "flogging" are not defined in the case, however it appears to be a euphemism for male masturbation.

[423] *Young* 66.

[424] ibid

Dismissing the appeal, the Lord Justice-General Clyde stated that "breach of the peace...is an offence the limits of which have never been sharply defined".[425] On this basis, the court in *Young* stated that in "very special cases", where no alarm or annoyance was produced, but the conduct was "so flagrant", the bench could instead draw an inference from the conduct itself as to whether it might be reasonably expected to annoy or alarm the lieges.[426] Edward Young's conduct was one such very special case. His behaviour had been flagrant because of "the disgusting nature of the suggestions made", the fact that they had taken place within a matter of hours with a series of "adolescent boys" and that they had been made by a depute headmaster "to whom they would normally look up to for guidance".[427] The court drew inference that this would reasonably cause alarm or annoyance to the lieges and upheld Young's conviction. Upheld, too, was his sentence of 60 days imprisonment owed to the "revolting conduct" established in the case.[428]

The test adopted in *Young* required the court to assess whether "the lieges", or public, as a hypothetical entity would be reasonably alarmed or annoyed by the conduct in question or whether they would be tempted to make reprisals in response to it. In effect it was a flexible and objective test for alarm or annoyance, which would be available to the bench in select circumstances. Specifically, when the conduct complained of was "private" - in the sense of there being no actual or likely witnesses to the conduct other than a single complainer and the accused - and "flagrant" enough. This formulation also presented a lower evidentiary threshold for the Crown, with no need to prove that there was any actual annoyance or disturbance caused by the conduct. Resultantly, the range of behaviour that could be criminalised by breach of the peace expanded, albeit in "very special cases".

There is no explicit reference to homosexuality in the *Young* decision, it being framed entirely in terms of indecency, but it is readily apparent that while Young's behaviour involved no physical contact, the content of the words spoken encouraged sexual activity between males and an admittance to previous sexual activity with males. Young was, in this sense, an archetypal mid-century homosexual in that he encouraged impressionable male youths below

[425] ibid 70 (LJ-G Clyde).

[426] ibid, the court relied on the objective test for alarm and annoyance developed in *Rafaelli v Heatly* 1949 JC 11 involving a "peeping tom" in an Edinburgh neighbourhood.

[427] *Young* 70 (LJ-G Clyde).

[428] ibid.

his age to participate in non-heterosexual activity. That he was in a wider position of trust to the young men who were his subordinates, being a senior member of staff in their school, and had sought to encourage more than one youth into such activities served to intensify the danger that he posed. It is in relation to this homosexual threat that the complainers in *Young* emerge, not as young men over the age of consent, but "adolescent boys". Their ages emphasised their relative susceptibility to homosexual encouragement, such encouragement being all the more acute because each was a pupil under the governance of Young. The explicit absence of any reaction from the complainers, whether alarm or otherwise, upheld their position as untarnished and upright heterosexual adolescents who resisted Young's acts.

While Scottish officials after Wolfenden claimed the criminal law would continue as it had on the past to generally prohibit homosexuality on the basis of moral reasoning; the decision in *Young* indicates that there was a shift in the rationality of the law. This shift was characterised by the increased judicial recognition of homosexuality as a threat to male children, an understanding which had been formed in contemporary social scientific and scientific knowledges about the distinct problem of male homosexual behaviour; rather than purely moral teachings. In *Young,* the bench therefore primarily re-interpreted the common law in response to an understanding of the social, rather than moral problem, of homosexuality. Commenting on the case, Gordon states that "it is difficult to resist the conclusion that "breach of the peace" was used in order to penalise the accused behaving immorally".[429] However, the timing of *Young*, the nature of the "moral" statement made in the decision, and the reasoning used to make it, were more readily inclined to the contemporary social understanding of homosexuality as a problem than any principled moral understanding of the behaviour. Homosexuality had become a category of sexuality that was subject to official and scientific inquiry to a greater extent than any previous decade. The nature of, and problems posed by, male homosexuality that was communicated through the Wolfenden Report prioritised the protection of young men and boys from sexual behaviour with adult men. But for this background and the problematic it constructed, the impact and meaning of the decision in *Young* would be lost. The objective test for alarm and annoyance adopted by the court meant that the judiciary was able to interpret, and construct, this contemporary social meaning of homosexuality into the law of breach of the peace. Thus, the wrongfulness of Young's statements made sense only on the presupposition the hypothetical Scottish public, constructed by the bench, would be reasonably alarmed or

[429] Gordon (1978) (n 371) paras 41–06.

annoyed. This was not a question of the actual or likely harm to the complainers at trial, or to a real member of the public.[430] Instead it was a judicial measure of Young's behaviour based on the given knowledge and ideas about adult men's behaviour with younger men at the time.

As previously detailed, during the interwar period there were few common law offences that addressed homosexual behaviour, in general, and that protected male children, specifically.[431] The re-interpretation of breach of the peace ensured that the criminal law was capable of prohibiting a wide range of conduct between adult men and those falling below the age of 21, irrespective of any actual harm that resulted, and therefore addressed the general danger posed by male homosexuality. It was in taking this approach that boys and young men emerged within the category of the child in the postwar Scots criminal law. But the male child was not constructed in the same manner as girls and young women, nor protected from the same kind of sexual wrongs. This is apparent in *Young* and further case law development that followed it.

Some indication of the separation of sexual offences against female children and that of male children comes from the case of *Cox,*[432]decided two years following *Young.* There, the court determined that it was not possible for a charge of sodomy in respect of the accused's step-son to be mutually corroborated by the charges of incest against his step-daughters. All of the charges related to penetrative sexual activity with children in the same relation to the accused, in the family home, with children between the ages of eight and 13. However, Lord Hunter's decision noted that the sufficiency of similarity in time, place, and circumstance, as set-out in the case of *Moorov,*[433] required that the alleged crimes were "in the normal sense of language" the same crime.[434] To apply the precedent of *Moorov* to charges of both incest and sodomy would be to extend the doctrine beyond principle as the offences were not "in the same

[430] Discussing the concept of social law, François Ewald notes that it is characterised by flexible judgement with the ability to adapt to history, to development, to social change…it must not be hung up on an *a priori* respect for principles…[t]his is the *principle of the generalised relativity of all values."* François Ewald, 'A Concept of Social Law' in Gunther Teubner (ed), *Dilemmas of Law in the Welfare State* (De Gruyter 1985) 66 (emphasis original).

[431] See discussion of in Chapter 2 at 2.2 and 4.3.1, above.

[432] *HM Advocate v Cox* 1962 JC 27.

[433] As detailed in Chapter 3 at 3.3.

[434] *Cox* 29 (Lord Hunter).

group".[435] Sexual behaviour toward boys, while now subject to greater regulation by the criminal law, was nonetheless not equivalent to that of sexual behaviour toward females.

This is not a matter of more or less substantive protection for females or males, but a qualitative difference in the nature and the object of the protection in the criminal law, which was predicate upon different understandings of the male and female child. The characteristics of this difference are threaded throughout the policy and decisions of Scots law during the mid-to-late twentieth century. As stated in evidence to Wolfenden, the Lord Advocate had, generally, pursued a prosecutorial policy that would prevent the debauchery of the young. In practice, this meant that all charges involving indecency against boys would be referred to the Lord Advocate's Department in order to determine the appropriate court proceedings.[436] If one of the parties was under the age of 16, it was typically the case that the charge would be made only against the elder party. By the nineteen-sixties, the age limit was increased to 21,[437] effectively mirroring the legislative position reached in England. This upper age range differed from the comparable age of consent of 16 for females.

This scope of protection reflected the characteristics and traits of the gendered male child that the law sought to protect within the criminal law. These traits were closely aligned with the idealised masculine citizen envisaged by state bodies in the period. In her study of reform ideals in postwar institutions for delinquents, Abigail Wills illustrates that reform practice in the period served to inculcate an ideology of masculinity that would ensure that young men and boys displayed character and behavioural traits that were suitable for their performance as male citizens in heterosexual marriages and families in the future.[438] This ideal of matrimonial masculinity was premised on normative heterosexuality, self-discipline, and strength of character.[439] Homosexuality was therefore an inverse to the ideal of masculinity in the period.[440] Sexual behaviour between men opposed the normative heterosexuality that was

[435] ibid 30.

[436] Roger Davidson and Gayle Davis, *The Sexual Sate: Sexuality and Scottish Governance, 1950-80* (Edinburgh University Press 2012) 55.

[437] ibid 74.

[438] Abigail Wills, 'Delinquency, Masculinity and Citizenship in England 1950–1970' (2005) 187 Past & Present 157, 159.

[439] ibid 162.

[440] ibid. See also: Lynne Segal, *Slow Motion: Changing Masculinities, Changing Men* (Palgrave Macmillan 2007) ch 1.

expected of young men in order that they could function as a constituent part of the heterosexual family by eliding the distinction between essential masculine and feminine sexual traits.

It is possible to interpret the masculine ideology detected by Wills in relation to offenders and the construction of male children as victims in the criminal law. The lack of negative response by the complainers in *Young* was therefore no inhibition to prosecution because it nonetheless did not evidence a positive inclination toward the conduct and it was an exemplification both of their lack of homosexual interest in the appellant and their strength of character and physical rectitude. In being unaffected by, and capable of, resisting homosexual advances they simultaneously exemplified heterosexual masculinity and justified intervention by the criminal law to protect it from perversion.

This reading also offers insights into the higher age of consent for boys and young men. Unlike sexual behaviour of adult men toward female children, homosexual behaviour toward male children was an inversion of the gendered order of sexuality envisaged by postwar policy ideals. While young women were protected, the aim of that protection was the eventual entry of women into healthy, productive, and heterosexual marital relationships with men. Early sexual contact between female children and adult men was therefore a deviation within an essentially heterosexual relationship model. Male children, however, were not expected to have sexual interactions with other males at all. The greater age of protection afforded to male children reflected the heightened danger that homosexual behaviour posed to young men. Conduct between older men and young men threatened to subvert masculinity and render it feminine, preventing a male child's eventual entry into a heterosexual family as an unfeminized and self-disciplined man.

4.3.4. Scots Law and Homosexual Wrongs in the Later-Twentieth Century

The construction of male children, and the sexual wrongs that they were protected against, that had been articulated after Wolfenden continued into the late twentieth century, notwithstanding reforms to the regulation of homosexuality and the rise of homosexual rights campaigns. Homosexual rights groups formed and gained prominence in the decades after Wolfenden and, in Scotland, activists communicated with the Scottish political and legal administration in order to advocate for the decriminalisation of consensual homosexual activity, through legislation

rather than prosecutorial policy, and lower the age of consent in relation to it.[441] In the early nineteen-seventies, the Government introduced a Sexual Offences Act in relation to Scotland for the first time,[442] but despite activism for its inclusion, the Bill contained no amendments to the law governing homosexuality. The continued reluctance for change was attributed to the need to protect children. The Lord Advocate, Norman Wylie, maintained that the prosecutorial policy adopted would ensure that homosexual activity was not prosecuted except when there was evidence of "debauchery of the young";[443] the justification for this being a reluctance to "clog the legal machine" with the unnecessary prosecution of homosexuals,[444] rather than any tolerance toward the behaviour. By the late nineteen-seventies, the Scottish Human Rights Group petitioned the European Court of Human Rights arguing, *inter alia*, that the Lord Advocate's prosecutorial policy and the criminal law regarding homosexual acts in Scotland was contrary to the European Convention of Human Rights.[445] In light of the legal challenge, its cost implications, and potential to succeed,[446] the central government were persuaded of the need to undertake legal change. The Criminal Justice (Scotland) Act 1980 decriminalised sexual acts between consenting male homosexuals in private over the age of 21.[447]

However, the 1980 Act did not beacon an entirely new approach to the protection of male children. Prosecutions in the last two decades of the century indicate that the protection of boys and young men continued to be premised upon the protection of the idealised, masculine, and heterosexual, child from the specific threat posed by homosexual behaviour. This operated to include a wide range of behaviour within criminal law's prohibition; but also, to exclude boys and young men who did not display the necessary traits that warranted protection.

In 1986, William Hay was charged with breach of the peace at common law. He had approached two young men, aged 14 and 16 respectively, on separate occasions, in separate

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[441] For an overview of campaign efforts for homosexual law reform, see, Davidson and Davis (2012) (n 418) ch 4.

[442] Sexual Offences (Scotland) HL Bill (1974-75) 161.

[443] Davidson (2019) (n 405) 80.

[444] ibid.

[445] ibid 84.

[446] ibid.

[447] Criminal Justice (Scotland) Act 1980 c62 s80.

towns, and in separate parks.[448] On approach, Hay asked the first complainer if he "wanted sex?" and, upon being told no, asked whether the complainer "was wanting [sex] for money?".[449] In another incident, Hay embraced the second complainer from behind without exchanging words.[450] Unlike *Young*, the issue on appeal was not whether there was actual or potential disturbance to the lieges, which was uncontended in the case. Hay denied that he had conducted himself as alleged and with the only witnesses to each incident being Hay himself and the individual complainer concerned, the question was whether it was possible to mutually corroborate the complainers' accounts using the *Moorov* doctrine.[451] Upholding the convictions, the High Court decided that the interrelation of time, place, and circumstance necessary for the doctrine was present. The key dissimilarities between the two incidents was that one involved physical but non-verbal conduct and the other non-physical but verbal conduct. But, there was a common connection because Hay's intention had been the same: "to make homosexual advances on youths".[452] The appellate bench therefore agreed with the findings of the court of first instance that one charge related to a "lewd homosexual embrace" and the second an "explicit homosexual advance". Although the two charges were not "precisely the same" they were both a version of "accosting of a young male person…in one way or another".[453]

It is significant that Hay's conduct toward the complainers was found to have shared an explicitly "homosexual" motive. Hay's sexuality was the starting point of the court's reasoning. The assessment by the bench was not, therefore, an exposition of whether there was the same underlying and nefarious sexual motive in each instance; but whether Hay's behaviour towards the complainer could reasonably be said to display homosexual traits. The technical differences between each incident were far outweighed by the underlying context of Hay's homosexuality and its assumed characteristics.[454] This can be compared with the more restrictive approach to mutual corroboration in contemporaneous cases of breach of the peace involving alleged sexual

[448] *Hay v Wither* 1988 JC 94.

[449] ibid.

[450] ibid.

[451] Raitt *The Use of "Similar Facts* (2003) (n 287)

[452] *Hay* 94 (LJ-C Ross).

[453] ibid.

[454] ibid.

behaviour towards young women and girls. In *Farrell v Normand,*[455] the appellant was charged with two counts of breach of the peace after he had requested to "feel" a ten-year old girl in exchange for money and, the next day in the company of her friends, beckoned her over and asked if she would "like a drink?". These incidents did not display a unified sexual motive and could not be mutually corroborated. It is notable that the court did not identify any underlying "heterosexual" intent of the appellant, and his first remark to the complainer – which was found to be both distressing and sexual – did not form part of the wider context of the second incident a day later. This latter incident was not found to be sufficiently distressing to amount to breach of the peace at all.

Hay, like *Young* decades earlier, is also indicative of the attributes of the male child protected by the criminal law, and the underlying objectives of that protection. In both *Hay* and *Young,* the complainers were found to have either actively resisted the alleged homosexual behaviour undertaken toward them, or been entirely unaffected and therefore resistant to it. When read in context, these acts of resistance, for example pushing the appellant away,[456] or indifference,[457] in the case reports operate to emphasise that the complainers were unyielding to homosexuality. Their implicit heterosexuality frames their vulnerability to the emasculating and dysgenic homosexual behaviour against them.

The centrality of heterosexual and masculine ideals in the protection of male children is also apparent in cases where young men and boys did not display the necessary resistance or indifference towards homosexuality. The so-called "rent-boy scandal" of the early nineteen-nineties is one particularly useful and well-reported example of the divergent construction, and protection, of young men and boys who appeared to identify as homosexuals. In what was named "Operation Planet" by the Police, several young men between the ages of 15 and 18 were found living in a flat in Edinburgh and routinely performing sexual acts with older men for money under the direction of another male.[458] Some of the young men had been absconding from residential care facilities and all were routinely provided drugs as part of, or in preparation

[455] *Farrell v Normand* 1993 SLT 793

[456] *Hay* 94 (LJ-C Ross).

[457] *Young* 70 (LJ-G Clyde).

[458] A summary of the facts can be found in WA Nimmo Smith QC and JD Friel, 'Report on an Inquiry into an Allegation of Conspiracy to Pervert the Course of Justice in Scotland' (1993) ch 16. In that report, all of the young men were stated to be over the age of 16, but subsequent review of the witness testimony has confirmed their actual age range, see: 'Shiny Bob: The Devil's Advocate' pt 3 <https://www.bbc.co.uk/sounds/brand/p0fr5qvc> accessed 11 May 2023.

for, the sexual encounters with older men.[459] The discovery led to the prosecution of ten men on 54 charges, including sodomy and shameless indecency.[460] The Crown accepted pleas of not guilty in respect of a substantial majority of the charges, and most of the men charged were not subject to criminal sanction. The case gained attention following allegations of judicial corruption,[461] and prompted an extraordinary report by Lord Nimmo-Smith as well as a revision by the Lord Advocate of the prosecutorial policy related to homosexual acts.

Most of the controversy surrounding Operation Planet centred upon the possibility that some members of the judiciary were participating in clandestine homosexual behaviour, and consequently at risk of blackmail, rather than the possible injustice of the failed prosecutions for the young male complainers.[462] Both the focus and language of the Nimmo-Smith Report, and press coverage related to Operation Planet, indicate that the complainers were assumed to be willing participants in the sexual behaviour they experienced. Rather than "innocent adolescents" or subjects of lewd homosexual advances[463] who were vulnerable to the behaviour of men substantially older than them, the Nimmo-Smith Report consistently refers to them as habitual, "teenage rent boys".[464] This term ascribed them the disparaging status of prostitutes who were voluntarily providing sexual services in exchange for money in what was described as the "rent boy scene" with other "male homosexuals".[465] They were, themselves, homosexuals and their apparent participation in homosexual behaviour framed the interpretation of the behaviour undertaken against them by other adult males.

This point is furthered by the revision to the prosecutorial policy undertaken by the Lord Advocate's Department following Operation Planet. In its final form in 1991, it created two separate ages of consent. For males between 18 and 21 participating in homosexual activity with males above the age of 21, it advised there would be no public interest in prosecution

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[459] ibid 'Shiny Bob'.

[460] *HM Advocate v Neil Duncan and Otrs* as reported in Nimmo Smith Report (1993) (n 431) ch 3.

[461] The allegation that some judges were closeted homosexuals and had a vested interest in the case failing has largely been disproven, see the recent investigation 'Disclosure: Beneath the Magic Circle Affair' (31 January 2023) <https://www.bbc.co.uk/programmes/m001htbp> accessed 4 February 2023.

[462] The Nimmo-Smith Report was explicitly an investigation into a conspiracy to pervert the course of justice by members of the legal profession or judiciary.

[463] *Cf* the language of *Young* (1959) and *Hay* (1988) discussed above pts 4.3.3-4.3.4.

[464] Nimmo Smith Report (1993) para 8.2.

[465] ibid 16.5.

unless there were circumstances "pointing to exploitation, corruption, or breach of trust".[466] For those between 16 and 18 participating in homosexual activity with males above the age of 18,[467] there would be no public interest in prosecution if the acts were private and consensual. But, in both cases, if,

> "it appears that one of the parties has engaged in homosexual acts ***before*** the occasion under consideration and has acted as a prostitute, there is little justification in pursuing the client of such an individual while ignoring his activity as a prostitute."[468]

The revised prosecutorial policy points to a *de facto* reduction in the age of consent in relation to male homosexual activity. Nonetheless, the age of consent for males participating in sexual activity with other males remained higher than that of females. The policy caveat for those young men who had participated in prior homosexual behaviour and prostitution implied that young men, like those in Operation Planet, who had previously had sexual contact with males and exchanged sexual services for money would not benefit from the same scope of protection as other males. Their known sexuality did not cast them as vulnerable and easily led astray by money, as was the case in discussions related to amateur prostitutes;[469] but sexually experienced individuals exercising free and deliberate choice.

The events that followed Operation Planet serve to illustrate that the male child who displayed homosexual behaviour, particularly in exchange for money, was neither understood in the same way as females nor heterosexual males in the same age range. The criminal law related to sexual behaviour between adult males and those below the age of 21 had unfolded on the basis that the core wrongfulness of the behaviour was the damage that it threatened to the heterosexual and masculine vigour of male youth. When the male youth's heterosexuality was inverted, the scope and nature of protection offered by the criminal law was less certain; and the principled basis for that protection less obvious.

The preceding sections of this chapter have argued that the development, objectives, and scope of protection from sexual wrongs for male and female children diverged in the

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[466] Crown Office Circular No. 2025/1 20 December 1991, pt 1.

[467] ibid pt 2.

[468] ibid pt 3, emphasis original.

[469] Further discussion of amateur prostitution is contained in pt 4.2 and Chapter 1, above.

postwar decades. Although different, the protection afforded to each gender was moulded by and aligned to the ideological and institutional primacy of the heterosexual family structure in postwar state strategies, and the role and status of each respective gender in that structure. The next and final section of this chapter explores the reform to the law of incest in Scotland in the nineteen-eighties. It argues that this change arose out of a new official focus on the relationships within families, and new kinds of harm that could be experienced by children.

4.4. Incest, the Family, and Child Sexual Abuse

Throughout the interwar and postwar period, the crime of incest had been relied upon to prosecute sexual behaviour by adults against children.[470] However, the rise of knowledge about family violence and new strategies of the state to regulate it led to a critical re-evaluation of the crime and reform in the mid-nineteen-eighties.

Despite its classification as a child sexual offence from the nineteen twenties,[471] the prohibition on incest applied to a much wider range of relationships than parents and children. The Incest Act of 1567[472] detailed the offence by replicating several versus of Leviticus, Chapter 18, as stated in the 1562 print of the Geneva Bible. By the nineteen-seventies, as interpreted by the courts and limited by legislation governing marriage, [473] incest criminalised sexual penetration[474] between members of the opposite gender who were related to them in forbidden degrees, either by consanguinity[475] or affinity.[476] This prohibition applied equally to adults or children. For consanguinity, it applied to relations by full or half-blood; and for relations by affinity, it applied even after the dissolution of the marriage that had created the relationship.[477] The criminal offence was therefore wide ranging, it potentially criminalised

[470] See, for example, the cases in Chapter 3 pt 3.3.

[471] See Chapter 2, above.

[472] Incest Act 1567 cap 14.

[473] *HM Advocate v Aikman and Martin* 1917 JC 8; and Marriage (Scotland) Act 1977 c15 s2.

[474] The definition of sexual intercourse had the same meaning of rape: penetration of the women's vagina with a penis, see Scottish Law Commission, 'Memorandum on the Law of Incest in Scotland (No. 44)' (1980) para 2.1.

[475] For example, male persons having intercourse those in relation to them by blood, such as their mother, daughter, grandmother, granddaughter, sister, aunt, niece.

[476] For example, male persons having intercourse with those in a relation to them by marriage, such as mother-in -law, daughter-in-law, grandmother-in-law, step-mother, step-daughter, step-grandmother.

[477] Scottish Law Commission, 'Memorandum on the Law of Incest in Scotland (No. 44)' (n 474) para 2.8.

both parties to the intercourse,[478] and could only be tried in the High Court, where it could result in a life sentence.[479]

But as the sixteenth century legislative crime of incest was applied in mid-twentieth century practice, it came under increasing scrutiny. Despite the apparent breadth of the offence, judicial interpretation nonetheless excluded a number of legal and increasingly commonplace family relationships from the scope of the prohibition. From the nineteen-fifties, reform to the law of marriage prohibited marriage between adopted or illegitimate children and their parents,[480] which reflected the improved social and legal recognition of such children as equal in status within the families to those children born of, or into, marriages.[481] But this same recognition was not reflected in the criminal law of incest. In the case of *R.M.,*[482] which was decided at the end of the nineteen-sixties, the appellant was charged with incestuous intercourse with his 14-year old adopted daughter. The complainer, born out of wedlock, was also the illegitimate daughter of her mother. On the basis of this, the Crown argued that the relation fell within the forbidden degrees outlined in the 1567 Act because these were tied to the forbidden degrees of marriage in the civil law. As such, because it was invalid for the appellant to marry his adopted daughter or, alternatively, the illegitimate daughter of his spouse, the law of incest would equally prohibit sexual intercourse.[483] However, this argument was repelled and the court indicated an unwillingness to amend the 1567 Act in light of the changing law of marriage when there had been no explicit reference to the crime of incest within the reformed legislation.

The reluctance of the court in *R.M.* to interpret incest in a more inclusive manner was accompanied by a call from members of the Scottish judiciary for both clarity and legislative reform. In his decision, Lord Justice-Clerk Grant noted that "[c]lear language is required for the creation of a criminal offence, particularly when it can carry a sentence of life imprisonment" [484] and further advised that if the legislature wished to amend the law of incest

[478] Albeit this was not typically the case when one of the parties to the incestuous act fell below the age of 16, see Gordon (1978) (n 371) paras 41–07.

[479] ibid.

[480] Adoption Act 1958 c5 s13(3) amended by 1977 Act s2.

[481] 1977 Act s2.

[482] *R.M. v HM Advocate* 1969 JC 52.

[483] ibid 54 (LJ-C Grant).

[484] ibid.

in order to remedy the exclusion of adopted or illegitimate children, it could do so.[485] The clarity of the prohibition based on Leviticus had been in doubt amongst legal scholars since the early twentieth century,[486] and it was commented in *R.M.* that a copy of the text in the Geneva Bible upon which the offence was based had been requested from the National Library, "an advantage which might not be shared by all persons who were in doubt as to whether they were within the prohibited degrees or not."[487] In 1976, the Sexual Offences (Scotland) Act[488] had excluded any reference to the law of incest. However, a year after its enactment, new legislation on marriage passed through Parliament and prompted calls for reform of the criminal law in order to fix the perceived uncertainty and inadequacy of the definition of incest in the criminal law.[489] As the marriage reform passed through Westminster, the Secretary of State for Scotland made a reference to the Scottish Law Commission (SLC) requesting it review the law of incest and make recommendations for legislative reform.

Reform to the law of incest was therefore framed as a matter of improving legal clarity and assessing whether the forbidden degrees of incest adequately coincided with the forbidden degrees of marriage. However, the subsequent publications of the SLC, investigating whether and to what extent the offence of incest should be retained in the criminal law, indicate that the primary problem that the criminal law sought to address was sexual conduct by adults upon children within family homes.

The SLC recommended that the crime of incest be retained as a specific offence that would be integrated within the 1976 Act alongside the other sexual offences therein.[490] It also proposed two additional sexual offences be added to the Act, applicable to adult step-parents[491] and adults who were members of the same household and in a position of trust and authority over a child.[492]

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[485] ibid 56 (LJ-C Grant).

[486] Several of these early criticisms are listed in Scottish Law Commission, 'The Law of Incest in Scotland (No 69)' (1982) ch 2. Hereinafter the "Final Report 1982".

[487] *R.M* 55 (LJ-C Grant).

[488] Sexual Offences (Scotland) Act 1976 c67.

[489] See, for example, the discussion in HL Deb 15 January 1977 vol 379, cols 363-399.

[490] Final Report 1982 para 5.5.

[491] ibid para 4.24.

[492] ibid para 4.23.

The proposals intended to compensate for the possible deficits in the law related to sexual offences against children and, secondly, to account for the distinct wrongfulness of sexual behaviour between adults and children within the same household. In its 1980 Memorandum, the SLC noted that incidents of incest were extremely difficult to estimate,[493] but that research indicated the behaviour was not related to "poverty or inadequate housing conditions or with conditions of remoteness or social disorganisation"[494] and instead a majority of the reported cases appeared to occur within the middle classes.[495] A common condition giving rise to incestuous relationships was the "emotional subjection of the daughter to the authority of the father", which was typically not defined by violence and would place the subject of incest in a completely different "set of conditions regarding defence, tolerance, and participation from the child or maturing girl who meets a completely unrelated adult aggressor" or a transient or unknown sexual partner.[496] It was therefore difficult to talk of the daughter's consent in these circumstances.[497]

Although it was difficult to know how common the behaviour was, it was nonetheless the case that it resulted in a range of significant harms. The 1980 Memorandum drew together psychiatric, psychological, and medical research and reported that intercourse between males and females of certain relations could result in physical and mental abnormalities in children born as a result of the relationship.[498] This alone, however, was not a chief justification, and the Final Report in 1982 noted the genetic evidence itself would not be the basis upon which the offences could be founded,[499] and the proposed offences should apply to relations where little or no genetic risk could be found. Instead, incestuous relations primarily posed psychological harm to those involved, particularly when one of the parties was a child or "otherwise in a position of dependence or subject to the authority of the other party"[500] and it undermined the trust and solidarity of the family as a whole.[501] For this reason, while the prohibition on incest

[493] ibid para 3.7.

[494] ibid.

[495] Scottish Law Commission, 'Memorandum on the Law of Incest in Scotland' (1980) para 1.7. Hereinafter the "Memorandum 1980"

[496] ibid para 4.2.

[497] ibid.

[498] Final Report 1982 para 3.1.

[499] ibid 3.20.

[500] ibid para 3.10

[501] Final Report para 3.10.

could no longer be a matter of religion, as Scotland was now a nation with a variety of religious beliefs or none at all, the present ends of society ought to be the "strengthening of the fabric of the family, and the protection of its members, *especially* children from molestation".[502]

Reporting on the psychological harms presented by incestuous relations, the 1980 Memorandum drew heavily on an "abundant" literature published about father-daughter incest, which was the focus of most of the research and figured most prominently in criminal statistics.[503] The harms of incest were wider than simply those to the actual participants, but also applied to the other members of the family in the immediate and long term.[504] Incest within families was therefore associated with "unsettled ways of life", such as violence, drinking, and drug taking on the part of the wife and the negative influence of the husband on the shaping of marriage and the family.[505] In cases where mothers were made aware of incest, their "collusion in incest behaviour" indicated a failure in their role to protect and socialise the child.[506] Daughters who were subject to incest evidenced both "disturbed personality development", in the form of truancy, running away from home, or "undesirable sexual relations" as well as behavioural problems such as anxiety, claustrophobia, and suicidal tendencies.[507] Moreover, incest was both emotional and stressful for the child and early experience of "sensual stimulation" meant that there was a premature development of sexuality without an "adequate means of coping with the sexual tension"; the result was that "[o]nce the incest barrier is broken, it is easier to advance to other forms of deviant behaviour…the adult female exhibits a marked inability to protect herself from self-destructive behaviour and relationships".[508] This included evidence from one study that incest could lead to prostitution but also an "aversion to sexual relations" within marriage, and depressive reactions.[509]

From this understanding of the harms presented by incest, the SLC recommended that all three of its proposed offences should be limited to sexual intercourse (the penetration of a vagina by a penis), and therefore replicate the law of rape at the time, between individuals

[502] ibid para 6.8, emphasis added.

[503] Memorandum 1980 para 4.1.

[504] Final Report 1982 para 3.10.

[505] Memorandum 1980 para 4.4.

[506] ibid 4.8.

[507] ibid 4.4.

[508] ibid 4.10

[509] ibid.

within the forbidden degrees. However, the structure of the proposed offences and their underlying justification differed according to the nature of the relationships within the forbidden degrees. The complete offence of incest would apply to all those who were related by half or full blood and those related by adoption. This would include aunts and uncles as well as illegitimate children.[510] The motivation behind the inclusion of these relations within the primary offence was the position of trust and dependency that children in these relationships would have on the adults. It was not uncommon, for example, for aunts and uncles to act as parents towards children in Scotland[511] and the status of adopted children meant that the relationship between them and adoptive parents was typically the same as that between a parent and a natural child.[512] In these degrees, the underlying issue was not the genetic risk that occurred from intercourse; but the violation of the relationship of trust and dependency between an adult and child in the family that such intercourse would exemplify.

For other relationships, two new offences could nonetheless be relied upon. The 1982 Report noted that there was neither any genetic argument nor was it common for in-laws to form part of the typical household in Scotland.[513] However, there remained the need to protect "young children from sexual abuse by adult members of the family".[514] As such, it was necessary to create adequate safeguards for the continuing protection of young children from sexual molestation.[515] The SLC proposed that step-children, related to adults by marriage only, and children who were in a position of dependency and trust to other adults in a household were granted specific protection in the criminal law. These two separate offences were required because, while the complete offence of incest was, and should remain, associated with a more limited range of relationships; there was no comparable criminal offences that would recognise the seriousness of intercourse with children by adults within a family relationship, nor the particular harm that it could cause to the child and the family relation as a whole.[516] The creation of two new offences would therefore recognise the nature of the offending and strengthen the criminal law as a whole. In particular, there was no comparable offences that would protect

[510] Final Report 1982 para 4.10.

[511] ibid 4.14.

[512] ibid.

[513] ibid 4.19.

[514] ibid 4.20.

[515] ibid.

[516] ibid 4.23(a).

male children over the age of 14 from sexual intercourse with adult step-parents or those forming relations of authority to them in the same household.[517] For female children below the age of 13, while a sentence of life imprisonment might apply,[518] for those between the age of 13 and 16 the punishment would be only two years, which the SLC considered inadequate.[519]

The SLC recommended that it be an offence for a step-parent to have sexual intercourse with his or her present or former step-child.[520] It was originally proposed that this should apply only until the age of 16,[521] principally because this was the age at which most children in Scotland could marry.[522] However, it was noted in the 1982 Report that "beyond 16 years…few children achieve true independence from parental control or are capable of making a mature reasoned decision in respect of their parents at that age".[523] In the Incest and Related Offences (Scotland) Act 1986,[524] which substantially replicated the SLC recommendations, the final offence applied to any step-child under the age of 21 or, if the child was older and no longer living in the same household, to step-children who had previously lived in the same household at any point when they were under the age of 18 and had been treated as a child of the accused's family.[525] This essentially created an equivalence in the law between the natural child of an accused and a step-child brought up as part of the accused's household until the age of 18. The implication of the equivalence was that children and their families who were related only by marriage were regarded as equally susceptible to the harmful effects of sexual intercourse between adult relations and children and therefore equally worthy of protection in the criminal law. It further reflected the SLC's statement that children, including step-children, living in a household under parental control were not capable of achieving independence until well beyond the age of 16. The age limit of 21 was legal recognition of the dependency, and subsequent vulnerability, of younger people within a family relationship above the traditional age of sexual consent.

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[517] ibid.

[518] ibid.

[519] ibid 4.25.

[520] ibid 4.23(a).

[521] ibid 4.24(b).

[522] ibid.

[523] ibid.

[524] Incest and Related Offences (Scotland) Act 1986 c36.

[525] A valid marriage between the accused and the step-child was made a defence, 1986 Act s2B.

The final offence recommended by the SLC, and subsequently enacted in the 1986 Act, recognised that children could have relationships of trust and dependency with a wider range of adults who form part of their household than would be captured by the offence of incest. It was therefore an offence for an adult to have sexual intercourse with a child below the age of 16 when that adult was a member of the same household as the child and in a position of trust or authority in relation to the child.[526] This age limit was selected because beyond the age of 16 there would be no civil prohibition on the child marrying an adult in a position of trust or authority to them,[527] but the offence as a whole intended to prohibit adults, for example, "friends of the child's mother" who lived in the same household as them or relatives by marriage, who were not step-parents, from engaging in sexual intercourse with children.[528]

All three offences in the 1986 Act were punishable with life imprisonment.[529] The reform to the definition of incest and the addition of the two separate offences meant that both male and female children would be protected from heterosexual intercourse with some family members, and consent was not a feature of the offence definitions. The absence of consent within the offences aimed to recognise that children in a position of dependency, submission, or simply youth[530] in a family were likely to become acquiescent to sexual behaviour, particularly of adults, because of the "various methods and devices which apply only in a family situation".[531] To establish consent would therefore be practically difficult. This differed from sexual behaviour with male or female children when there was no family relationship, because the assumed dependence or authority of a family relation was not present.[532]

However, consent was not only difficult to establish in relation to sexual intercourse between adults and children in families, but also irrelevant. The wrongfulness of the behaviour was connected to the inversion of the family relationship itself, rather than the lack of consent on the part of the victim. On the one hand, sexual intercourse between family members could result in physical and psychological harm; but it also threatened the trust and stability of the

[526] 1986 Act s2C.

[527] Final Report 1982 para 4.31.

[528] ibid.

[529] 1986 Act s2D(5).

[530] Final Report 1982 para 3.13.

[531] ibid 3.12.

[532] ibid.

family structure as a whole. This was particularly the case in relation to children. The family was meant to be a place of safety, security, and protection for children. Family relationships inherently involved a level of trust and dependency between adults in authority and younger members. The child protected by the 1986 Act was therefore vulnerable within the family *because* of the nature of the family and the relative status of children within it.

This differed substantially from previous understandings of sexual offences against children throughout the twentieth century. As the previous chapters and sections of this work have evidenced, from the interwar period until the mid-twentieth century, adult sexual behaviour with children was primarily understood as a wider symptom of working class habits and conditions and the "dangerous strangers" who threatened to lead unsupervised children away and commit offences upon them. The publications of the SLC that led to the 1986 Act, however, explicitly ruled out that sexual intercourse within families was related to class or material conditions. Incest and its related offences could occur in all families, irrespective of how they were constituted – whether with step-parents, uncles and aunts, or even unmarried partners of parents – because families were, by definition, places of trust and dependency for children. The criminal law therefore operated to protect all children within the family from their inherent vulnerability.

The sexual harms that the offences in the 1986 Act protected against were also notably different from the understandings that had developed throughout the previous decades. Sexual intercourse between dependent children and adults in the family could cause physical injury,[533] but the long-term and predominant effects were psychological. It could undermine the victim's ability to self-regulate and lead to self-destructive behaviours as well as a lack of tenacity and fulfilment later in life, through anxiety or depression. Harms were no longer, for example, a matter of causing disease or "over-sexed" behaviour that could undermine the ability of female children to enter into healthy and productive marriages. To the extent that intercourse between children and adult family members had consequences for the later sexual behaviour of the victim, whether it was prostitution or an apathy towards sex with partners in the future, these were understood to be symptomatic of a range of wider self-destructive behaviour considered alongside mental illnesses. Sexual harms were no longer an inhibition to healthy reproduction

[533] The SLC documented that sexual intercourse could cause gross physical injury, ibid 3.10.

and marriage, but a threat to the victim's long-term wellbeing, happiness, self-fulfilment, and mental tenacity.

One consistency between the 1986 Act and past regulation of sexual offences against children, however, was the continued construction of the female child as the primary object of protection. But this did not operate to diminish the possibility of harms to male children as significantly as it had in the past. The final offences applied to male and female family members equally and in its 1982 Report, the SLC noted that most of the research on harms related to incest focussed on father-daughter incest, but it remained the case that the harms to a victim and the wider family could arise in relation to male children.[534] Furthermore, the SLC acknowledged that while the three offences it proposed were limited to acts of heterosexual intercourse, this was not intended to condone other forms of sexual misconduct, such as oral and anal penetration, "homosexual offences" or even more trivial but nonetheless harmful acts, such as exposure or indecent suggestions.[535] These offences fell outside of the scope of the SLC's inquiry, but its Final Report suggested that the other offences contained in the Sexual Offences (Scotland) Act 1976 may be considered for reform in the future.[536] The 1986 Act, then, was presented as a limited reform to the criminal law regulating sexual offending against children, suitable to address a specific problem for the criminal law, that could well be supported by wider reform.

Reform to the law of incest from the nineteen-eighties marked a change in the regulation of sexual offences against children within the family home. Children, both male and female, in various family make-ups were recognised to be dependent upon, and trusting of, adult family members who had authority over them. Trust and dependency were broadly understood to be beneficial and necessary for families. And as a whole, families were expected to provide a safe and secure social unit for dependent children to be cared for. However, these same features of the family made children vulnerable to adults who could exploit their position of trust and authority. Sexual intercourse between adults and children within families therefore posed significant harm to the individual child; but it was also an affront to the institution of the family

[534] ibid 2.3.

[535] ibid 4.3.

[536] ibid 4.2.

itself because it undermined the ideals of care, safety, and security that a family relationship ought to guarantee.

The following, and final, section of this chapter situates the 1986 Act offences within the wider context of official knowledge about the problem of child sexual abuse and changing policy approaches towards the family. It argues that knowledge about, and official interest in, families and the harms that children could experience within them developed in the mid-to-late twentieth century. By the nineteen-eighties, official knowledge recognised child sexual abuse within the family as a common and widespread form of harm to children. However, the interest in, and management of child sexual abuse, was also coincident with significant changes in state policy that sought to improve family responsibilities.

4.4.1. The Rise of the Problem of Child Sexual Abuse

The problem of child abuse emerged out of new understandings about the particular harms that children faced from members of their family and official action taken to prevent it. This was initially formed out of concerns about violence of parents towards their children. From the nineteen-forties, advances in forensic medicine, x-rays, and the international publication of research findings led to new understandings of the possible injuries that children could experience at the hands of their parents.[537] What came to be known as "battered-baby syndrome" was characterised by physical violence against children at the hands of their parents. It was presented as a discovery, in that the advances in diagnostic techniques revealed many children's injuries, that would otherwise have been misdiagnosed, were in fact the result of deliberate violence.[538] By the nineteen-sixties research about battered children had been adopted by British medical professionals and the National Society for the Prevention of Cruelty to Children (NSPCC), which established a Battered Child Research Unit in 1966 that sought to understand the problem and propose policy solutions in Britain.[539] By the early nineteen-seventies, parliamentary debates on "battered babies" drew attention to the problem as outlined in NSPCC research, noting that it was "widespread" and that its occurrence was not related to "employment, housing, social circumstances, and the level of intelligence of educational

[537] Jennifer Crane, '"The Bones Tell a Story the Child Is Too Young or Frightened to Tell": The Battered Child Syndrome in Post-War Britain and America' (2015) 28 Social History of Medicine 767.

[538] ibid 769.

[539] The NSPCC has been characterised as an essential means of communicating research about battered baby syndrome from America into Britain, see ibid 783.

standards of families".[540] In 1973, memorandums about non-accidental injury and how to best identify and manage it were circulated within government departments.[541]

Government action to regulate non-accidental injury to children at the hands of family members later coalesced with official investigations into the problem of battered wives and the general problem of "child abuse". The identification of the need to address violence against women and children in the family home has been attributed to the publicity of campaigns by the growing Women's Liberation Movement across Britain,[542] which had drawn attention to "wife abuse" and established places of refuge across the country for victims of violence in their own homes. In Scotland, feminist campaign organisations created Women's Aid and, in the latter part of the nineteen-seventies, Rape Crisis Centres in communication with English organisations.[543] This raised the public profile of violence and sexual wrongdoing within family homes and encouraged official responses to it through highly effective media and public engagement. The work of feminist campaigns during the period has been shown to have prompted debates about the impact of domestic violence on women and the family.[544] In 1975, Parliament voted to establish a Select Committee on Violence in Marriage and a second Select Committee on Violence in the Family followed in 1976.[545] The latter published a report on Violence to Children, where it noted that the issues of battered wives had many features in common with child abuse and that improved relations within the family, including the reduction of violence and stress between members, would be of benefit to society as a whole.[546]

From the nineteen-eighties, the official understanding of the problems of violence against women and children in families was later expanded to include sexual violence. In Scotland, Women's Liberation activists and Rape Crisis Centres campaigned for reform to

[540] HC Deb 22 December 1972 vol 848, cols 1800-1815.

[541] HC Deb 6 November 1973 vol 863, col 155W.

[542] The Select Committee on Violence in Marriage, for example, noted that there had been "considerable publicity about battered wives. Voluntary hostels of refuge have been established and questions have been tabled in parliament." Select Committee on Violence in Marriage, 'Report from Select Committee vol 2' (HC 1975-76 543-II) 36. See also Ian Hacking, 'The Making and Molding of Child Abuse' 17 Critical Inquiry 253.

[543] Sarah Brown, *The Women's Liberation Movement in Scotland* (Manchester University Press 2014) 96.

[544] ibid.

[545] Sarah McCabe, 'Unfinished Business: The Reports of the Select Committee on Violence in Marriage and Violence in the Family' (1977) 17 British Journal of Criminology 280.

[546] Select Committee on Violence in the Family, 'Violence to Children vol 1' (HC 1975-76 260) para 19.

marital rape laws throughout the decade.[547] In England and Wales, several reports related to sexual offences were published, including an investigation into the age of consent[548] and a report into sexual offences more broadly. These reports had noted the view of the SLC publications on the reform to the law of incest in Scotland, and the English reports endorsed the same view that the "primary aim of the law of incest is the protection of the young and vulnerable against exploitation in the family".[549] Sexual abuse within families was also a subject of official inquiries, which focussed increasing attention on the wider management of suspected cases of child sexual abuse by social services, the police, and other government agencies.[550] By 1987, the Report into Child Abuse in Cleveland,[551] documented that child abuse "had many forms" and included sexual abuse.[552] The most common form of child sexual abuse was that which took place in the family, and it involved the exploitation of the child by an adult, usually as a result of dependence, by involving children in sexual activities that they could not give informed consent to, did not fully comprehend, and which violated "social taboos or family roles".[553]

The SLC was therefore an official institutional means through which contemporary understandings of child abuse within the family and its harms could be collected and communicated with reference to the Scottish jurisdiction, specifically. The problem of incest that the 1986 Act sought to address was resultantly formed out of a wider official understanding of the nature and prevalence of child sexual abuse within families as a whole. Child sexual abuse was neither associated with class or material circumstances, nor any specific form of family structure. Instead, it was widespread, and it involved the exploitation of relationships of trust and dependency that formed an essential part of family life. But the regulation of child

[547] Brown (2014) (n 543) 106.

[548] See: Policy Advisory Committee on Sexual Offences 'Report on the Age of Consent in Relation to Sexual Offences' (cmnd 8216, 1981).

[549] Criminal Law Revision Committee 'Report on Sexual Offences' (cmnd 9213, 1985).

[550] In relation to Scotland, see: Secretary of State for Scotland, 'The Report of the Inquiry into the Removal of Children from Orkney' (1992).

[551] Established following allegations that a number of children had been incorrectly diagnosed as victims of sexual abuse and removed from their homes. See: Secretary of State for the Social Services 'Report of the Inquiry into Child Abuse in Cleveland' (cm 412, 1987) paras 1-4

[552] ibid.

[553] ibid.

sexual abuse in the criminal law was also critically linked to wider state interest in, and official action about, the regulation of families in the late-twentieth century.

In the later part of the twentieth century, families and the problems that arose within them, came to be studied and understood within government. The increase in official knowledge about child abuse and wife abuse, and its prevalence within families, was accompanied by official investigations that acknowledged that different forms of family structure, beyond the nuclear family, had emerged in the twentieth century.[554] This was in part attributable to divorce, contraception, and abortion reform in the period. [555] The number of marriages that led to divorce increased and, more generally, sex became separated from marriage. Intercourse no longer carried the same risks of pregnancy and, further, cohabitation between unmarried partners became more common prior to marriage or instead of it.[556] In short, the ideal family, which was principally matrimonial and heteronormative, that had formed the basis of much of the social provision in the decades immediately following 1945 was no longer the dominant family unit in British society. It was accompanied by an ever-common mix of different family structures that included re-married or unmarried partners in the care of children; lone-parents; or, as evident in the progress of the 1986 Act, adopted parents.

The status of women and children within families was also changing. The timings of women's entry into the labour market had "changed decisively" since 1939, and more women would continue to work, and contribute to the family income, after childbirth[557] and their participation in occupations was encouraged.[558] The relative length and characteristics of childhood had altered as well. Until the nineteen-seventies the average age of marriage steadily declined and the policy of full-employment pursued within the welfare state meant that many young people gained social and financial independence from their families in their teens or early twenties.[559] However, from the nineteen-seventies onwards, the rate of marriage declined

[554] See, for example: Department of Health and Social Security, 'Report of the Committee on One Parent Families vol 1' (cmnd 5629, 1974).

[555] Jane Lewis, *Should We Worry About Family Change?* (University of Toronto Press 2003) 96.

[556] ibid.

[557] 'Report of the Committee on One-Parent Families' (1974) para 2.5.

[558] ibid.

[559] Christian Bagge, '"Selling Youth in the Age of Affluence": Marketing to Youth in Britain since 1959' in Lawrence Black and Hugh Pemberton, *An Affluent Society? Britain's Post-War 'Golden Age' Revisited* (Routledge 2004) 165.

as the average age of marriage increased.[560] Young people in their teens and early twenties were more likely to continue living with their parents and would not achieve financial and material independence until later in life when compared to their counterparts in the nineteen-fifties and sixties.[561] By 1992, the Scottish Office noted that "children are affected by major demographic and social change"[562] and that as more children continued on in secondary education, and into higher education, they would be "dependent on their families for a longer period of time".[563]

The demographics of families in the later part of the twentieth century therefore changed. But, so too did the state aspirations for the family. Despite the shift away from the matrimonial, male-breadwinner format of the family as the main unit in society, the diverse family forms that had subsequently emerged were nonetheless considered by government policies to be the "continued foundation" for the "care and development of young people".[564] But the role of the family and its governance had altered during the twentieth century, and this has been attributed to a wider change in the approach taken by the British state to social provision from the nineteen-seventies. In her study of family change, Jane Lewis argues that successive administrations sought to reduce public spending in light of financial pressures following global, and domestic, economic change.[565] As the social provision that had grown in the decades after 1945 became more scarce, the family emerged as a crucial part of government strategy in order that it "could be counted upon to bear its responsibilities" in order to supplement, and supplant, social provision that was previously guaranteed by the state.[566] The traditional nuclear family, with a male breadwinner and dependent wife, in receipt of social provisions of the postwar welfare state could be "counted on" as the responsible family unit who would engage with state bureaucracy and correctly distribute social provision.[567] That social provision would be guaranteed by the state. But the economic changes from the nineteen-seventies meant that this same guarantee could not be met and it was no longer considered

[560] Todd and Young (2012) (n 335) 453.

[561] Shinobu Majima and Mike Savage, 'Contesting Affluence: An Introduction' (2008) 22 Contemporary British History 445.

[562] Scottish Office, 'Scotland's Children: Proposals for Child Care Policy and Law' (cm 2286, 1992) paras 1.2-2.5.

[563] ibid 1.8.

[564] ibid 1.10.

[565] Lewis (2003) (n 555) 96.

[566] ibid 102.

[567] ibid.

desirable by successive state administrations.[568] The nuclear family was accompanied in society by new kinds of family relation. Policy change in the period meant that it was increasingly the task of the diverse mix of individual family relations to bring about their own well-being in a manner that was coordinated by the central state; but not guaranteed by it as in the past through, for example, the state-provision of universal support that had epitomised the welfare-based policies from the nineteen-forties and fifties.[569]

Viewed in this light, the emergence of the problem of child sexual abuse and state strategies to manage it operated as a means of regulating families as well as protecting children within them. The 1986 Act offences constructed the child as vulnerable because of their relationship of trust and dependency within the family. But this vulnerability was also presented as an essential and important feature of family relations. Therefore, the sexual wrong of incest and its related offences was not simply the breach of trust and authority against the child; but the threat that it posed to the reliability of the family to make appropriate choices to govern and protect children. The offences were built upon, and projected, an understanding of the family as the main source of provision for children. It would be a matter of individuals in families to nurture and assist dependent children and the role of the 1986 Act was to coordinate that responsibility, first by constructing the child as dependent upon family members and therefore vulnerable to them; and secondly by ensuring there were safeguards against sexual intercourse that may arise because of that trust and dependency.

4.5. Conclusion

This chapter has argued that the child continued as an object of protection in the criminal law throughout the second part of the twentieth century, however this protection was marked by both continuity and change in its scope, objectives, and function. Towards the end of the twentieth century, the emerging problem of child sexual abuse alongside the transformation of state strategies, and the rationality that they rested upon, resulted in a new understanding of children and sexual harms against them within the family.

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[568] Nikolas Rose, 'The Death of the Social? Re-Figuring the Territory of Government' (1996) 25 Economy and Society 327.

[569] See: John Pratt, 'Governing the Dangerous: An Historical Overview of Dangerous Offender Legislation' (1996) 5 Social & Legal Studies 21.

The chapter has evidenced that the protection of female children from adult sexual contact was marked by continuity with interwar presuppositions about gender in the decades following 1945. It has analysed evidence from the Wolfenden Committee and the reforms brought about by the Kilbrandon Committee and contended that the protection of female children continued to be premised on the need to ensure that they were not dangers to themselves and the future health of the nation by improper sexual contact with adults at a young age. It has further explained that this continuity was bound up with the official aspirations for women and girls in the postwar welfare state, which shared many of the presuppositions about gender that infused the development of sexual offences against children in the interwar period.

The chapter has also documented two major changes in the regulation of sexual offences against children that occurred as the postwar period progressed. First, it has evidenced the increased protection of the male child from sexual behaviour by adult males. It has argued that this arose in the context of increased official knowledge about sexuality as a whole, and homosexuality, in particular. It has detailed the development of Scots common law and argued that the problem of homosexuality, and the particular threat it posed to male children, was developed by the judicial interpretation of pre-existing common law. The male child resultantly emerged as a qualitatively different object of protection from the female child as sexual wrongfulness of adult male behaviour was understood as the threat to the masculine, heterosexual ideal of the male child that had developed in the wake of 1945. It has further illustrated that the construction of the male child and the distinctively homosexual wrongs that they were protected against operated to exclude male children who did not display the necessary heterosexual, and therefore masculine, characteristics or traits from sexual protection in the criminal law.

This chapter has argued that the protection of the male child in the criminal law was connected with the similar ideas about the role and status of the male and female genders, and their eventual place in heterosexual marriages, that shaped the protection of female children in the immediate postwar decades. However, the final section of this chapter has evidenced a second change in sexual offences against children that aligned with new strategies of the state that were adopted in the wake of social and economic change.

In particular, the chapter has illustrated that reform to the law of incest resulted in three new offences that principally aimed to protect children from sexual intercourse with adults in their families. It has evidenced that these offences reflected new understandings about the

problem of child sexual abuse. This differed from the interwar understandings of sexual offences against children that associated sexual conduct between adults and children with the class, conditions, and habit of the child and their family. The reforms to the law of incest constructed the child as vulnerable to physical and psychological harms as a result of an abuse to their relationship of trust and dependency with family members.

It has argued that the regulation of child sexual abuse in the criminal law reflected a wider change in the regulation of families by British state administrations from the nineteen-seventies. Families were increasingly responsible for their own welfare and wellbeing, including that of their children. This chapter has therefore argued that reform to the law of incest in the nineteen-eighties built upon, and reproduced, the responsibility of the family to care, protect, and govern children in the late twentieth century. The child that emerged as an object of protection was dependent and therefore vulnerable within family relationships. The criminal law sought to protect children from sexual intercourse from adult family members in order to protect them from physical and psychological harm; but further to ensure that the relationships of trust and dependency in the family were appropriately maintained in order that families could fulfil their responsibilities towards their children.

The emergence of the problem of child sexual abuse, and the criminal law reform that sought to address it, was an important change to the protection of children from sexual behaviour towards the end of the twentieth century. The next and final chapter of this work explores the continued development of official understandings of child sexual abuse into the twenty-first century alongside institutional change and major reforms to sexual offences against children.

5. Vulnerable Children: Sexual Offences Against Children in the Twenty-First Century

The problem of child sexual abuse that underpinned reform to the law of incest in the nineteen-eighties continued as a policy concern into the twenty-first century but also expanded in definition. By the nineteen-nineties, the child was understood to be vulnerable to a wide range of sexual harms from adults in family homes, from neighbours, and strangers online.[570] Expanded understandings of the child's sexual vulnerability coincided with an increased fluidity of intimate relationships in society as a whole and the continued decline of the traditional "male bread-winner" family form. Adult sexual relationships came to be both elective and impermanent as autonomous individuals could choose to enter into intimate partnerships without the same obligations of marriage or progeny.[571]

Against this background, the twentieth century settlement of sexual offences was increasingly regarded as unsatisfactory. Common law reform to the law of rape, in particular, at the turn of the century was perceived to be both deficient and limited. While England and Wales had enacted an entirely new legislative scheme of sexual offences in 2003, the process of reform in Scotland was now the responsibility of new political institutions that were separate from those at Westminster. With the creation of the Scottish Parliament and Executive in 1999,[572] a separately elected devolved authority in Edinburgh could rely upon new institutional structures to create and enact legislation and policy related to Scots criminal law. In 2004, Scottish Ministers commenced a review of the law of rape and other sexual offences following similar efforts in England and Wales. A new legislative framework was enacted in 2009 that substantially redefined sexual offences against both adults and children around the fundamental principles of sexual autonomy and the need to protect vulnerable people. Importantly, this new legislative framework replaced the common law and legislative offences related to the protection of children from sexual behaviour with adults that had developed throughout the

[570] See, for example the policy justifications for sexual offence reform in Home Department, 'Protecting the Public: Strengthening Protection Against Sex Offences and Reforming the Law on Sexual Offences' (cm 5668, 2002) chs 4-5.

[571] Jane Lewis, 'Introduction: Children in the Context of Changing Families and Welfare States' in *Children, Changing Families and Welfare States* edited by Jane Lewis, (Edward Elgar 2006) 6.

[572] Now known as the Scottish Government.

twentieth century with specific statutory crimes that were neutral as to both gender and sexual orientation.

This chapter develops an account of how the child emerged as an object of sexual protection in the criminal law in light of these changes. It argues that the re-organisation of sexual offences around the principle of autonomy meant that the child was constructed as lacking either the capacity or maturity to exercise free choice to engage in sexual activity with adults. This construction of the vulnerable child has operated to expand the protection of the criminal law, in the offence definitions and in criminal practice. Furthermore, criminal law change has aligned to the wider strategies of the state, which aim to coordinate and enable the protection of vulnerable children in society as a whole in order that they develop into autonomous, tenacious, and fulfilled adults capable of bearing individual responsibilities in modern society.

Part 5.1 details the changes in the criminal law and understandings about child sexual abuse that occurred at the turn of the century following the creation of the new devolved Scottish administration. It argues that child sexual abuse continued as an important policy concern and was increasingly understood in terms of both its immediate physical and psychological harm but also its long-term psychological consequences. Some partial reform to sexual offences against children expanded the scope of criminal protection in relation to them, particularly in response to the perceived harms that could arise remotely or in wider positions of trust and dependency than the family home. These reforms were accompanied by common law change to the law of rape, which nonetheless led to further criticism of the coherence, clarity, and suitability of the criminal law for addressing the sexual wrong of rape in modern society. In response to these concerns, a review of rape and other sexual offences was conducted by the Scottish Law Commission. The resultant Sexual Offences (Scotland) Act 2009 reformed the offence definition of rape and framed all other sexual offences in relation to it.

This legislative change substantially reformed the scheme of sexual offences against children. Part 5.2 therefore explores the development of the 2009 Act, which was designed to protect and enhance individual sexual freedom and codified sexual offences into a new systemic form. It is argued that by organising offences around the concept of sexual autonomy, a wide range of behaviour is now subject to criminal regulation if it is undertaken without consent. Consent, understood as free choice, therefore delineates between lawful and unlawful sexual behaviour in society. The creation of a range of sexual offences against young children, older

children, and children in positions of trust was explained in relation to this autonomy-based model of sexual offences. It is shown that the regulation of sexual conduct between adults and children was justified by constructing the child as lacking capacity to enter free agreement or vulnerable to exploitation when engaging in sexual activity. But the protection of children was not only derivative of the concept of sexual autonomy, but symbolic of it. By protecting children in this way, the criminal law expressed the centrality and qualities of the sexual autonomy that it sought to protect.

Part 5.2 investigates the changing practice of the criminal law by explaining the development of the *Moorov* doctrine of mutual corroboration over the past two decades. It argues that the doctrine has altered to reflect modern understandings of child sexual abuse. In particular, new judicial understandings of the vulnerability of children in relationships of trust and dependency in families, institutions, or when they are manipulated by unrelated adults has led to a greater focus on the relation of adults to children when undertaking alleged sexual acts; rather than the specific ways, places, or times, the criminal acts occurred. Furthermore, there is increasingly no need for sexual behaviour between adults and children to be of a similar level of seriousness or involve a similar kind of behaviour for the doctrine of mutual corroboration to apply because judicial understandings of the vulnerable sexual autonomy of the child in different relationships to adults has allowed the court to see all forms of sexual behaviour by adults against children as alternative ways of exploiting the child who either lacks capacity to consent or whose consent is easily manipulated.

Part 5.4 undertakes an analysis of the Scottish Child Abuse Inquiry into allegations of historical child abuse. It argues that the Inquiry can be understood as an administrative body that is an extension of the wider Scottish state. It collects and classifies information about the past in a manner that is meaningful to present official understandings. The Inquiry therefore operates as a means by which the state can create an official version of the social world, and base further institutional actions upon that understanding. It thereafter investigates the way in which the responsibility of the state for child protection, the construction of the child as an object of protection, and the harms of child sexual abuse, have unfolded at the Inquiry and how these align with the contemporary policies and objectives of the Scottish Government. Finally, it reflects upon the developments in the criminal law in light of this reading of the Inquiry and argues that the criminal law now supports and mirrors broader state strategy to protect vulnerable children from adult sexual conduct in order that adults fulfil their responsibilities

towards children and, further, that children are capable of developing into healthy, autonomous, and responsible adults in the future.

5.1. The Need for Reform: Toward the Sexual Offences (Scotland) Act 2009

Following the establishment of the Scottish Parliament in 1999, the regulation of sexual offences in Scots criminal law came under increasing scrutiny. In particular, there was a perceived lack of clarity about the definition of the offence of rape, and a general perception that the scheme of sexual offences was incoherent, especially in light of the reform to sexual offences in England and Wales, which had organised offences around consent in order to protect sexual autonomy.[573] Alongside this general concern about rape, Scottish policy continued to express an ongoing commitment to address the problem of child sexual abuse and exploitation that had developed in the later decades of the twentieth century.

Prior to 2004, there were changes in the Scots law that sought to amend the criminal definition of rape in order to reflect modern understandings of the position of women and the nature of sexual wrongdoing.[574] In 2001, the Lord Advocate referred a point of law to the High Court and invited it to review the definition of rape.[575] The reference arose following the acquittal of a defender because there had been no evidence of use of force upon the complainer and, in absence of force or threat of force, it was not possible to establish a lack of consent in Scots law.[576] The High Court agreed there was a need to review the law because the question was "new and a matter of continuing public concern"[577] particularly in respect of the profound changes that had taken place in society "including the major redefinition of the roles of men and women".[578] The law of rape therefore came to be defined as a man having sexual intercourse with a woman without her consent and the *mens rea* was knowledge or recklessness in the subjective sense as to whether the accused knew the complainer was consenting or not. This redefinition meant that force or threat of force was no longer required for a successful

[573] See on this: Jennifer Temkin and Andrew Ashworth, 'The Sexual Offences Act 2003 (1) Rape, Sexual Assaults and the Problems of Consent' (2004) May Criminal Law Review 328.

[574] See, for example, the common law reform that ended the exemption for marital rape in the nineteen-eighties: *Stallard v HM Advocate* 1989 SCCR 248 and Timothy H Jones, 'Marital Rape' [1989] SLT 279.

[575] *Lord Advocate's Reference* (No 1 of 2001) 2002 SLT 466.

[576] ibid.

[577] ibid 475 (LJ-G Cullen).

[578] ibid 481 (Lady Cosgrove).

conviction of rape[579] and the bench also emphasised that the object of the law of rape was to promote sexual freedom.[580]

The decision in the 2001 *Lord Advocate's Reference* was not unanimous, however, and in his dissenting opinion, Lord McCluskey argued that the revised definition of the crime sought by the Lord Advocate ought to be undertaken by the Scottish Parliament, not the courts, because judges were not in a position to make an essentially political decision about the underlying justification for a change to the law of rape.[581] The necessity for political intervention grew in the years following the *Reference*, as Members of the Scottish Parliament called for further reform after a number of widely publicised rape cases drew attention to the apparent difficulties that the Crown faced when trying to prove the *mens rea* of knowledge or recklessness for rape when there was no violence.[582] Despite its reformulation, the law was still not considered to offer satisfactory protection.[583] Beyond rape, the "curious mix of statute law and common law"[584] involved in the regulation of sexual offences was also criticised for the apparent incongruity and gaps in the law, for example the unequal age of consent between heterosexual and homosexual acts and the lack of protection for familial abuse short of sexual intercourse.[585]

The criticisms of the objectives, coherence, and extent of protection offered by sexual offences in Scotland grew alongside an increasing policy focus on child sexual abuse and exploitation. The Sexual Offences (Amendment) Act 2000,[586] created in Westminster but made applicable to the new devolved authority in Scotland,[587] had created a new offence of abuse of a position of trust. This criminalised sexual intercourse, whether vaginal or anal, with any

[579] Albeit, it would be evidence of the accused's *mens rea*.

[580] "In the present day, in which there is considerable sexual freedom, both inside and out of marriage, should the law of rape not support the principle that whether there is to be sexual intercourse should depend on whether the woman consents, wherever and whenever she pleases?" ibid 452 (L-JG Cullen).

[581] "If the underlying social circumstances have changed in such a way that the law as understood and applied for centuries in hundreds of cases has effectively been overtaken by events and ought to be reformed, then that is a matter for Parliament, not for judges" *Lord Advocate's Reference (No 1 2001)* 490 (Lord McCluskey).

[582] On this, see James Chalmers, 'Sexual Offences in Scotland: An Agenda for Reform' [2004] SLT 109 and comments on unreported cases *Cinci v HM Advocate* 2004 JC 103 and *McKearney v HM Advocate* 2004 JC 103.

[583] ibid 117.

[584] Chalmers (2004) (n 563).

[585] ibid.

[586] Sexual Offences (Amendment) Act 2000 c44.

[587] ibid s7(2).

person under the age of 18 by an older adult when that adult was in a position of trust.[588] A relevant position of trust would be established when the adult looked after the person under 18 in residential accommodations, such as institutions for the care and protection of children; hospitals; or in the course of full-time education at an educational institution.[589] The reform extended the protection of children within family relationships that had been granted by the Incest and Related Offences (Scotland) Act 1986,[590] first by proscribing anal, as well as vaginal intercourse, and also providing protection for children up to the age of 18 in a wider range of relationships than the trust and dependency than a family relationship. Children were therefore vulnerable to sexual harms, and required heightened protection, in institutional settings that did not involve the same relationships as a family home but still involved their relative submission to adult authority, and therefore susceptibility to exploitation, in residential care settings or education.

In 2000, a cross-party group for survivors of childhood sexual abuse was convened in the Scottish Parliament and by 2001 there was a parliamentary debate on sexual offences. In the course of the debate, Members stressed the need for policy strategies to recognise both the physical and long-term psychological consequences of childhood sexual abuse, which included "mental health problems, alcohol, drug-use, domestic violence and homelessness" which presented "social, health, and legal implications" for society as a whole.[591]

By 2005, the Protection of Children and Prevention of Sexual Offences (Scotland) Act[592] was passed, with the explicit aim to prevent sexual offences against children by allowing early stage-intervention of the criminal law when a child was being "groomed" online or in person and the need to ensure a robust response in the law when a sexual offence had been committed.[593] Child grooming had come to be known as a feature of child sexual abuse from the early nineteen-nineties and was understood to involve behaviour undertaken with the view to psychologically manipulate children into building emotional trust with an adult in order that

[588] ibid s3.

[589] ibid s4(1)-(4).

[590] Discussed above, Chapter 4 pt 4.4.

[591] See SP OR 7th March 2001 "Sexual Abuse".

[592] Protection of Children and Prevention of Sexual Offences (Scotland) Act 2005 asp 9.

[593] SP Minutes Justice 1 Committee 12th January 2005.

he or she acquiesce to sexual activity while refraining from disclosing it to others.[594] In 2002, the Home Office proposals for reform of sexual offences in England and Wales had created a new offence to tackle grooming both "online and offline" in order to address predatory sexual behaviour before any sexual activity with the child had taken place.[595] In Scotland, the 2005 Act offence that made it an offence to intentionally meet, travel with the intention of meeting, or make arrangements with the intention to meet, a child under the age of 16 with to engage in unlawful sexual activity[596] was intended to bring the Scottish law in line with the English offences.[597] The Act further removed the two-year time limit on prosecutions for the offence of unlawful sexual intercourse with a female child between the ages of 13 and 15,[598] with a view to facilitating prosecutions because "the time bar did not take into account how long it often takes victims in such cases to disclose fully the circumstances of what happened to them".[599]

Sexual offences, in general, and sexual offences against children, in particular, were therefore subject to increasing scrutiny and reform in the first years of the devolved Scottish administration. There were new understandings of the complainer's freedom to choose, and have that choice respected, in relation to the redefinition of the law of rape. The protection of children from adult sexual behaviour was an early and important policy concern and representations from parliamentarians as well as the discussions surrounding the creation of the 2005 Act indicate that the consequences of sexual contact with adults as a whole was understood to be both the physical injury and a complex range of enduring psychological problems that may result in further social problems. This understanding was accompanied by the recognition that sexual offending against children could occur in a wider range of relationships than those of the family, and that these relationships made the child vulnerable to abuse. The law therefore criminalised sexual conduct between adults and children in institutional settings, where they were trusting and dependent on adults, as well as sexual conduct by strangers that arose out of the relationship that an adult had established with the child - especially on the internet.

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[594] Alisdair Gillespie, 'Tackling Grooming' (2004) 77 T*he Police Journal: Theory, Practice and Principles*.

[595] Home Department 'Protecting the Public' (2002) para 52. See 2003 Act ss15-15A.

[596] 2005 Act s1.

[597] SP Minutes Justice 1 Committee 12th January 2005.

[598] 2005 Act s15.

[599] Explanatory Notes to the Protection of Children and Prevention of Sexual Offences (Scotland) Act 2005, para 43.

There was, further, some indication that the common law definitions of sexual offences against children were being adapted by the bench in light of contemporary understandings of child sexual abuse that could be committed both online and offline. In the 2003 case of *Webster v Dominick*[600] the court abolished the crime of shameless indecency,[601] and criticised the uncertain definition of the offence that had developed throughout the case law.[602] A survey of cases involving sexual relationships or lewd conduct, predominately towards young female complainers, indicated that the charge had come to be relied upon in cases where the time-bar on prosecutions for other offences or the increased age of the complainer made relevant statutory offences inapplicable.[603] This was deemed unacceptable as it circumvented statutory determinations[604] and the question of what private sexual conduct ought to be criminalised was a matter for the Scottish legislature.[605] While the apparent statutory limits to some prosecutions of sexual behaviour by adults towards children was therefore a matter for the Scottish parliament, the court nonetheless noted that conduct previously prosecuted as shameless indecency towards children could nonetheless be captured by the crime of lewd and libidinous practices.[606] This included taking indecent photographs of children, indecent exposure, showing indecent photographs, and lewd conversations with a child, "whether face to face or by telephone call or through an internet chat room"[607]

But these changes were nonetheless partial and in 2004, the First Minister announced that the Government had requested a comprehensive review of rape and other sexual offences in Scotland to be undertaken by the Scottish Law Commission (SLC).[608] Its subsequent publications and recommendations formed the basis of the Sexual Offences (Scotland) Act 2009.[609] The legislation significantly altered the definition and structure of sexual offences

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[600] *Webster v Dominick* 2005 JC 65.

[601] See above pt 4.3.

[602] *Webster* para 60

[603] See ibid paras 32-43. In particular *HM Advocate v RK 1994* SCCR 499 where a charged under the equivalent provisions of the Incest and Related Offences Act 1986 could not be made out because the complainer, a foster daughter from the age of eight, had been 16 at the time of sexual intercourse with her foster father. See above, pt 4.4.

[604] ibid 61 (LJ-C Gill).

[605] ibid 43.

[606] ibid 49.

[607] ibid.

[608] SP OR 3rd January 2004 (Jack McConnell FM).

[609] Sexual Offences (Scotland) Act 2009 asp 9.

against children. The following section will explore the scheme of offences that were enacted and their underlying rationale in order to explain how the child was constructed by the criminal law as an object of protection and what sexual wrongs they were protected against.

5.2. The Construction of the Child in the Sexual Offences (Scotland) Act 2009

The SLC consultation documents were drawn together on the basis of research, seminars organised by Rape Crisis Scotland, and the input of an Advisory Group of experts that was established to assist with the review. The Group included members of the legal profession and academics alongside a number of representatives from women's and gay rights organisations, such as Outright Scotland;[610] Scottish Women's Aid; and Rape Crisis Scotland.[611] In 2006, the SLC published its first Discussion Paper on rape and other sexual offences,[612] followed by a Final Report in 2007.[613]

Two key motivations were identified for sexual offence reform. First, the need to address perceived problems with the law of rape and the particular problems faced by the Crown when corroborating the *mens rea* of knowledge or recklessness as to consent as defined by the 2001 *Reference* when there was no violence toward or resistance from the complainer.[614] Second was the need to reform the law of sexual offences more generally to reflect modern attitudes. As defined, rape could only be committed by vaginal penetration and therefore other forms of penetrative activity were not included within the offence definition. More generally, offences did not offer an equal age or scope of protection for males and females; nor for homosexual or heterosexual activities. But sexual freedom had changed markedly from the late twentieth century. Homosexuality was an increasingly accepted form of intimate relationship, as evident in the inclusion of homosexual rights groups within the SLC's Advisory Group. The previous gender-settlement for women had continued to shift, as women's role in public life, employment, and education continued to grow.[615] Furthermore, sexual relations between individuals had become more fluid. It was now a matter of choice for autonomous individuals

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[610] Previously the Scottish Minorities Group, which sought to promote issues relating to homosexual law reform. See Davidson and Davis, *The Sexual State* (2012) (n 436) ch 3.

[611] Scottish Law Commission, 'Discussion Paper on Rape and Other Sexual Offences No 131' (2006) para 1.2.

[612] ibid hereinafter the "Discussion Paper 2006".

[613] Scottish Law Commission, 'Report on Rape and Other Sexual Offences No 209' (2007) hereinafter "Final Report 2007".

[614] Discussion Paper 2006 para 1.4.

[615] See: Lewis, *Should We Worry About Family Change?* (2006) (n 571).

to enter into sexual relationships, whether long-term or impermanent, without the same obligations or consequences of marriage or childbirth.[616] While the law had been "modernised but not entirely altered by the Incest and Related Offences (Scotland) Act"[617] there remained a significant number of sexual offences that were governed by the common law and the more far reaching change that was required in order to adapt to the social circumstances of the twenty-first century was unlikely to occur solely through judicial development of the common law.[618]

The consent model adopted in England and Wales intended to give legal expression to a wider autonomy-based approach to sexual offences,[619] which was also adopted by the SLC.[620] This sought to define the scope and structure of the proposed offences on the basis of a modern understanding of sexual autonomy. The SLC therefore maintained that the criminal law should seek to uphold and protect each person's freedom to choose to participate in sexual activity and, as such, the criminal law would not typically be justified in order to criminalise sexual behaviour that was entered into freely.[621] On the other hand, the criminal law would prohibit behaviour that undermined or disrespected an individual's freedom of choice, and therefore their sexual autonomy.[622] This position resulted in the SLC recommending the creation of several offences that would criminalise a range of sexual behaviour undertaken when there was an absence of consent, which was defined as a person's free agreement.[623] The focus was not, therefore, on the nature of the behaviour undertaken inasmuch as it was the absence or presence of consent and therefore respect for a person's sexual autonomy. Non-physical, non-proximate sexual communications online, for example, would be criminal for the same reason that sexual penetration was, even if they were not of comparable seriousness, because they were examples of sexual activity undertaken without consent, and therefore in violation of a person's autonomous freedom to choose.

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[616] ibid 6.

[617] ibid 1.4. See Chapter 4 pt 4.4, above.

[618] ibid 1.5-1.5.

[619] See: 2003 Act ss74-76 and, further: Lacey, *Beset by Boundaries: The Home Office Review of Sex Offences* (2001) (n 13).

[620] Discussion Paper 2006 para 1.28.

[621] ibid 2.5.

[622] ibid.

[623] Final Report para 2.8.

This form of consent would be active, in that implied free agreement would not be sufficient to establish consent.[624] Instead, the definition of consent and its relevance within offence definitions would operate to prompt an assessment of what each party to a sexual relation had done in order to secure free agreement and whether this evidenced respect for each other's sexual autonomy.[625] It was necessary, then, for the accused to demonstrate the positive steps that had taken place to ascertain another party's consent; rather than rely on an honest belief in consent.

The autonomy-based approach advocated by the SLC had consequences for the structure of the offences, the range of behaviour that they related to, and the underlying aims of sexual offences in Scotland. The offences logically prohibited a wide range of sexual behaviour involving physical contact and non-physical interactions that, because of the absence of consent rather than the nature of the contact itself, could justifiably be subject to criminal sanction. Thus, the 2009 Act criminalised penetrative and non-penetrative physical acts, such as rape - defined as the penile penetration of the vagina, anus, or mouth;[626] sexual assault by penetration;[627] and touching.[628] But it also prohibited behaviour that caused, or coerced, another person to look at sexual images;[629] and communicating with them in a manner that was sexual.[630] The central wrongfulness of this behaviour, when undertaken without consent, was the infringement of the person's sexual autonomy that it evidenced. Penile penetration of any part of the body without consent was a serious violation of the complainer's sexual autonomy because it involved the violation of the body with a sexual organ.[631] However, by the same reasoning sexual activity that involved no infringement to the complainer's body, such as communications, was also wrongful because they were not consented to and also infringed the complainer's autonomy.[632] If violence was present when a person's sexual autonomy was undermined, it was an additional, but not the central wrong, of the behaviour.[633] Furthermore,

[624] ibid.

[625] ibid 2.8 and 2.38.

[626] 2009 Act s1.

[627] ibid s2.

[628] ibid s3.

[629] ibid s4.

[630] ibid s7.

[631] Final Report 2007 para 3.12.

[632] ibid 3.48.

[633] ibid 3.5.

the active model of consent that sought to assess what each party had done to establish free agreement in a given sexual interaction meant that across the offences it would be necessary to prove that the complainer did not, in fact, consent and further that the accused did not have reasonable belief that the complainer was consenting.[634]

The SLC built its approach to sexual offences against children upon this understanding of sexual autonomy and how it might be realised within the criminal law. It was stated that there were protective principles implicit within the consent model of sexual offences,[635] which would apply to vulnerable people who may either have no capacity to reach free agreement or who, because of their characteristics may be able to agree to sexual activity but could not do so freely.[636] Children under 13 therefore lacked the capacity to consent and in these circumstances sexual activity with them would be "intrinsically wrongful".[637] Such behaviour did not simply undermine free agreement, but the very human capacity upon which free agreement could be reached. The SLC therefore contended that the criminal law should indicate that it was entirely impermissible.[638] It was recommended that there should be distinct sexual offences within the legislation that would criminalise sexual activity with young children as a matter of strict liability.[639] The 2009 Act resultantly created a scheme of offences related to young children, criminalising the same range of behaviour that could be committed against adults but with consent removed as an element of the offence definition and no defences available as to reasonable belief that the child was older.[640]

Older children, between the ages of 13 and 15, were understood to be capable of exercising choice and therefore could enter into an agreement to participate in sexual activity. However, their relative lack of maturity meant that they were not as knowledgeable about the activity they were agreeing to, and were therefore vulnerable to, the exploitation of adults.[641] Their agreement to adult sexual contact, in particular, would therefore cast doubt on their ability to validly consent because an adult could be expected to have more experience or knowledge

[634] ibid 2.4 and 3.67, replicated across offence definitions in the 2009 Act pt 1.

[635] ibid 5.9.

[636] ibid 5.7.

[637] ibid.

[638] ibid.

[639] ibid 5.9.

[640] 2009 Act pt 4 ss18-27.

[641] Final Report 2007 para 5.9.

of sexual behaviour.[642] When an older child agreed to sexual contact, the SLC recommended the criminal law contain several offences that, while wrongful, were not as culpable as those involving young children or when no agreement was present at all.[643] In the Act, these included behaviour modelled off of the main offences, but without the same labels in order that the distinction between an absence of valid agreement; and the complete absence of any agreement was reflected in the criminal law.[644] In those cases where no agreement was evident at all, then the main offences contained in the first part of the Act would be applicable.[645] For example, in absence of any agreement to participate in penile penetrative activity, the offence of rape would apply; however if an older child provided consent to sexual activity, while not valid, this would be ascribed the label "having sex with an older child".[646]

Offences against older children were also subject to the defence that the accused reasonably believed the child was 16 or older and he had not been previously charged with a similar offence or subject to a sexual harm order.[647] This appeared to expand the "young man's defence" that had been made out in the Criminal Law Amendment Act 1922, which had applied only to men under the age of 24.[648] However, the structure of this defence within the wider scheme of the 2009 Act indicates that it did not share the same underlying motivation to excuse the possible mistakes that arose as a result of young men's sexual vigour.[649] For one, it was more limited than the prior defence and applied only in respect of those offences against older children where there was some agreement, albeit not necessarily valid, to sexual activity and therefore in conditions where there was a general lack of consent it would not apply. It could not be raised if the accused had previously been charged by the police with a previous sexual offence against a child, but also if a civil order was in place, which requires only a civil burden of proof to establish the necessary risk required for it to apply.[650] Furthermore, the SLC's

[642] ibid.

[643] ibid 5.37.

[644] ibid and 2009 Act pt 4 ss28-36.

[645] ibid 5.40.

[646] See 2009 Act s1 and s28.

[647] ibid 4.63 and 2009 Act s39.

[648] ibid 4.60 and see Chapter 2 pt 2.2, above, for further discussion of this defence.

[649] On this, see ibid.

[650] See 2005 Act, ss2-8.

intention was that the age of the accused would instead be part of a more general assessment of his credibility rather than a formal limitation on his ability to raise a defence.[651]

In its Final Report, the SLC recommended that breach of trust offences, involving children below the age of 18, should be maintained within the criminal law but subject to amendment. The proposed offences built upon the 1986 Act and the additional breach of trust offences created in the 2000 Act in relation to children in institutions and educational settings. These distinct offences, and their increased age limit from the general age of consent adopted, were justified because the existence of trust in a relationship between an adult and younger person rendered consent "highly problematic" and was therefore a threat to sexual autonomy.[652] Furthermore, the offences undermined the duties of trust that someone in a given relationship owed to a child.[653] In family settings, agreeing with the SLC's position in relation to the 1986 Act, it was found that those below 18, "may find themselves in a highly vulnerable position in relation to other people who live in the same household" and that sexual activity between family members abused the relationship of trust and authority between members and the family unit as a whole.[654] For other relationships of trust, the SLC recommended that the criminal law protect children up to the age of 18 in both full-time and part-time education and that for both familial and general breach of trust offences the relevant behaviour could include all sexual activity prohibited under the 2009 Act, and not simply anal or vaginal intercourse.[655]

The sexual offences developed in the 2009 Act therefore removed many of the features of previous common law and legislative crimes and provided a principled basis for the criminalisation of a wide range of behaviour. The offences were now applicable to all children under the relevant age thresholds, irrespective of gender. They applied to physical contact, irrespective of whether it was indicative of heterosexual or homosexual inclinations, as well as a range of non-physical behaviour, or non-proximate behaviour, as evident in the criminalisation of indecent communications that could be conveyed by "whatever means".[656] The need to protect, and therefore enhance, sexual autonomy was not only the basis upon which

[651] Final Report 2007 para 4.60.

[652] ibid

[653] ibid 4.107.

[654] ibid. Enacted in 2009 Act part 5 ss42-44.

[655] ibid 4.111.

[656] 2009 Act ss24(2) and s34(2).

the general offences in the Act were developed, but it also functioned as the justification for the range of specific offences that criminalised sexual contact between adults and children. Young children were therefore understood to lack the capacity required to exercise choice; whereas older children had capacity but were nonetheless vulnerable and immature when exercising sexual choice. The criminal law provided an expanded period of protection for children when they were in a position of trust and dependence upon an adult, partly in recognition that those below the age of 18 were more vulnerable when they were trusting and dependent on adults and could not make truly free choice to engage in sexual activity. But breach of trust offences also recognised that sexual activity between children who were trusting of adults undermined the conditions of trust that were necessary for families, educational institutions, and care facilities to fulfil their obligations of care and protection toward children.

However, the scheme of sexual offences against children in the 2009 Act were not simply shaped by the wider approach to adult sexual offences, which was the primary focus of the SLC, but acted to symbolically and materially protect the central importance of sexual autonomy in the law. The offences operated to uphold and enhance the idea and the meaning of sexual autonomy that underpinned sexual offences as a whole because they illustrated circumstances where free agreement would be impossible or absent, and therefore sexual autonomy would be undermined.[657] By constructing children as vulnerable when engaging in sexual contact with adults, whether it was because they had no capacity or alternatively were susceptible to exploitation and manipulation, the criminal law expressed the conditions where choice would not be free; and also when choice would be free. The principal social value that the law sought to protect was the freedom of mature, developed individuals with capacity to choose to participate in sexual activity as a positive social relation. This operated to protect children and disincentivise a wide range of adult sexual contact with them; while upholding the autonomous sexual freedom of adults more generally.[658]

The 2009 Act was a significant reformulation of the law protecting children from sexual behaviour with adults. The child that emerged as an object of protection in the Act was vulnerable to adult sexual contact because they lacked the necessary capacity, or maturity, to exercise free agreement. The wrongfulness of adult sexual contact was the threat it posed to the

[657] This is alluded to by the SLC in the Final Report 2007, which argued that sexual offences against children would "bolster" the consent model as well as protecting the vulnerable and preventing exploitation, para 2.6.

[658] ibid.

absent or underdeveloped sexual autonomy of the child, which undermined the general idea of sexual autonomy that the criminal law sought to protect and enhance. This was because adult sexual activity with children, by its very nature, was understood to be undertaken without free agreement. This reflected new understandings of sexual freedom in society, but also more specifically the number of ways that child sexual abuse could arise.

The development of the 2009 Act is also indicative of the change in the political and legal landscape brought about by the creation of the devolved Scottish administration in 1999. The creation of the new legislature with the necessary powers and resources to develop criminal law and justice policy appeared to create an opportunity for further and widespread reform to the law governing sexual behaviour in order to reflect the values and meet the needs of Scottish society. But the changing ideas about the child and sexual wrongdoing against them was not limited to legislative change. The following section continues on from the argument outlined in Chapter 3 of this work, which evidenced that the rationality of judicial interpretation in the Scottish courts allowed legal doctrines to evolve alongside social change. It therefore explores the judicial development of the doctrine of mutual corroboration in light of changing ideas about sexual offences against children in the twenty-first century.

5.3. The Emergence of the Child in the Contemporary Practice of the Criminal Law

As previously discussed, in the case of *Moorov*[659] the doctrine of mutual corroboration provided that several single instances of a crime committed by the same accused, with a single witness, could be corroborated by one another if the single instances were sufficiently similar in time, character, and circumstance so as to indicate that there was a unity of intent, project, or adventure that was beyond or behind, but related to, the separate acts. In Chapters 3 and 4[660], it was argued that the development of the doctrine by the courts was a result of the wider development of understandings about sexual offences against children as an increasingly important social problem, which meant that sexual behaviour by adults towards children could be interpreted to share underlying similarities. This shaped the application of the rule in some

[659] *Moorov* (1930). See above, Chapter 3 pt 3.3.

[660] On the application of the doctrine of mutual corroboration to homosexual offences against children, see Chapter 4 pt 4.3.1.

cases so that, for example, sexual behaviour with male children was considered to be characteristically different than that of a female child in the mid-to-late twentieth century.[661]

From the time of *Moorov* onwards, the similarity in time, character, and circumstance between crimes required for the doctrine to operate was understood to be interrelated. The greater the similarity in character and circumstance of the separate crimes, the greater time period would be allowed between them and *vice versa.* However, until the twenty-first century the maximum length of time that would be allowed for the doctrine was around three years. Consequently, two single crimes that occurred more than four years apart could not indicate an underlying pattern of conduct because they lacked the necessary connection in character and circumstance required for the doctrine. In the past two decades, developments in judicial knowledge about sexual offending against children have led to new interpretations of sexual conduct between adults and children and the legal rules of the doctrine have evolved. It is now possible to mutually corroborate several criminal acts over a decade apart and the distinctions between male and female children have diminished in the courts reasoning. The following section provides an overview of the common law change in this area in order to assess what kind of understandings about sexual offences against children, and child sexual abuse more generally, have shaped the development of the doctrine.

In the 2003 case of *Dodds v HM Advocate,* the Court of Appeal stated that it would be possible to mutually corroborate charges that occurred more than four years apart because there was no maximum time period between offences that would prevent the application of the *Moorov* doctrine. However, a greater latitude in time, beyond four years, between criminal acts would only be permitted if the similarity of character and circumstances was striking.[662] However, Dodd's charges were not an example of such a striking similarity. The rape of a 14-year-old girl in a public area was different from two further rapes of adult women in their twenties, with learning disabilities, and in private dwellings. The same year, in *Sinder v HM Advocate,*[663] a greater latitude in time was also denied because the court found too much dissimilarity between the separate acts. The appellant had been a friend of each of the two complainer's parents, but one incident of lewd and libidinous practices, by touching an 11 year old female on the buttocks while her father was in the room, but unaware, was "limited" while

[661] On this see the discussion of *Cox* (1962) above pt 4.4.3.

[662] *Dodds v HM Advocate* 2003 JC 8.

[663] *Sinder v HM Advocate* SCCR 271.

several incidents involving "touching the private parts" and licking the buttocks of a 9-year-old female while she was alone in her bed was "more serious".[664] While it would be possible to mutually corroborate incidents that were more than four years apart, it appeared that following *Dodds* this would only be permissible when the sexual behaviour towards the child was similarly serious and had occurred in similar locations.

The rule in *Dodds* was followed in *McKenna v HM Advocate*[665] but the assessment of the character and circumstances of the behaviour, and whether they were strikingly similar, differed. The case involved charges of lewd and libidinous practices involving digital penetration of a young male pupil, and the attempted sodomy of another, at their school wherein the appellant worked. The Crown argued that the test to be applied for determining whether these acts could be corroborated was "whether, on no possible view, it could be said that there was any connection between the offences spoken to by the complainers" and, further that "[w]here sexual abuse of children was in issue, the law did not require a particular conduct to be too precise".[666] The court maintained that in this instance, there were essential similarities between the offences that would justify a greater latitude of time. In particular, the place of the offence was the same as was the relationship of the accused to the complainers, as a member of staff in the school in a position of authority.[667] The appellant had demonstrated in his physical approaches that he was interested in the hinder parts of his pupils, whether it was through touching their backside, digital penetration, or attempted sodomy. The argument of the defence, that the attempted sodomy was significantly graver than any of the other crimes libelled, and therefore could not corroborate them, was not accepted because actual digital penetration was "just as grave…as the attempted penile penetration".[668] *McKenna* indicated that it would be possible for significant similarities to be found between charges more than four years apart even when the seriousness of the behaviour was not the same. Behaviour, such as "sitting the pupil's on [the appellant's] knees" or "handling the pupil's hinder parts over clothing" and actual or attempted penetrative acts were connected by the common interest in the complainers' backsides and the position of trust the accused held in respect of the children.

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[664] ibid para 10 (Lord Osborne).

[665] *McKenna v HM Advocate* 2008 HCJAC 33. See also: *McCrae v HM Advocate* 2005 1 JC.

[666] *McKenna* para 12.

[667] ibid 15.

[668] ibid 16.

While the court in *McKenna* relied on *Dodds* in order to allow corroboration of charges more than four years apart, the decision did not follow the same reasoning. For one, it suggested the quality of the relationship between the accused and the complainers, as well as the place of the offences, would be material in assessing whether there were striking similarities between the criminal behaviour. Furthermore, the court did not seek to weigh the apparent seriousness of each charge against one another in order to determine whether it was similar. Instead, it considered the serious and less serious behaviour as part of a continuum of abuse that had shared characteristics.

By 2009, the case of *Cannell v HM Advocate*[669] followed a similar approach to *McKenna* and looked at the more serious charges as a continuation of the less serious behaviour, rather than a mark of dissimilarity. The case involved charges of lewd and libidinous practices towards female children.[670]The first charge related to touching the complainer when she was under the age of 12, whereas the second involved digital penetration of the complainer when she was over the age of 13 and again when she was 16 or 17. The four years and four months between the acts was described as "substantial"[671] but the court dismissed the appeal and followed *Dodds,* stating that where a significant lapse of time had occurred, the other elements of the case had to be scrutinised closely.[672] In this case, the penetration that constituted lewd and libidinous practices against the second complainer was a "variation or development of" the touching of the first,[673] both of the complainers were the nieces of the appellant's partner, both were under 16, and the mode of perpetration was the same in that the appellant had waited until each complainer was asleep and then handled their naked private parts under their bed and night clothes.[674] Increasingly, the courts were willing to allow longer time periods between the charges with reference to the relation of the accused to the complainers and an understanding that more serious forms of sexual offending could be developments of, and therefore connected to, less serious charges.

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[669] *Cannell v HM Advocate* 2009 HCJAC 6.

[670] It should be noted that while the 2009 Act superseded all common law offences if behaviour occurred before the commencement of the Act on the 1st of December 2010, the previous legal regime in place at the time of the alleged offence continues to apply. See: Appendix 1 for a detail of common law and legislative offences in this work.

[671] ibid para 33 (Lady Paton delivering opinion of the court).

[672] ibid para 19.

[673] ibid.

[674] ibid para 34.

The full-bench decision of *M.R. v HM Advocate* in 2013 confirmed the shift in the court's approach to mutual corroboration in cases involving sexual offences against children that had been developed since *Dodds.* The appeal involved multiple charges related to the appellant's female relatives from the nineteen-seventies until the mid-nineteen nineties. He argued that the time lapse of some ten years between the charges meant that there was insufficient evidence to corroborate the behaviour. He further argued that there were significant dissimilarities in the charges because the incidents amounting to indecent assault were less serious and could not corroborate the acts of penetration amounting to rape, and that one of the indecent assaults involving no force could not corroborate the assault with intent to rape which involved a great deal more force. Delivering the opinion of the court, Lord Justice-Clerk Carloway endorsed the view that the *Moorov* doctrine had been extended by the courts in recent years and that this was because in any analysis of the doctrine it was necessary to consider that "the law has moved on since 1930".[675] It had specifically done so in an attempt to,

> "keep pace with modern societal understanding of sexual and other conduct and, in particular, what are perceived to be characteristic links between the perpetration of different types of sexual and physical abuse, especially, but not exclusively of children and young persons."[676]

It was therefore necessary for the court to proceed on its own understandings of the developing knowledge of child sexual abuse and how one criminal act could be connected to others.[677] Different forms of sexual or physical abuse in the same family unit, extended or otherwise, and perpetrated by the same individual would be an example of a type of child sexual abuse. This form of abuse could be made up of multiple criminal acts that were interrelated as part of a wider course of conduct.[678] There was, therefore, no rule that less serious charges could not be corroborated by more serious conduct. From this perspective, the appellant's rape of his 11-year-old niece, involving the removal of her clothes, could be corroborated by the similar behaviour involved in the attempted rape of his daughter. Further, the lewd and libidinous practices towards one niece and indecent assault on the other had involved variations of physical

[675] *M.R. v HM Advocate* 2013 HCJAC 8 (LJ-C Carloway delivering opinion of the court).

[676] ibid para 17.

[677] ibid.

[678] ibid 18

pushing of his female relatives in their own home.[679] The individual acts may have been of different levels of seriousness and they involved some mechanical differences, but *M.R.* demonstrated that the court would contextualise each individual criminal act within a wider understanding of familial sexual abuse. The appellant's relationship to the children meant that each instance of sexual behaviour could be understood as a variation on a wider theme of sexual abuse of female relatives without the distinct differences between each act, or the time lapse, being fatal to the application of *Moorov*.

This approach meant that an even greater latitude in time could be allowed between a range of sexual offences against children of differing levels of seriousness. In *S v HM Advocate,* a period of 18 years between charges of lewd and libidinous conduct towards the appellant's son and daughter and a later charge related to sexual behaviour with his granddaughter was allowed. Like *M.R.* the court relied upon its understanding of familial sexual abuse and found the similarities in the nature of the conduct, as well as the family relation of the accused meant that the extended time period could be explained as a result of the "generational interval" between the offences as some of the complainers ceased to be children,[680] and therefore of sexual interest, to the accused.

In cases involving child sexual abuse outside of family relationships, the approach of the courts has also developed. In these cases, the vulnerability of the complainers in respect of the behaviour of the accused is often drawn upon to assess the underlying unity between criminal acts. For example, in *Laughlan and O'Neill v HM Advocate* the court found similarities between various charges of "actual or potential sodomy" committed on young men between the ages of 14 and 17 in different locations more than four years apart because each allegation was a variation of "homosexual behaviour" including actual or potential sodomy and each of the complainers had been "young and vulnerable males". The court described how one of the complainers "lived with his mother, a chaotic drug addict", the other was "a young man of limited intelligence", and the last had been "indulged" by the appellant while his parents "appeared to have very little control over him".[681] Child sexual abuse outside of a household or family relationship could therefore be evidenced by an assessment of the vulnerable traits of the children that made them susceptible to the abuse itself, which might otherwise be assumed

[679] ibid 21-22.

[680] *S v HM Advocate* 2015 SCCR 62. See also: *N.K.S. V HM Advocate* 2006 SCCR 70.

[681] *Laughlan and O'Neill v HM Advocate* 2015 JC 75 para 6 (LJ-G Carloway delivering the opinion of the court).

in a family relationship, as well as the nature of the sexual acts.[682] Taken alongside the approach adopted in *McKenna,* where a teacher's interest in the backside of his young pupils was used to logically connect several incidents of more or less serious behaviour, *Laughlan and O'Neill* suggests that adult male sexual attraction to younger males, while no longer wholly distinct from the sexual abuse of females, remains relevant to the assessment of whether behaviour is in some way connected. This no longer seems predicate on the view that homosexuality is a threat to the heterosexuality of male children, but instead acts as an indicator of a sexual tendency which, taken along with the vulnerabilities of the complainers, can explain the connection between different kinds of behaviour.

The approach of the courts to sexual abuse committed against both family members and non-related children developed further in the 2020 case of *Adam v HM Advocate.*[683] Like *M.R.,* the court drew upon the "surrounding context of abuse", which it stated was more important than the specific physical acts that made up the charge. The accused was charged with criminal acts involving penetration, sexual touching, and indecent remarks to a neighbour, from the age of 10, and his stepdaughter, from the age of 12. The time lapse between the charges did not prevent mutual corroboration because both of the complainers were "vulnerable, in that neither of them had a father figure", the appellant had acted as this figure, and had embarked on a process of "grooming", which involved treats and rewards in order to gain the children's trust and commit ever more serious sexual acts upon them.[684]

Subsequent cases have continued to rely on the position taken in *M.R.,* despite some criticism. In *P v HM Advocate,* [685] Lord Uist contended that while the doctrine of mutual corroboration had been extended in recent years, it was not possible for child abuse at the upper end of the spectrum to corroborate that at the lower end. The case involved one charge of lewd and libidinous practices in relation to the appellant touching his niece under her top while she slept; whereas the other involved multiple penetrative acts against his nephew. This was

[682] See also *McCafferty v HM Advocate* HCJAC 2019 involving the rape of an adult woman who was on high-dose medication and rape and lewd and libidinous practices in respect of a female child. The charges were noted to have differences but all occurred in "a domestic setting" when the accused was in a "position of trust in relation to the complainers who were vulnerable in one way or another" para 8.

[683] *Adam v HM Advocate* 2020 SCCR 123.

[684] ibid para 10.

[685] *P v HM Advocate* 2015 SLT 485.

subsequently disapproved by the court in the 2022 case of *HM Advocate v L (B)*.[686] That case involved a single incident of lewd and libidinous practices following a sexual remark to and sexual touch of the appellant's neighbour, aged between seven and nine; and another involving multiple occasions where the appellant had induced the first complainer's brother to perform penetrative acts and mutual masturbation when the child was aged between six and seven years old. On appeal, the court confirmed that the test to be adopted for the application of mutual corroboration was whether there was "no possible view on which it could be said there is a connection between the offences".[687] It was further noted that this test was "very high" and, in modern practice, it would rarely be passed by cases of child sex abuse,[688] because "in cases involving the peculiar crime of the sexual abuse of children by adults, there already existed a special, compelling or extraordinary circumstance which would be sufficient for the jury to find the necessary course of conduct established, at least in cases where there was not an exceptionally long gap in time".[689] The consequence of this development is that a majority of cases involving sexual offences against children will necessarily be capable of mutual corroboration, and therefore put to the jury, because a wide expanse of sexual behaviour against children by adults can, within their context, be understood to be constituent elements of a wider pattern of child sexual abuse. Rather than simply evidencing an increased awareness of the circumstances within which child sexual offences can occur, the development of case law detailed here evidences that a key focus of the judiciary in assessing the similarity of offences is the relationship between the adult and child within which they unfolded. The importance of relationships within contemporary judicial reasoning is not simply evidence of an increased judicial awareness of the circumstances within which sexual offences against children occur, but reflects the construction of the sexually autonomous adult and the vulnerable sexual autonomy of the child shaped by the 2009 Act. Thus, the relationship of trust or dependency between the adult and child, and the behaviour undertaken to abuse it, becomes relevant because the adult is relatively more capacitated, autonomous, and responsible compared to the child who is the opposite.

This position has led some members of the judiciary and commentators to criticise the development of the *Moorov* doctrine. Peter Duff has argued that its "original vigour" has waned

[686] *HM Advocate v L(B)* 2022 HCJAC 15 (LJ-G Carloway delivering the opinion of the court).

[687] ibid para 10.

[688] ibid 11. See also, *DW v HM Advocate* 2023 HCJAC 28.

[689] ibid with reference to the decision in *Adams* (2020).

as the importance of relatively short time periods between charges has declined.[690] It is now possible to mutually corroborate charges within the same broad category of crime because this will be regarded as "inherently probative" and the courts have moved the doctrine away from being proof of a unified intent to being indicative of a general propensity.[691] In *A v HM Advocate*,[692] which involved sexual offences against children in a family, Lord Glennie contended that it seemed improper that the availability of evidence in a case should rest on whether two incidents could be "squeezed into the *Moorov* straightjacket"[693] by requiring that separate incidents should be formed as one unified course of conduct. The solution proposed by Duff, Lord Glennie, and also the SLC in its *Report on Similar Fact Evidence and the Moorov Doctrine,*[694] has been to suggest that Scots law adopt the broader evidential principle of similar fact evidence. As proposed by the SLC, this would remove the requirement to demonstrate a course of conduct, and instead admit evidence of similar conduct on a number of occasions that tends to prove any fact at issue in the proceedings or of consequence in the context of the proceedings as a whole.[695] Whether the evidence of one charge would be relevant to another would be a "matter of logic and common sense" , but if such evidence was deemed relevant it would be admissible in principle.[696]

There is therefore a desire to create a more predictable and principled approach to the doctrine of mutual corroboration than that developed by the courts, particularly throughout the past two decades. Whether the *Moorov* doctrine is more or less principled or predictable now than in the past is not within the remit of this work, however this section and the previous chapters have evidenced that the evolution of the rule of mutual corroboration in the past twenty years is explained by a constellation of knowledge, institutional practice, and wider social change in much the same manner that its original articulation was. While it is clear that the interpretation and application of the rule is now different, the judicial rationality that created this change was as much the same in the 1928 case of *McDonald* as it is nearly one-hundred years later in the case of *M.R.* in that sexual offences against children are what the courts

[690] Davidson, '"Similar Fact" Evidence and Moorov: Time for Rationalisation?' (n 287) 103.

[691] ibid.

[692] *A v HM Advocate* 2020 JC 16.

[693] ibid para 46 (Lord Glennie).

[694] Scottish Law Commission, 'Report on Similar Fact Evidence and the *Moorov* Doctrine No 229' (2012).

[695] ibid paras 6.90-6.96.

[696] ibid 6.96.

understand sexual offences against children to be. That is to say that the construction of the child and the similarity of adult sexual conduct between them is malleable and subject to change from a range of internal and external institutional, social, and knowledge conditions that are refracted within the practice of the law. Today, the transformation of knowledge about child sexual abuse from the nineteen-eighties means that male and female children are more readily understood to be vulnerable to abuse in family contexts, in institutions where they are under the control of adult authority, or in relationships to adults who have sought to gain their trust in order to manipulate them.[697]

New understandings about sexual offences against children have constructed the vulnerabilities of the child in these relational contexts. In turn, this knowledge has underpinned the judicial interpretation of similarities in the behaviour committed within different relational contexts. As such, the similarities in the physical space that a crime took place; or the time of day; or time between incidents, logically become less relevant. The courts now evaluate whether relationships between the adult and the child tended to create opportunities for abuse, whether these opportunities arose because of the vulnerable characteristics of the child, and when they arose in the course of the relationship; rather than distinguish between the day or night; domestic or public settings; or male or female complainers. That a parent sexually penetrated his son and daughter in their beds some two decades before he sexually touched his granddaughter in his car can be made sense of as a common pattern of generational abuse. The time period between the offences therefore becomes less relevant and so too do the physical characteristics of place or gender. Equally, the offender who develops a relationship with children he is not related to, by befriending them, by providing sweets, compliments, and support that they may otherwise desire, is shown to create opportunities for abuse by developing the relationship; whether sexual conduct occurs at different times or in different environments matters less because it is the relationship as a whole that acts as the context for, and can explain, the interrelation of different acts of offending.

The judicial assessment of sexual conduct towards children has also changed in line with these new understandings of child sexual abuse. The courts have all but removed the requirement that sexual behaviour between adults and children share similar levels of seriousness or physical modes of perpetration. This reflects the reform to sexual offences

[697] See, on this, Chapter 4 pt 4.4.1.

realised in the 2009 Act, as the central wrongfulness of the behaviour is not determined by its violence or physical harm, but by the violation of sexual autonomy that it symbolises. All sexual behaviour between adults and children can therefore rationally be understood as integral parts of a wider pattern of abuse to the vulnerable sexual autonomy of the child, and this interpretation will be assisted by an evaluation of the relationship that existed between the adult and child. Children's sexual autonomy is, moreover, inherently vulnerable because it is understood to be either absent or undeveloped, and especially so in contexts of dependency, trust, or manipulation. Any assessment of *Moorov*, or its alternatives, should therefore be informed by the development of the doctrine that has been detailed here. The decisions of the court that have led to the present interpretation and application of the rule are bound up with, and refract, a wider nexus of institutional and social conditions than any legislative amendment alone can necessarily alter or anticipate.

The development of the 2009 Act and the subsequent changes to the *Moorov* doctrine indicate that the construction of the vulnerable child has altered the scope and the objectives of the criminal law. The child is vulnerable because he or she lacks the capacity to undertake sexual choice or has an undeveloped, and easily manipulated, sexual autonomy that makes any sexual choice inherently dubious and invalid. This condition of vulnerability is developed from, but also projects, the meaning and content of adult sexual autonomy, which is constructed by the 2009 Act as fully capacitated, developed, and therefore capable of voluntarily agreeing to enter into sexual activities. Sexual activity between adults and children is wrongful because it is undertaken without respect for the conditions of full autonomy. It involves an abuse of the child's lack of capacity or the exploitation of the child's immature ability to participate in choice. This understanding of the child, and the wider concept of sexual autonomy that it is built upon, has justified the criminalisation of a wide range of sexual behaviour between adults and children that need not be physically harmful, such as penetrative acts, or even proximate, such as indecent communications.

The construction of the child's vulnerable sexual autonomy also changes the way in which child sexual abuse can be understood, and this is evidenced in the development of the *Moorov* doctrine. Patterns between sexual acts can be identified by assessing the relationship between an adult and a child and demonstrating that the child was in a position of trust, dependency, and therefore relative lack of autonomy compared to the adult. This is now possible in all relations between adults and children, it is no longer confined to families, because

children's condition of general vulnerability makes them generally susceptible to adult sexual abuse. From this perspective, the multiple individual sexual acts by adults towards children can be logically interpreted as different but connected ways of taking advantage of the general vulnerability of children, irrespective of gender or whether the harm experienced was grave or trivial.

The re-organisation of sexual offences around the principle of sexual autonomy has therefore sought to recognise, and protect, new sexual freedoms in society. However, it has also contributed to the construction of the vulnerable child who lacks the same capacity, maturity, and therefore sexual freedoms as adults. The criminal law now protects male and female children up to the age of 16, and in some circumstances up to the age of 18, from a range of sexual harms and the practice of the criminal law has evolved to reflect this new understanding of the child and sexual harms against them. This has, in turn, assisted the prosecution of sexual offences against children by making it easier to establish the necessary corroboration in order to prosecute charges of sexual offences against children.

The final section of this chapter critically analyses the scope and objectives of contemporary sexual offences against children by analysing the Scottish Child Abuse Inquiry, which is currently ongoing. It draws upon the conclusions in the previous three sections and argues that, while this inquiry is an investigation of allegations of abuse in the past, its formation, terms of reference, and initial findings are indicative of state policy aspirations for the protection of children from sexual harms now and in the future. Studying the Scottish Child Abuse Inquiry therefore offers insights into the wider function of the protection of children from sexual wrongdoing in the criminal law.

5.4. Scottish Child Abuse Inquiry and the Objectives of Child Protection

Announced in 2014 by the Scottish Government,[698] the Scottish Child Abuse Inquiry is a national public inquiry into claims of abuse experienced by children under the age of 18 in institutional care provided or arranged in Scotland at any time in living memory.[699] The Inquiry commenced hearings in 2017, with the overarching aim of investigating the nature and extent

[698]BBC News, 'Historical Abuse Inquiry Announced by the Scottish Government' (17 December 2014) <https://www.bbc.co.uk/news/uk-scotland-30515198> accessed 3 November 2022.

[699] Scottish Child Abuse Inquiry, 'Terms of Reference' <https://www.childabuseinquiry.scot/terms-reference#:~:text=To%20examine%20how%20abuse%20affected,not%20beyond%2017%20December%2020.> (Hereinafter "Terms of Reference") accessed 13 November 2022.

of the abuse of children in care in order to raise public awareness and publicly acknowledge the suffering of children.[700] It is reported to be the largest and most expensive public inquiry of its kind in Scotland[701] but it is by no means unique and shares a likeness to forums that have developed in many liberal democracies to investigate historic state failures to protect children from abuse in institutions or wider society.[702]

The events that led to the development of the Scottish Inquiry are testament to the increased social and political interest in physical and sexual child abuse in the twenty-first century. In Scotland, while national press reports of historic allegations of institutional child abuse are available from at least the mid-nineteen-eighties,[703] these early reports do not appear to have had the same effect as a series of articles in 1997 by *The News of the World* on allegations of physical abuse at Nazareth House, Cardonald.[704] The articles are said to have resulted in at least 293 claimants coming forward by the year 2000 with similar allegations of both sexual and physical abuse experienced in a number of institutions.[705] This encouraged further reports and initiated activism amongst in-care leavers.[706] An awareness of historic child abuse in institutions as an evident problem in Scotland was furthered by its regularity as a feature of online and print news from the late nineteen-nineties onwards, including a number

[700] ibid.

[701] The Herald and Sunday Herald, 'Abuse Investigation Set to Be Scotland's Biggest and Costliest Public Inquiry' (24 March 2016) <http://www.heraldscotland.com/news/14379518.Abuse_investigation_set_to_be_Scotland_s_biggest_and_costli est_public_inquiry/> accessed 27 November 2022.

[702] See, for example, Johanna Skold, 'Historical Abuse-A Contemporary Issue: Compiling Inquiries into Abuse and Neglect of Children in Out-of-Home Care Worldwide' (2013) 14 Journal of Scandinavian Studies in Criminology and Crime Prevention 5.

[703] Scottish Sunday Mail, 'Heart-Breaking but True…It Didn't Pay to Let Them See You Cry' (27 May 1984) <http://fbga.redguitars.co.uk/janMcQsunMail27_05_84.php>.

[704]A residential accommodation run by the Catholic Church.

[705] *A.S., D.M. and J.P. v Sister Bernard Mary Murray and Others [2005] CSOH 70* para 1 (Lord Drummond Young).

[706] Evidence of J. Buckley, Transcript to the Inquiry (24 April 2018) paras 18–19 <https://www.childabuseinquiry.scot/media/1631/trn0010030001-day-47.pdf> accessed 12 May 2020.

of well-publicised criminal prosecutions of individuals for abuse in different institutions[707] and civil legal actions.[708]

Alongside increased media interest from the turn of the century, there was increasing parliamentary and executive action in response to allegations of historic child abuse in institutions. Petitions were submitted by members of the public to the Public Petitions Committee of the Scottish Parliament and led to the formation of the Parliamentary Cross-Party Group on Survivors of Childhood Sexual Abuse in 2001, a debate in the Scottish Parliament,[709] and a national strategy to raise awareness about and address the effects of childhood sexual abuse.[710] In mid-2004, the Parliamentary Cross-Party Group convened a debate on "Institutional Child Sexual Abuse", where the First Minister Jack McConnell apologised on behalf of the people of Scotland that the abuse was allowed to occur[711] and announced that the Scottish Government would instruct an expert and independent report to assess the running and monitoring of the institutional child care system.[712] Two independent expert reports were subsequently commissioned by the Scottish Government: the SLC's *Report on Personal Injury Actions*[713] and the *Historical Abuse Systematic Review of Allegations of Abuse in Residential Schools and Children's Homes in Scotland between 1950 and 1995*,[714] known as the "Shaw Review".

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[707] BBC News, 'Child Rapist Jailed for 12 Years' (28 September 2001) <http://news.bbc.co.uk/1/hi/scotland/1568472.stm;> accessed 12 November 2022; BBC News, 'Nun "A Conspiracy Victim"' (15 September 2000) <http://news.bbc.co.uk/1/hi/scotland/926254.stm> accessed 12 November 2022.

[708] Of particular importance were the civil actions dismissed by the Outer House in 2005 as they fell outwith the statutory prescription period (time-bar): see, *A.S. and Otrs.* [2005].

[709] Discussed above pt 5.1.

[710] 'Response Submission to the Scottish Parliament Petition's Committee re PE1251' Cross-Party Group on Survivors of Sexual Abuse.

[711] 'Petition 535 Timeline (20th August 2002) <http://archive.scottish.parliament.uk/business/petitions/docs/PE535.htm> accessed 12 November 2022.

[712] SP OR 1st December 2004 "Institutional Child Abuse" (FM Jack McConnell).

[713] Scottish Law Commission 'Report on Personal Injury Actions: Limitation and Prescribed Claims (No 207)' (2007).

[714] Scottish Government, 'Independent Historical Abuse Systemic Review: Residential Schools and Children's Homes in Scotland 1950 to 1995' (2007).

The Shaw Review generated more news reports about the previously unknown prevalence of historic child abuse,[715] but neither it nor the SLC Report was considered satisfactory in remit and Shaw recommended even further action on the part of the Scottish Government in order to improve accountability and victim-participation in further review processes.[716] The Scottish Government accepted the recommendations of the Shaw Review in full, and then requested the newly established Scottish Human Rights Commission develop a "framework for remedies" for historic institutional child abuse.[717] In 2010, the Human Rights Commission published its Report, which recommended a comprehensive approach to child abuse claims based on human rights.[718] From 2010 until 2014, the Scottish Government engaged with Members of the Scottish Parliament, the Scottish Human Rights Commission, and survivors of institutional child abuse to develop a means to explore issues of responsibility, the long-term mental health consequences of institutional child abuse, to document the incidence and prevalence of abuse, and to influence change.[719] By December 2014, the Scottish Government convened a public inquiry into the historical abuse of children in institutional care. The reasons given were that "parliament must always be on the side of victims of abuse".[720]

In order to achieve its objective of acknowledging and raising the awareness about historic child abuse, the Scottish Inquiry's terms of reference require it to both document and evaluate allegations of child abuse. It must create a national public record and commentary of what abuse happened, why, and where it took place as well as the effects it had on both the children involved and their families.[721] Further to this, it must also evaluate the organisational responsibility of state and non-state institutions, including the courts, for child abuse. It must further assess the extent to which the causes of institutional failure have since been addressed or whether further changes in policy, practice, or legislation are necessary in order to protect

[715] 'Scotland's Shame: Decades of Neglect Abuse and Suffering' *The Herald* (23 November 2007) <http://www.heraldscotland.com/news/12454083.Scotland_apos_s_shame__decades_of_neglect__abuse_and_suf fering/> accessed 12 July 2023.

[716] See: Shaw Report ch 6.

[717] Scottish Government, 'Looked after Children' <https://beta.gov.scot/policies/looked-afterchildren/residential-care/> accessed 12 July 2023.

[718] Scottish Human Rights Commission 'A Human Rights-Based Framework for an Acknowledgement and Accountability Forum for Survivors of Historic Abuse' (2010).

[719] See: 'Child Abuse Victims Hail Major Step Forward in Fight for Justice' *The Herald* (28 October 2014) <http://www.heraldscotland.com/news/13186690.Child_abuse_victims_hail_major_step_forward_in_fight_for_justice/> accessed 12 November 2022.

[720] SP OR "Historical Child Abuse" 17th December 2014 (Angela Constance).

[721] Terms of Reference 1-4.

children in care from abuse in the future.[722] It is chaired by a member of the judiciary, Lady Smith, and has commissioned multiple research reports as well as undertaken oral hearings, and published reports on various themes.

There is a wide range of academic studies that seek to critically assess both the form and function of public inquiries in general, and public inquiries into child abuse more specifically. Such inquiries have been argued to be sources of legitimacy and reassurance in the modern state because they place information in the public domain and therefore aid public scrutiny.[723] Or, alternatively, public inquiries have been analysed as a means for governments to re-establish trust and social order in state institutions by outsourcing the management of difficult political issues to a member of the judiciary who can be regarded as legitimate, external, and objective.[724] However, beyond the fact that inquiries can assist in the reproduction of the power of state bodies, they can also operate to define what the state's proper role, function, and strategy should be. Paul Starr has observed that commissions of inquiry have historically functioned within liberal states to collect information about complex societies and officially recognise it, record it, and classify it in a manner that is meaningful and politically relevant in the given time period.[725] In this way, they are a means by which the state "edits" an official version of the social world, which can then form the basis upon which state institutions can take political actions.[726] This process is enabled by the constitutional structure of inquiries within administrative states, which are created by state agents, but made-up of members who are not within the political institutions of state, such as the judiciary or academics.[727] The information gathered, the rules that shape the classifications and meanings ascribed to that information, and the recommendations that are built upon it are presented as verified and independent expert findings that can justify and explain subsequent state actions.[728]

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[722] ibid 5-8.

[723] See, for example: Philip Sales, 'Accountability of Government via Public Inquiries' (2004) 9 Judicial Review 173. Alternatively, this assist state control, see: Chris Greer and Eugene McLaughlin, 'Theorizing Institutional Scandal and the Regulatory State' (2017) 21 Theoretical Criminology 112.

[724] Frank Furedi, *Moral Crusades in an Age of Mistrust: The Jimmy Savile Scandal* (Palgrave Macmillan 2013).

[725] Paul Starr, 'Social Categories and Claims in the Liberal State' (1992) 59 Social Research 263, 270.

[726] ibid 273. See also: Geoffrey C Bowker and Susan Leigh Star, *Sorting Things Out: Classification and Its Consequences* (MIT Press 1999).

[727] Starr (1992) 274.

[728] ibid.

From this perspective, the Scottish Child Abuse Inquiry is simultaneously backward and forward looking in its function. It is a means of generating information about the past, using categories and meanings that are socially and politically relevant in the present in order to create an understanding of the social world for state authorities to act upon now and in the future. This critical perspective is important for the present argument because it offers a means of interpreting the terms of reference and findings of the Inquiry in order to better understand the wider state objectives for protecting children from child sexual abuse in the present day. This, in turn, can further enhance the account of child sexual offences that has unfolded in this chapter.

Thus, the findings of the Inquiry, and response of the Scottish Government to them, construct a particular role for the state in the protection of children. In her analysis of the role of commissions of inquiry into child sexual abuse in Australia,[729] Arlie Loughnan has argued that state responsibility has become more developed in that the state has now taken on the role of accounting for past abuses as well as preventing future potential harms against children in society.[730] A similar ascription of state responsibility for the protection of children is observable in the Scottish Child Abuse Inquiry publications. In the Inquiry Case Study of the Scottish Government's decision-making between 2002-2014, the Government acknowledged that it should have publicly recognised what happened to children in state care and accept responsibilities for past institutional abuse.[731] A Case Study on child migration reported that "individual child migrants could be forgiven for thinking that Britain, and the government who sent them away, no longer had any real interest in them. Indeed, there is little evidence to suggest they were wrong"[732] and Inquiry publications have noted that there was an absence of government oversight in order to ensure child abuse was reported and addressed within the many religious and voluntary institutions who undertook child care on behalf of the state.[733]

A similar understanding is reflected in the Case Study findings about historic abuse in independent private residential boarding schools that were not created by state authorities nor run by them. In the investigation into allegations of abuse at Loretto School between 1945 and

[729] Arlie Loughnan, *Self, Others and the State: Relations of Criminal Responsibility* (Cambridge University Press 2020) ch 8.

[730] ibid 238.

[731] Scottish Child Abuse Inquiry, 'Case Study Findings – Scottish Government (No 6)' (2021) 130-38.

[732] Scottish Child Abuse Inquiry 'Case Study Findings – Child Migration (No 8)' (2023) para 1.7.

[733] ibid 2.567.

2021, the first and currently only Inquiry investigation of a private boarding school, findings document that the state had "little oversight" of the operation of the School until 1995, when new regulations were introduced.[734] It highlights, further, that what inspections did take place until the later part of the century were not aimed at assessing the care and wellbeing of children boarding at the school; but mainly the efficiency and suitability of education, and the standard of accommodation, and school premises.[735] The Case Study findings explicitly draw attention to an unexplained gap of 27 years between state inspection reports, from 1965 and 1992,[736] but later note that from 1999 pastoral care of pupils, including child protection provisions, were instituted and the inspections assessed the quality of governance of the School.[737] It is from this overview that the Case Study connects the quality and consistency of state oversight of Loretto to the incidence of sexual, physical, and emotional abuse that took place. The findings consequently note that the 27 year gap in Reporting was not only "wholly unsatisfactory" but also "redolent complacency on the part of [state] inspectors" which "must have played a part in fostering the school's own complacency and serious abuse was able to occur unchallenged and without fear of detection".[738] The implication of these findings is that the lack of state responsibility for oversight of the wellbeing and care of children within private institutions was a contributory factor to the abuse that was experienced within them. By positively evaluating the changed focus and regularity of state oversight of Loretto from the later twentieth century into twenty-first, the Inquiry also indicated that the enhanced oversight of state inspections with a core focus on children's wider pastoral needs, rather than simply accommodation and education, was a necessary and beneficial task for the state.

In attributing responsibility for past failures to the state, and emphasising the necessary and responsibilities that the state should have, the Inquiry findings position contemporary Scottish state authorities as holding an essential responsibility for the oversight and regulation of children in the present in order to prevent and detect abuse. Moreover, this position is reflected in current child protection policies of the Scottish Government. These maintain that the Government is "responsible for setting national child protection policy and legislation", which now intends to ensure that effective protection is in place to identify and protect all

[734] Scottish Child Abuse Inquiry, 'Case Study Findings – Loretto School (No 9) Vol 1' (2023) 122.

[735] ibid 123.

[736] ibid 126.

[737] ibid 126-8.

[738] ibid 130.

children at risk of child abuse and neglect.[739] The policy states that it has developed its National Child Protection Guidance "through extensive consultation…and incorporates [the Government's] understanding of best practice and what works from various sources, including practitioner and stakeholder experience, inspections, research and case reviews".[740] But while the state has assumed widespread and central responsibility for the protection of children, it is notable that the policy, funding, standards, and procedures set by the state are designed in line with the view that "everyone who works with children and families has a role in making sure children are safe and well" as well as "individuals and local communities" who have an important role in helping to protect children.[741]

The responsibility of state authorities for child abuse that emerges in the Inquiry reports and current policy documents of the Scottish Government is therefore centralised and expansive, especially in light of the development of understandings of child sexual abuse that have been evidenced in the previous sections of this chapter. However, it is not total. Instead, the state appears to perform a facilitating role in the protection of children, setting the necessary standards, procedures, and processes for child protection while also relying on a wider network of responsible individuals. Whether these are professionals, firms, schools, parents, and individual members of the community; everyone is expected to act in partnership to resolve the problem of child abuse and take a portion of the responsibility to fulfil the social obligation to protect children.[742]

Further insight can be gained from the classification of the child and understandings of child sexual abuse that have been developed at the Inquiry. The child in care who is the subject of the Inquiry's investigation is understood to have had vulnerable sexual autonomy that was dependent and trusting of adults while in institutional care. Thus, for the purposes of its investigation, the child is classified as those below the age of 18, which reflects current understandings of the particular vulnerabilities of the child within institutional settings, where they are trusting and dependent upon adult authorities. In case study reports into residential homes, the particular nature of the child's vulnerability is made clear. These note that

[739] Scottish Department for Education and Skills, 'Child Protection Policy' <https://www.gov.scot/policies/child-protection/> accessed 12 May 2023.

[740] Scottish Government, 'National Child Protection Guidance' < https://www.gov.scot/policies/child-protection/national-child-protection-guidance/> accessed 12 May 2023.

[741] ibid.

[742] Nikolas Rose, *Powers of Freedom: Reframing Political Thought* (Cambridge University Press 1999) 174.

institutions should have been like homes, which are meant to be "safe places" where children will find "unconditional love provided by adults they can trust…a place that does not fill them with fear; a place where they will not suffer abuse".[743] Sexual abuse is understood to include sexual activity by adult staff members, as well as witnessing sexual behaviour towards children of all genders.[744] But it is included alongside a range of other physical and emotional abuse, including beatings, a lack of comfort and reassurance, a lack of emotional support for past trauma, and no reliable system for marking children's birthdays.[745] This point about the expectations of care for children, and the subsequent range of abuse that can arise from its absence, is substantiated further in the Case Study into the provision of residential care for children in Scotland by the religious order the Sisters of Nazareth.[746] The findings document that while in care children, "[c]hildren in need of kind, warm, loving care and comfort did not find it. Children were deprived of compassion, dignity, care and comfort".[747]

Furthermore, a research study conducted for the Inquiry noted both that children in the care system should be particularly vulnerable because they are at higher risk of experience multiple types of abuse, whether sexual; physical; or emotional upon being previously abused.[748] The particular wrongfulness of sexual abuse within institutional care that is constructed from the Inquiry's investigations is the inversion of the relationship between the adult and child that it symbolised. That is, the inversion of the relationship of trust and dependency that the child had upon the adults whom they relied upon. This not only injured the child but it undermined the safety, care, and affection that was expected to have been provided within those relations of trust and dependency. This point is further demonstrated in the findings of the Case Study into the care provided by the Sister's of Nazareth, which noted that many children who came into the care of the Sisters had lives that were "blighted in some way" but this presented the Sisters with the possibility of making a "real and positive difference" to each of those children but while the "unfailing focus [of the Sisters] should have been on identifying

[743] Scottish Child Abuse Inquiry, 'Case Study into Residential Care provided by the Daughters of Charity of St Vincent de Paul (No 1)' (2018) 4.

[744] ibid para 2.93.

[745] ibid viii – ix.

[746] Scottish Child Abuse Inquiry, 'Case Study into Residential Care Provided by the Sisters of Nazareth (No 2)' (2019) 6.

[747] ibid ix.

[748] Lorraine Radford et al., 'Report for the Scottish Child Abuse Inquiry into the Abuse of Children in Care in Scotland: Research Review' (2017) 11 <https://www.childabuseinquiry.scot/sites/default/files/2023-03/prevalence-of-abuse-in-scotland-professor-lorraine-radford.pdf> accessed 29 January 2023.

how best to heal and nurture these children" instead "there was no such system and many individual Sisters, throughout the period examined, inflicted further damage".[749]

Another commissioned study further documented the specific harms and impacts associated with child sexual abuse, ranging from serious to trivial contact. This research states that child sexual abuse was associated with problems in physical health, including an increased risk of developing diabetes and cancer as adults.[750] It was also found to be associated with long-term mental health problems, such as post-traumatic stress disorder, anxiety disorder, and poor-outcomes following clinical treatment for depression and bipolar disorder.[751] More generally, it was associated with low-self-esteem, school attainment problems, parenting problems, sexual aggression, suicides, and a negative quality of life.[752] Across the Case Study findings of the Inquiry the various impacts of abuse also mirror these problems associated with abuse. It is shown to have had a lasting impact on many victims,[753] and some victim's "reflections" are documented at the end of several case studies These reflections refer to illness and addition, such as those that describe victims as being describe being "full of damn illness" and "charity cases" following childhood abuse[754] others point to a high incidence of suicide following the abuse as well as issues with alcoholism and drug use.[755] Those abused under the care of male religious orders were found not only to have negative and long-term impacts on their physical and mental health but also their faith, which in some accounts is described as a form of spiritual death following abuse.[756]

As previously argued, throughout the twentieth century, children who experienced adult sexual behaviour were institutionalised because their physical health, immoral behaviour, or

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[749] Case Study into Residential Care Provided by the Sisters of Nazareth (No 2) ix.

[750] Alan Carr, Hollie Duff and Fiona Craddock, 'Report for the Scottish Child Abuse Inquiry: Literature Review on the Outcomes for Survivors of Child Maltreatment in Residential Care or Birth Families' (2017) para 3.3 < https://www.childabuseinquiry.scot/evidence/literature-review-outcomes-survivors-child-maltreatment-residential-care-or-birth-0 > accessed 29 January 2023.

[751] ibid 3.5.

[752] ibid 3.6.

[753] Case Study into Residential Care Provided by the Sisters of Nazareth (No 2) 13.

[754] Scottish Child Abuse Inquiry, 'Case Study into Residential Care Provided by the Quarriers, Aberlour Care Trust, and Barnardo's between 1921 and 1991 (No 3)' (2020) 97.

[755] "…every other one of them bar my sister and I committed suicide after they left. They had had horrific, probably sometimes worse than maybe which I experienced in their abusive lives, but they were either suffering from alcoholism or drugs and they committed suicide" testimony of "Angela" reported ibid 103.

[756] Scottish Child Abuse Inquiry, 'Case Study into Residential Care Provided by the Benedictine Monks of Fort Augustus Abbey between 1948 and 1991 (No 5)' (2020), see testimony of "Russell" at 99.

warped development posed a threat to their potential to become productive adults in heterosexual families in line with the status of their gender.[757] However, the child in institutional care that is constructed by the Scottish Child Abuse Inquiry has a particularly vulnerable sexual autonomy because they existed in a position of trust and dependency and the institution is no longer intended to control and train them in order to reproduce class and gender norms. Instead, it is meant to be a home, where a child can be safe and trusting while experiencing emotional support and respect from adults. The harms a child can experience as a result of sexual abuse are no longer framed as a matter of venereal disease, or injury to their expected sexual behaviour in the future, but the long-term injury to their physical health and their psychological well-being, understood in terms of emotional resilience, and even school achievement.

Despite its focus on historic abuse, this section has argued that the classifications and understandings of the Inquiry provide insight into the contemporary objectives, and aspirations, of the state for the protection of children from sexual offences. The state has taken responsibility for the protection of children from a wide range of harms, whether sexual, physical, or emotional because children are understood to have a vulnerable autonomy, which is dependent on and trusting of autonomous adults. But the central responsibility of the state is now shared by individuals in society, who are also expected to take their own measure of responsibility to protect children. Those responsible for children in households or institutions are particularly important, because there is a need for children to be safe, secure, and supported when in obvious relations of trust and dependency upon adults. Furthermore, this protection is necessary in order to prevent a range of long-term physical and mental health harms to the child that can result from sexual abuse. These harms are understood not only as negative effects upon the child's personal wellbeing, but also their future capacity to live fulfilled, employed, and healthy lives. This view is mirrored in current Scottish Government policy which states that "child abuse and neglect have significant effects on children's emotional and physical health, social development, education, and future employment."[758]

It is therefore possible to situate the development of sexual offences against children within these broader aims of the state. The protection of the child's vulnerable sexual autonomy in the criminal law recognises the relative incapacity, dependency, and trust of children upon autonomous adults. This has led to a scheme of sexual offences against children that proscribes

[757] See: Chapters 3 and 4 above.

[758] Scottish Department for Education and Skills, 'Child Protection Policy' (n 739).

a range of contact and non-contact offending, and proximate or remote sexual wrongdoing. This, alongside the development of the *Moorov* doctrine in the twenty-first century, not only provides an expansive scope of protection for the vulnerable child; but it also inscribes the proper relationships expected of autonomous adults with children. The construction of full sexual autonomy, and its absence in respect of children, understands adults to be in a position of power, and therefore responsibility, over children. The regulation of sexual behaviour between adults and children in the criminal law communicates the appropriate way that adult responsibility towards children will be fulfilled. That is, by providing safety and security for children rather than undertaking sexual behaviour toward them. The criminal law therefore operates alongside the other institutions of the Scottish state to coordinate the appropriate behaviour between adults and children, and protect the vulnerable autonomy of children when it is violated by inappropriate sexual conduct. This, in turn, seeks to protect children who lack capacity and full autonomy in order that they can become autonomous adults with the necessary physical and mental faculties to exercise adult autonomy successfully in the future, such as mental tenacity, educational attainment, a sense of control over their decision-making, and the emotional resilience required for personal fulfilment and employment.

5.5. Conclusion

In conclusion, this chapter has argued that the criminal law of the twenty-first century seeks to protect the vulnerable sexual autonomy of the child. It has evidenced that the continued development of ideas about child sexual abuse, and the enhanced sexual freedoms of adults in society as a whole from the turn of the century meant that the capacity of the common law to reform sexual offences in order to reflect modern understandings was increasingly limited. The problems with common law reform to the definition of rape, in order to reflect subjective knowledge or belief of consent on the part of the accused, were identified within the new Scottish political institutions that had been established following devolution. The subsequent review and reform of the law of sexual offences codified the criminal law and organised offences around the principle of sexual autonomy. The sexual autonomy of children was regarded as either absent, due to the incapacity of age, or underdeveloped and therefore vulnerable. This chapter has illustrated that this understanding of the child meant that the previous gender-based protection of the criminal law was abandoned and, instead, all children were protected up to the age of 16 from a range of physical and non-physical sexual behaviour as well as proximate or remote sexual behaviour from adults. For those in families and positions

of trust, children were protected from this same range of conduct up to the age of 18. The chapter has further contended that the construction of the vulnerable autonomy of children in the 2009 Act not only derived from adult sexual autonomy, but served to give it further content and meaning by indicating when it would be absent. The child was therefore immature, underdeveloped, or incapacitated while adults were understood to be sexually mature with the capacity to undertake free agreement.

This chapter has also demonstrated that the practice of the criminal law has changed to reflect new understandings of the vulnerable sexual autonomy of the child, and child sexual abuse. It has illustrated that the development of the *Moorov* doctrine for mutual corroboration in the twenty-first century has evolved in order to identify patterns between individual charges of sexual activity that are far apart in time, committed in different places, against different genders of children, and of varying levels of seriousness. The chapter has argued that this is because the contemporary understanding of the child's vulnerable sexual autonomy makes it possible for the courts to assess an underlying unity between acts that are conducted within the overall context of the relationship between the adult and the child. Sexual acts can therefore be understood as connected examples of an adult's abuse of the child's dependency, trust, and weakness within a given relationship. The developments in the doctrine mean that the practice of the criminal law has expanded to facilitate the prosecution of sexual offences against children and, today, a majority of multiple charges of sexual offences against children perpetrated by a single defender will be capable of being mutually corroborated.

Furthermore, this chapter has argued that the formation and working of the Scottish Child Abuse Inquiry evidence the current understandings and objectives of the state in respect of the protection of children from child abuse generally, and child sexual abuse specifically. It has evidenced that the construction of state responsibility at the Inquiry, alongside the Scottish Government's current policy documents, position the state as the central authority responsible for the protection of children in society. But this state responsibility is premised on the wider social responsibility of individuals in society and professionals to work in partnership with the state. Additionally, this chapter has evidenced that the classification of the child and sexual harms against children in the past by the Inquiry align with the contemporary construction of children's vulnerable sexual autonomy by state policies. Children are therefore trusting and dependent on adults, who are responsible for their safety, security, and support in society. This is particularly the case in institutions and family homes. The protection of children intends to

ensure they do not suffer the long-term physical and psychological harms of child sexual abuse and can therefore live self-governing, fulfilled, lives as workers in the future.

From this analysis, the chapter has contended that the construction of the child as vulnerable within the contemporary criminal law operates to ensure that sexual offences protect children from an expansive range of harms and more charges of sexual offences against children can be tried. But it has also argued that this construction of the vulnerable child as trusting, dependent, and easily exploited, operates to uphold the responsibility of adults in society towards children and communicate the appropriate way in which adults should fulfil their responsibilities towards them. Both of these features of the criminal law seek to protect the vulnerable sexual autonomy of the child in order that the child can become an autonomous and responsible adult in the future.

6. Conclusion

This thesis has investigated the emergence and endurance of the child as an object of sexual protection in the criminal law. In order to do this, it has developed a socio-historic analysis of the criminal law, from the initial development of sexual offences against children as a distinct category during the interwar period until the present day.

It has made three core and overarching claims about sexual offences against children throughout the course of the argument. The first is that, from the initial formation of the category of sexual offences against children in the criminal law, they have operated to classify children as distinctive from adults and in need of a distinctive form of protection from adult sexual contact. Second, this thesis has claimed that the child as an object of protection in the criminal law is not a stable category. Who is protected within the category has changed over time - from girls to boys and, now, to all children in general – just as the aims of protection have changed to reflect different understandings of childhood and its relationship to the adult world. And thirdly, it has claimed that this process of legal change affects the function that the criminal law performs at different times within the wider institutional context of the state. These three claims have been evidenced in the argument detailed in each chapter of this work and also have implications for the wider critical understanding of contemporary sexual offences against children, and sexual offences more broadly.

Chapter 2 argued that pre-existing and common law crimes were organised into the distinct category of sexual offences against children in the interwar period. The child that formed the principal object of protection was female and working class. The sexual wrong that the child was protected against was the damage that premature sexual contact threatened to both the moral and physical health of the child. The chapter evidenced that the intelligibility of sexual behaviour against children as a social problem to be regulated by the criminal law, emerged out of the institutional role of women, the circulation of scientific knowledge about venereal disease within state bodies, and the policy focus of the British state during the period, which sought to improve public health. Sexual conduct between individuals in society came to be the subject of official policy action in the period following the First World War because the British government had sought to develop knowledge about, and policies to address, the spread of venereal disease and therefore improve the physical, and material, health of the population as a whole. Alongside this, newly enfranchised female activists and professionals were able to

articulate their political ideas about the protection of children from adult sexual behaviour using the language of "social hygiene", which relied on secular scientific understandings about sexual behaviour in order to justify essentially moral positions. The receptiveness of state institutions to the political ideas of women during the period was shown to have shaped the construction of the category of the child in the criminal law. The protection of young women, in particular, rather than their punishment for engaging in sexual activity with adults was seen as necessary because it would enforce an equal standard of morality between men and women. However, the chapter also illustrated that ideas about social hygiene, and the wider public health it sought to enhance, were underpinned by presuppositions about the appropriate gender roles for children and the position of the working classes. Thus, sexual behaviour between adults and children was understood to be indicative of improper personal habits and behaviour. That included a lack of self-control expected of male adults; but also, close living conditions, inordinate sexual knowledge in childhood; and a lack of parental supervision. These conditions of the working classes were presented as being particularly conducive to adult-child sexual relations as a result.

Ideas about socially hygienic sex meant that the harm of adult sexual contact with children was understood to be the damage that it could cause to the hygienic practices and behaviour of the child in the future. Female children exposed to sexual contact below a certain age were seen to be in particular need of protection because ideas about social hygiene understood them to be the most susceptible to becoming sexually licentious as a result of premature sexual contact. A female child's sexual licentiousness in the future risked the continued spread of venereal disease, prostitution, or illegitimate offspring in the future. The protection of children in the criminal law therefore operated as a means through which principally female and working-class children could be protected from physical and moral dangers in order that they grew up to display the appropriate behaviour and attain the appropriate level of health to engage in heterosexual marriages and produce healthy children in the future, for the material welfare and health of the population as a whole.

Chapter 3 built upon the analysis developed in Chapter 2, and evidenced that the creation of the Criminal Court of Appeal in Scotland, alongside the distinctive creative rationality of the Scots common law, meant that common law rules of evidence evolved during the interwar years and facilitated the mutual corroboration of multiple charges of sexual offences by adults against children. It evidenced that judicial re-interpretations reflected wider understandings about the category of sexual offences against children that had developed

externally to the criminal law. The chapter then argued that the new category of sexual offences against children became a basis upon which, mainly female and working class children, could be classified to be in need of care and control. This classification could lead to their institutionalisation within the new approved school system. This system used training and education to reproduce "ideal citizens" in a manner that reflected gender and class distinctions in the social body. The criminal law therefore became part of a wider administrative system that sought to identify and govern children who had been subject to sexual activity by adults, and therefore were at risk of becoming morally and physically diseased, in order that they developed into healthy and productive citizens, as understood and defined within wider state strategy during the period.

Chapter 4 argued that the scope and objectives of protection for both male and female children in the decades immediately following 1945 transformed, however this difference aligned to the creation of new knowledge about homosexuality during the period and the wider policy agenda of postwar state welfare institutions, which sought to support the heterosexual family structure premised upon a male-bread winner and dependent wife who would care for children. The scope of protection for female children therefore continued on the basis of the previously established common law and legislative offences of the interwar period. While new social scientific knowledge related to child development altered the official understanding of sexual harms against children, which were now no longer firmly related to the risk of sexual licentiousness and the venereal disease of female children in the future, this new knowledge and the strategies from which it was built, nonetheless continued to presuppose that female children necessitated protection in order to prevent them from exercising inappropriate sexual behaviour in the future that undermined their idealised role as well-adjusted, reliable, home-makers within a heterosexual family structure.

The chapter then evidenced the emergence of the male child as an object of protection in the criminal law. It argued that this was attributable to the development of social scientific knowledge about sex that was collected and circulated within an official inquiry. The state action taken upon the basis of this knowledge, however, was shaped by the gendered policy objectives for men and women in postwar British society. Male homosexuality thus became an intelligible problem upon which state regulation could be formed. Within state institutions, male homosexuality was interpreted as both a natural sexual trait that was not firmly fixed until adolescence and a threat to the heterosexual family unit in society. This meant that male children were increasingly understood to necessitate protection within the category of the child

in the criminal law from adult male sexual conduct. This was reflected in the evolution of Scots common law by the judiciary during the period, which sought to protect young men and male children, above the comparable age of consent for female children, from adult male sexual conduct. The chapter argued that in doing so, the Scots criminal law protected the masculine and heterosexual traits of male children from the threat posed to them by male homosexual wrongdoing. The criminal law during the period therefore supported the aims of the wider administrative bodies of the postwar state to ensure that male and female children were protected in order that they develop the necessary behaviours and attributes that would allow them to participate in heterosexual family structures in accordance with the roles and status expected of their respective genders.

Finally, the latter part of Chapter 4 and Chapter 5 documented the gradual transformation of the scope and objectives of sexual offences against children from the late twentieth century until the present. Chapter 4 documented the reform to the law of incest. It argued that the child protected by these reforms was understood to be trusting, dependent, and therefore vulnerable within a range of family relationships. The sexual harms that criminal law protected against included the physical and long-term psychological damage to the child, as well as the overall damage to the relationships of trust and dependency that were expected within a family unit. The male or female child who experienced sexual intercourse within the family was no longer understood as a threat to the reproductive or industrial capacity of the population, whether through sexual disease or inability to enter into normative heterosexual family life; instead, the harm they experienced was understood to be the injury to their personal wellbeing and the inversion of family responsibilities of care and dependency that this symbolised. Sexual offences against children therefore were no longer related to the conditions or behaviour of certain classes or genders, but arose from the relationships between dependent children and adults that were essential within families. The chapter evidenced that law reform in this period reflected, and enhanced, wider official understandings of child sexual abuse that had emerged as a problem from the nineteen-seventies. This problem was attributable to feminist campaign efforts and new international research, which communicated findings about the previously unacknowledged incidence and prevalence of sexual and physical harm to children within family homes and across classes. But the chapter also showed that knowledge about the incidence and prevalence of harm to children within private family homes coalesced with new understandings of, and objectives for, the family and children within government policy. As the status of women in public life and employment changed, and children became

financially and materially dependent upon their families for longer, and policy from the nineteen-eighties gradually repositioned the range of diverse family forms in society as the primary source of care, safety, and control of children. This contrasts with the previous emphasis on welfare state institutions caring for the population. The protection of children from child sexual abuse in the family home therefore functioned to uphold the appropriate relationships within families; this was required for the state to fulfil its responsibilities for the care of children by providing a safeguard against the possible abuses that could arise as a result of family relationships.

Chapter 5 has detailed the emergence of the child as an object of protection in the contemporary criminal law. It argued that the creation of a new devolved Scottish administration, an ongoing policy focus on child sexual abuse, and the gradual receptiveness of legal and political institutions to the changing sexual behaviour of individuals in society led to the codification and re-organisation of sexual offences as a whole in the early part of the twenty-first century. The criminal law therefore protected the sexual autonomy of adults in society, and this was reflected in the role of consent within offence definitions. The objective of law reform was to support the sexual autonomy of individuals to enter into sexual relations on the basis of free agreement, by criminalising those instances where it was absent. The criminalisation of adult sexual conduct with children was justified on the basis of the wider understanding of adult sexual autonomy. Children were therefore constructed in the criminal law to have vulnerable sexual autonomy, that was either absent or underdeveloped. Sexual activity with a child by an adult would consequently automatically undermine the concept, and social meaning, of sexual autonomy. The chapter evidenced that the development of this underlying sexual wrong meant that a range of physical, non-physical, proximate, and remote sexual behaviour with children was proscribed. It documented that the law no longer provided differential protection for male and female children, or heterosexual and homosexual behaviour, and that it also justified extended periods of protection for children in relationships of trust and dependency within the family where their sexual autonomy would be particularly vulnerable.

In Chapter 5, it was also shown that the construction of the child's vulnerable sexual autonomy in the criminal law is evident in changing judicial understandings of child sexual abuse. This has facilitated the gradual re-interpretation of the doctrine of mutual corroboration in the twenty-first century and therefore expanded the criminal law in practice. It is now possible for the courts to identify a pattern of abuse from multiple individual charges against

the same accused in light of the overall relationship context that the defender had with the child and whether this relationship created the necessary conditions and opportunities to manipulate or abuse a child's vulnerable autonomy and therefore perpetrate sexual offences.

However, Chapter 5 also analysed the objectives of the protection of the child in the twenty-first century and assessed its function in light of the wider state strategies to protect children. In respect of the criminal law's objectives, it argued that the protection of the vulnerable child not only logically derives from the concept of full, adult autonomy, that underpins contemporary sexual offences; but it also acts to provide meaning and content to that concept of autonomy by indicating when it will be absent. The child is therefore constructed as incapacitated, dependent, trusting, and easily manipulated; whereas adult autonomy is capacitated, independent, calculating, and consequently free. By protecting children from sexual activity with adults, the criminal law therefore seeks to prevent the physical and psychological harms that may result to the child but it also protects the meaning and social value of sexual autonomy as a whole. This dichotomy between the vulnerable child, who is protected in the criminal law, and the autonomous adult from whom they are protected, furthermore, appears to align with the wider state policy objectives of child protection.

The argument that has unfolded in this work therefore points to a more enriched critical understanding of the criminal law in general, and sexual offences against children in particular. It has established that, throughout the past century, the protection of children from the sexual behaviour of adults has followed distinctive aims at different periods of time that are shaped by the interrelation of knowledge, ideas, and institutional practice. Its findings contribute to the growing socio-historic scholarship of the criminal law[759] as well as the social histories of childhood and sociological studies of families from which its research questions were formed. But, as stated at the beginning of this thesis, and evidenced in its research findings, the sexual protection of children in the criminal law cannot be reduced to or wholly explained by the changing concepts of childhood in society, the changing role of the family, or the changing role of physical institutions or social work practices in classifying, controlling, or protecting children. Instead, the value of the socio-historic approach adopted in this work has been to illustrate that the process of legal change involves a complex interaction of these conditions

[759] See, for example: Farmer, *Making Modern Criminal Law* (2016) (n 34); Lacey, *Responsibility* (2019) (n 35) 88.

within the institutional practices of the criminal law, which shape its scope, objectives, and wider function.

This position has implications for the critical understanding of child sexual offences today. In the twenty-first century, the increasing fluidity of sexual relations and the changing role and status of women and children in society meant that the previous criminal law settlement could not be sustained and the need for reform at the turn of the century seemed clear. Sexual relationships have now become elective and no longer firmly coupled with entry into marriage and consequently having children;[760] women's participation in economic, social, and family life is no longer anchored to dependence upon a male bread-winner; and, in respect of children, since the nineteen-nineties it has become all but impossible for most children and young people to live independently of the economic and material support of their family until at least their late teens.[761] The scheme of sexual offences that recognised both the freedom of individuals to choose to enter sexual relationships, irrespective of their gender or sexuality, and have that autonomous choice respected alongside enhanced protection for the vulnerable autonomy of children therefore presented a solution to many of previous problems identified with the criminal law in the late twentieth century.

However, the inscription of autonomy into the criminal law has brought with it new responsibilities on the part of individuals. With the rise of autonomous subjectivity, individuals have greater choice and freedom to make choices, in order that they can act to maximize the wellbeing, wealth, skills, and happiness of themselves and their families.[762] Alongside this freedom, however, individuals are now expected to take initiative for their own decisions, and responsibility for their own risks, security, and success.[763] The state has therefore devolved responsibility to the individual and its policies intend to facilitate individual choice.[764] This has a particular effect on the protection of children, as it is now the responsibility of autonomous adults – whether in families, education facilities, or general relations in the community – to

[760] Lewis, *Children in the Context of Changing Families and Welfare States* (2006) (n 571) 9.

[761] ibid.

[762] Rose, *Powers of Freedom: Reframing Political Thought* (1999) (n 742) 145.

[763] See: Vikki Bell, 'Governing Childhood: Neo-Liberalism and the Law' (1993) 22 Economy and Society 390; John Pratt, 'Governing the Dangerous: An Historical Overview of Dangerous Offender Legislation' (1996) 5 Social & Legal Studies 21; Nikolas Rose, 'The Death of the Social? Re-Figuring the Territory of Government' (1996) 25 Economy and Society 327.

[764] Rose (1996).

secure the safety and care of children who lack autonomy.[765] Sexual offences against children re-inscribe this relation of responsibility between the state, individuals, and children and the law operates to coordinate the appropriate ways autonomous adults should fulfil their responsibility towards children in order that those children are protected from a range of physical and psychological harms that may undermine their capacity to become autonomous adults capable of self-direction and fulfilment in the future. In this sense the sexual protection of the child in contemporary criminal law is a means of governing *through* the category of the child in order to secure the reproduction of individual autonomy in society.

This understanding of sexual offences against children may also offer critical insights into contemporary problems for sexual offences more generally. Munro and FitzGerald, for example, have documented the reliance on the concept of vulnerable sexual autonomy in state strategies relating to the protection of adult women.[766] These policies have been subject to criticism because of their regressive outcomes, and potential to render women childlike at the expense of their agency. However, as evidenced in this work, the construction of vulnerable autonomy not only operates to inscribe the power relations between adults and children, but it does so in pursuit of wider objectives for the criminal law. The assessment of vulnerable autonomy offered in this thesis therefore prompts a more critical investigation of the aims of the criminal law, and the function of these state strategies, when ascribing the same vulnerable autonomy to adult women.

Furthermore, the argument developed in this thesis offers a critical contribution to the growing literature on criminalisation. It has evidenced that insofar as the vulnerable sexual autonomy of the child is protected within the criminal law, it is not a reflection of a natural or inherent condition of children.[767] Instead, the category of the child is constructed. Today, the protection of the child in the criminal law operates to uphold the wider responsibility of adults towards children to undertake active choices for their safety, care, and fulfilment. This construct of the child is, by definition, exposed to danger in relations of dependence to autonomous adults in society, who also have the primary responsibility to protect them, and the argument detailed in this thesis therefore offers insights into what features of the criminal law and its wider social-

[765] Lewis (2006) 12.

[766] Vanessa Munro, *Shifting Sands?* (2017) (n 23) FitzGerald and Munro, *Sex Work* (2012) (n 24).

[767] *Cf* this point made in relation to sexual autonomy as a whole in Farmer, *Making Modern Criminal Law* (2016) (n 30) 297.

political conditions may be driving calls for an ever-increasing protection of children, the rise of inchoate offences, and the proliferation of technologies of risk management in relation to children.[768]

This thesis has developed an account of the changing category of the child in the criminal law over time and it has evidenced that the scope of this category, and the range of protection granted to it from adult sexual behaviour, has changed in line with different social, institutional, and legal objectives. This form of critical historical research offers an important insight into the present regulation of sexual behaviour against children and provides necessary context that may be valuable for further historical and socio-legal scholarship.

[768] See, for example John Pratt, *Law, Insecurity and Risk Control: Neo-Liberal Governance and the Populist Revolt* (Springer Nature 2020); Ian Dennis and GR Sullivan, *Seeking Security: Pre-Empting the Commission of Criminal Harms* (Hart 2012); Lucia Zedner, 'Fixing the Future? The Pre-Emptive Turn in Criminal Justice' in Alan Norrie, Bernadette McSherry and Simon Bronitt (eds), *Regulating Deviance: The Redirection of Criminalisation and the Futures of Criminal Law* (Hart 2008).

Appendix I

This appendix details the main statutes and common law offences referred to in this work throughout the period 1919-present day

Common Law

Assault Aggravated by Attempt to Ravish or Lewdness.

Assault at common law is an attack, whether it causes injury or not, upon another person with evil intent.[769] Assaults could be aggravated if perpetrated with intent to ravish a female child below the age of 12. This was construed as an attempt to have intercourse and there was no need to prove that the penetration had taken place, only that it was attempted.[770]

Additionally, assaults could be aggravated by 'intent to gratify lewdness', which would involve sexual behaviour falling short of penetration and covered by the common law definition of lewd and libidinous practices detailed below. This aggravation could apply to assaults against female children below the age of 12 and boys below the age of 14.[771]

Lewd and Libidinous Practices and Behaviour.

Macdonald details that in cases where there is no assault, the charge of lewd and libidinous practices and behaviour would be applicable at common law in respect of acts against girls under the age of 12 and boys under the age of 14.[772] Behaviour and practices deemed lewd and libidinous were those that 'tended to corrupt the morals of the young'.[773] Examples given include touching female children 'improperly'[774] and indecent exposure to female children. It therefore covered behaviour involving physical and non-physical contact. The same behaviour was criminalised in relation to girls above the age of 12 but below the age of 16 in the Criminal Law Amendment Act 1922 and later the Sexual Offences (Scotland) Act 1976, detailed below. Until the commencement of the Sexual Offences (Scotland) Act 2009, this common law

[769] Macdonald *A Practical Treatise* (1929) (n 74) 161.

[770] ibid 165.

[771] ibid.

[772] Macdonald (1929) (n 74) 220. These ages were determined in law by the age of puberty.

[773] ibid.

[774] "improper handling of them", ibid.

offence, and its legislative counterpart for older girls,[775] was used to prosecute a range of sexual behaviour against those below the age of 16. The offence continues to be relied upon in relation to behaviour that occurred prior to the commencement of the 2009 Act.

Rape.

In common law, rape was defined as the carnal knowledge of a woman forcibly and against her will. For girls below the age of 12, it was not necessary to evidence force and instead carnal knowledge alone would be sufficient.[776] 'Carnal knowledge' was understood to be penetration, irrespective of the extent of that penetration.[777] For females above the age of 12, it was necessary to prove that force offered by the accused was such that it could overcome any physical resistance of the complainer. Macdonald wrote in respect those above the age of 12 that,

> "it is rape only where resistance has been to the utmost. It is not rape if [the complainer] after however much distress, at last yield consent. The resistance must be to the last and, until overcome by unconsciousness, complete exhaustion, brute force or fear of death".[778]

In 2001, the *Lord Advocate's Reference (No 1)*[779] redefined the common law of rape. It no longer required force in order to evidence that the complainer's will had been overcome. Instead, it was defined as the vaginal penetration of a woman by a male without her consent and with knowledge of or recklessness as to her non-consent. The common law of rape was abolished by the Sexual Offences (Scotland) Act 2009.

Sodomy.

Attempted or complete connection, or penetration, between two males was an offence at common law. This criminalised both parties to the behaviour[780] irrespective of age. From the middle of the twentieth century, sodomy was not charged in relation to two males participating

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[775] Detailed below in the Criminal Law Amendment Act 1922 and Sexual Offences (Scotland) Act 1976.

[776] Hume *Commentaries* (1844) (n 73) 302.

[777] ibid.

[778] ibid and Macdonald (1929) (n 74) 176.

[779] *Lord Advocate's Reference* (No 1 of 2001) 2002 SLT 466 see Chapter 5, Part 5.1 above.

[780] Macdonald (1929) 219.

in intercourse in private when both parties were above the age of 21.[781] This prosecutorial policy was eventually made law in the Criminal Justice (Scotland) Act 1980.[782] Sodomy was abolished by the Sexual Offences (Scotland) Act 2009.

Shameless Indecency.

This offence was established as part of the common law in *McLaughlan v Boyd*[783] and found its basis in the statement by Macdonald that "all shamelessly indecent conduct is criminal".[784] The charge could apply to a range of behaviour and was used to prosecute homosexual activity in the mid and later part of the twentieth century, like that detailed in *McLaughlan,* that fell short of sodomy. In 2005, the common law offence was abolished in the case of *Webster v Dominick*[785] and in that case the court remarked, when applicable, the proper charge should be lewd and libidinous practices and behaviour.

Breach of the Peace

Originally thought to have been a general organising title for a range of offences, breach of the peace was latterly considered an indictable common law offence in its own right and principally understood as a lesser form of rioting. By the middle of the twentieth century, it was relied upon in Scots courts to prosecute a wide range of behaviour that caused an individual to experience fear and alarm or, in absence of actual fear and alarm, behaviour that the courts would 'reasonably expect' to cause members of the public alarm or annoyance including what Gordan described as 'immoral behaviour'.[786] In the 1948 case of *Raffaeli v Heatly*[787] the court determined that when no actual fear or alarm had been caused, it would be the matter of the court to objectively assess the behaviour in order to determine whether it posed a reasonable threat of alarm or annoyance to the public; rather than a factual determination of whether the public were actually likely to be alarmed in the given circumstances. The common law interpretation in *Raffaeli* was followed in *Young*[788] in order to prosecute the homosexual

[781] See Chapter 4, Part 4.3.3, above.

[782] See below for overview of this statute.

[783] *McLaughlan v Boyd* 1934 JC 19. See Chapter 4, Part 4.3, above.

[784] Macdonald (1929) (n 74) 222.

[785] *Webster v Dominick* 2005 JC 65.

[786] Gordon *Criminal Law of Scotland* (1978) (n 369) ch 40.

[787] *Raffaeli v Heatly* 1948 JC 101.

[788] *Young v Heatly* 1959 JC 66. See Chapter 4, Part 4.3.3, above.

conduct of an adult towards male children and the common law offence was thereafter relied upon in order to prosecute sexual behaviour against male and female children by adults.[789]

In 2002, the decision of *Smith v Donnelly*[790] re-articulated the common law offence of breach of the peace in response to a human rights challenge regarding the legal certainty of the common law definition. It was thereafter necessary prove that the conduct was severe enough to cause alarm to ordinary people and threaten serious disturbance to the community. Whether conduct was genuinely alarming to an ordinary person and potentially disturbing to the community would depend on the bench's assessment of it from the perspective of a reasonable person. The common law offence definition outlined in *Smith* remains applicable to a range of conduct, including sexual offences against children and the common law offence was not abolished or amended by the Sexual Offences (Scotland) Act 2009.

Statutes

Incest Act 1567, cap. 15.

This Act applied to Scotland and proscribed intercourse between male and female relatives with reference to Chapter 18 of Leviticus in a 16th century print of the Geneva Bible. The interpretation of the biblical chapter specified forbidden degrees of relationship. The prohibition in the 1567 Act included intercourse between father and daughter; grandfather and granddaughter; mother and son; and brother and sister. The judicial interpretation of the forbidden degrees in Leviticus did not include adopted children, step-children, or illegitimate children.

Criminal Law Amendment Act 1885 (48 & 49 Vict. c69).

The provisions of the 1885 Act applied to England and Wales and Scotland. Section 4 created an offence of 'defilement of a girl under 13 years of age' for actual or attempted 'unlawful carnal knowledge' of a girl below that age. Section 5 created the same offence in respect of girls between the ages of 13 and 16, however prosecutions could be brought no later than three months following the commission of the offence under Section 5. Section 2 of the Criminal Law Amendment Act 1922 later increased this to nine months following the commission of the offence and added an additional defence for male accused under the age of 23, who had no

[789] See discussion in Chapter 4, Part 4.3.3.

[790] *Smith v Donnelly* 2002 JC 55.

previous charges of an offence under the 1885 Act, if he had reasonable cause to believe the complainer was over the age of 16.

Section 11 of the 1885 Act created an offence of 'outrages on decency', which applied to any male who 'in public or private' committed, or was party to the commission of, or procured or attempted to procure the commission by any male person of, any act of gross indecency. This offence, known as 'gross indecency' was added as a late stage amendment to the Act and has subsequently been referred to as the "Labouchere Amendment" after the member who tabled its addition.[791] Section 11 criminalised both parties to male homosexual behaviour, irrespective of their age.

The provisions in the 1885 Act did not replace any of the Scots common law offences.

Defence of the Realm Act 1914 c29.

This Act applied to the whole of the United Kingdom of Great Britain and Ireland as it then was. It was commenced at the outbreak of the First World War and Section 1 provided the British Executive wide-ranging powers to make regulations during war for the purposes of defence of the realm. In 1918, the Regulations created under the Act were updated to include an offence under Regulation 13A. This criminalised any male who engaged in intercourse with girls between the age of 13 and 16. Regulation 14D also criminalised any female who participated in intercourse while suffering from a venereal disease and made a further offence applicable to women who loitered or solicited, while suffering from venereal disease, in areas where troops were stationed. The Act, and its Regulations, ceased to apply at the conclusion of war.

Criminal Law Amendment Act 1922 c56.

Section 4 of this Act applied to Scotland. This made it an offence for any person to use 'any lewd, indecent or libidinous practice or behaviour' towards a girl between the ages of 12 and 16 years regardless of her consent. The definition of behaviour or practices that were considered lewd, indecent, or libidinous was that which would be considered so under the Scots common law of the same name, which was applicable to female children under the age of 12.[792]

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[791] See Chapter 4, Part 4.3.1 above.

[792] See "Common Law Offences" in this Appendix.

Sexual Offences (Scotland) Act 1976 c67.

This Act applied to Scotland and consolidated certain legislative sexual offences previously detailed in the 1885 Act and 1922 Act. Section 3 created the offence of unlawful sexual intercourse with a girl under 13, Section 4 created the comparable offence of intercourse with a girl between 13 and 16. Under Section 4(b) a man under the age of 24 had a defence to a charge in Section 4 if he had not previously been charged with a like offence and had reasonable cause to believe that the girl was of or above the age of 16.

Section 5 of the 1976 Act created the offence of "indecent behaviour towards girls between 12 and 16". This replicated the offence created in Section 4 of the 1922 Act and re-stated that any lewd, indecent, and libidinous behaviour that would be an offence at common law when undertaken toward girls under the age of 12 would be an offence under Section 5 if the girl was between 13 and 16.

Section 8 replicated the offence of gross indecency between males, previously regulated under Section 11 of the 1885 Act. The Act did not amend common law offences nor the law of incest.

Criminal Justice (Scotland) Act 1980 c62.

This Act contained a range of provisions related to criminal justice in Scotland. Section 80 legislated for 'Homosexual Offences', and provided that homosexual acts in private would not be a criminal offence in Scotland if both parties were consenting and over the age of 21. Subsection 2 of Section 80 further detailed that homosexual acts would not be considered private if more than 2 persons take part or the acts were undertaken in a lavatory that the public had access to.

Incest and Related Offences (Scotland) Act 1986 c36.

This Act superseded the Incest Act of 1567 and amended the Sexual Offences (Scotland) Act 1976. It created an offence in Section 2A of the 1976 Act, known as incest, which criminalised individuals who had sexual intercourse with a family member of the opposite sex within the forbidden degrees listed in the Act. These degrees included mothers and fathers; daughters and sons; grandmothers and grandfathers, granddaughters and grandsons; sisters and brothers; aunts and uncles; nieces and nephews; great grandmothers and great grandfathers as well as great granddaughters and great grandsons. This section also criminalised intercourse between

adoptive, or former adoptive, mothers; fathers; daughters; or sons as incest. Illegitimate children were also included within the prohibition.

The Act created an offence in Section 2B of the 1976 Act entitled 'intercourse with a step-child', which criminalised intercourse between step-parents or former step-parents and their current or former step-children of the opposite sex. The offence applied only when the step-child was under the age of 21 or if the step-child had at any time before attaining the age of 18 lived in the same household as the step-parent and been treated as a child of his or her family. Section 2B further provided defences to a charge if the accused could prove he or she did not know and did not have reason to believe that the person was their step-child; or had reasonable grounds to believe the person was over 21; or did not consent to the intercourse.

A further offence in Section 2C of the 1976 Act relating to 'intercourse of a person in position of trust with a child under 16' when any person over the age of 16 had intercourse with a child under the age of 16 who was a member of the same household as that child and was in a position of trust or authority in relation to that child. This section also created the defences of reasonable belief that the child was over the age of 16 and non-consent to the intercourse.

Protection of Children and Prevention of Sexual Offences (Scotland) Act 2005 asp 9.
Section 1 of this Act created an offence of 'meeting a child following certain preliminary contact'. This offence was intended to tackle 'grooming' behaviour[793] and criminalises those who, having met or communicated with an child under the age of 16 on at least one previous occasion, then intentionally meets that child; travels with the intention of meeting that child; or makes arrangements for the child to travel with the intention of meeting the child with intent to engage in 'unlawful sexual activity' with the child or in his or her presence either during or after the meeting. The Act applies to travel, arrangements, and sexual activity that takes place in 'any part of the world'. The offence detailed in the 2005 Act is still in force at the time of writing and was not superseded by the 2009 Act, detailed below.

Sexual Offences (Scotland) Act 2009 asp 9.
This Act substantially reformed the law of sexual offences in Scotland. Under Section 52, the common law offences of rape; clandestine injury to women; lewd, indecent or libidinous

[793] See Chapter 5, above.

practices or behaviour, and sodomy were abolished in respect all behaviour undertaken after the Act came into force on the 1st of December 2010. However, other common law offences used to prosecute sexual behaviour, notably breach of the peace, were not abolished by the 2009 Act. Behaviour undertaken before the commencement of the Act is prosecuted using the common law and legislative regime in force at the date the behaviour occurred.

Part 4 of the 2009 Act applies to children. It creates two separate legislative regimes governing sexual behaviour against 'young children', those below the age of 13, and 'older children', those between the ages of 13 and 16.[794] Those offences against younger children are strict liability offences and there is no defence available as to reasonable belief as to the age of the child. For offences against older children, section 39 of the 2009 Act provides a defence if the accused proves he reasonable believed the child had attained the age of 16. Offences against older children carry lower punishment thresholds than those against younger children, however when there is no evidence of any consent on the part of the older child, the legislative offences applicable to adults and detailed in Part 1 of the Act can be relied upon.

[794] A detailed outline of the legal regime created by the 2009 Act is included in the analysis in Chapter 5, part 5.2.

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