Chapter 11

Sexual offences

CRIMINAL LAW AND SEXUAL FREEDOM

11.1 The extent to which the criminal law attempts to interfere in the sexual conduct of consenting adults is strictly limited. The libertarian ideal – that the law should intervene only if conduct causes unwanted harm to another – is now largely realised in this area, allowing adults to lead the sexual life of their choice. Most sexual offences arise therefore where there is a victim – one who either does not consent to the conduct in question or who does not have the capacity to give a proper consent. There remain, however, certain significant restraints which have nothing to do with consent. Consensual adult incest is still illegal. The possession of child pornography and extreme pornography is illegal, as is the importation or distribution of obscene material in general. There are also prohibitions against indecent displays and other forms of conduct which the public might find sexually shocking. Sexual freedom is therefore conditional upon the recognition of certain social limits, the contours of which may not always be clear and which develop with the views and mores of society.

Sexual offences in Scots law are defined both in statute and under the common law. There is a degree of overlap between the two categories, but the main source of law is now the Sexual Offences (Scotland) Act 2009 with common law offences applying mainly in the prosecution of historic sexual offences committed prior to the commencement of the 2009 Act.

The Sexual Offences (Scotland) Act 2009

11.2 This Act became law on 1 December 2010. It made fundamental changes to the framework of sexual offences in Scotland; it arose from what was described as widespread public, professional and academic concern that the Scots Law on rape and other sexual offences was out of date, unclear and derived from a time when sexual attitudes were very different from those of contemporary society.[1] The Scottish Law Commission prepared a report[2] and, after consultation, the Act came into being. The purpose of the Act was to consolidate and clarify the law on sexual offences. The Act makes use of the terminology of the Sexual Offences Act 2003,[3] describing offences with reference to 'a person "A" as the perpetrator' and 'a person "B" as the victim', the effect of which can be confusing and has been subject to criticism.[4]

The effect of the Act was to codify the law relating to sexual crime and to abolish the common law offences of rape, clandestine injury, lewd indecent or libidinous practices, and sodomy.[5] But its provisions apply only to offences committed after it came into force. The common law and existing statutory provisions continue to apply to offences committed prior to that date and so the common law decisions which preceded the introduction of the Act remain relevant. The Act does not provide a comprehensive treatment of all sexual crimes; for example the common law crime of assault aggravated by indecency and offences relating to prostitution remain. The most commonly encountered provisions are found at parts one to five of the Act, each of which is considered below.

1 Reflecting the Lord Justice Clerk's observations in *Webster v Dominick* 2005 1JC 65, 2003 SLT 975 at para [58] in relation to the offence of public indecency.
2 Report on Rape and Other Sexual Offences (Scot Law Com No 209, 2007).
3 A UK statute which defines sexual offences in England and Wales and which makes provision for the UK wide sex offender notification scheme.
4 See Professor JR Spencer article 'The drafting of criminal legislation; need it be so impenetrable?' [2008] CLR 585, where he describes the English Act as impenetrable and ineffective; E Clive 'Drafting the law on sexual offences' 2006 JR 55.
5 Section 52.

Part One: Rape, Sexual Assault and other offences

11.3 Part One of the Act defines the offences of: rape; sexual assault by penetration; sexual assault; sexual coercion; coercing a person to be present during sexual activity; coercing a person to look at an image of sexual activity; communicating indecently; sexual exposure; voyeurism; and administering a substance for sexual purpose. The principal offences are defined as follows.

Rape[1] is defined as penetration by the penis of the vagina, anus or mouth, without consent and without reasonable belief of consent. Accordingly, rape is extended from the common law offence which was restricted to vaginal intercourse. The offence is gender neutral in respect of both the perpetrator and the victim. 'Penetration', 'penis' and 'vagina' are all defined.

Sexual assault by penetration[2] occurs if a person penetrates sexually (using part of their body or anything else) the vagina or anus of the victim without consent and without reasonable belief of consent. There must be either an intention to do so, or a recklessness about whether there is penetration.

Sexual assault[3] covers a variety of conduct deemed to constitute assault, including penetration, reckless or intentional touching, sexual activity which involves physical contact, and the intentional or reckless emission of some bodily fluids. Again the offence is only committed if there is no consent and no reasonable belief of consent.

The offence of sexual coercion applies where a person causes another person, without that person's consent, to participate in sexual activity. Whereas the offences relating to rape and sexual assault all require some degree of physical

contact between the perpetrator and victim, the offence of sexual coercion does not. An obvious example would be where A compels B, under threat of violence, to undertake a solo sexual act not involving A.

While the offences of rape, sexual assault (whether by penetration or otherwise) and sexual coercion all require some form of physical violation of the victim, there are many sexual offences which do not. For example, sending an unsolicited and sexually explicit text message, performing a sexual act in front of an unsuspecting passer-by, or peering through a curtain to watch a person undress are all acts through which the perpetrator places the victim in a sexual situation to which they did not consent. While such conduct may not involve the victim in a physical act, they violate the victim's sexual autonomy in one way or another. The Act makes provision for five types of conduct which fall into this category: (i) coercing a person to be present while another engages in a sexual act;[4] (ii) coercing a person to look at a sexual image;[5] (iii) indecent communication;[6] (iv) sexual exposure;[7] and (v) voyeurism.[8]

A particular feature of these 'non-physical' act offences is that, in respect of each of them, it must be proved that the perpetrator's purpose was either: (i) to obtain sexual gratification; or (ii) to humiliate, distress or alarm the victim. That requirement is absent from the 'physical act' offences of rape, sexual assault and sexual coercion, presumably on the basis that one or other of these purposes is implicit in the nature of such conduct.

It is worthy of note that the offence of voyeurism was not part of the Scottish Law Commission report, but was introduced by the Scottish Government during the passage of the Bill into law. The provisions are broadly similar to the provisions of ss 67 and 68 of the Sexual Offences Act 2003, although arguably less accessible.[9] The section is designed to catch a variety of conduct within the definition of voyeurism. That includes observing a private act of another party, operating equipment with the intention of enabling themselves or others to observe such a private act, recording such a private act, and installing equipment or adapting a structure to enable such acts to be observed, or recorded.

1 Section 1.
2 Section 2.
3 Section 3.
4 Section 5.
5 Section 6.
6 Section 7.
7 Section 8.
8 Section 9.
9 See 'Two problems in the Sexual Offences (Scotland) Bill' article by James Chalmers 2009 SCL 553 for a robust critique of these provisions, in which the language is described as 'tortuous'.

What is a sexual act?

11.4 As can be seen, the offences created by the 2009 Act cover a wide range of conduct from words spoken to physical assaults of varying descriptions, but the Act is concerned only with *sexual* offences and so an essential element

of each of the 2009 Act offences is that the conduct in question was sexual in nature. Sometimes that is a straight-forward question; but not always. The 2009 Act addresses that question in two ways.

First, there is conduct which is obviously sexual in nature. That category is reserved for conduct involving penile penetration (rape in terms of s 1) and the emission of semen onto the victim (sexual assault in terms of s 3(2)(d)). Such acts are, self-evidently, sexual.

The matter is not always so clear. Medical procedures, for example, can require digital penetration. Theatrical performances may involve some form of intimate touching. With the exception of penile penetration and the emission of semen onto the victim, the conduct in question requires to be assessed according to its context. So what, then, is a sexual act? The short answer is that the reasonable person will know it when they see it or, in the words of s 60(2), activity is sexual 'if a reasonable person would, in all the circumstances of the case, consider it to be sexual'. That is an objective test.[1]

1 See *Jack Ferguson v HM Advocate* 2022 S.C.C.R. 26 in which the defence contended that the accused's act was drunken rather than sexual. The Court observed that, while the intoxication of the accused was a circumstance to which the decision-maker may have regard when deciding whether the reasonable person would regard the behaviour in question as sexual, usually it would be unlikely to be of any great assistance. The Court rejected the suggestion that, in the case on an intoxicated accused, the jury ought to have been directed to consider whether the incident was drink-fuelled rather than overtly sexual. The Court found that that distinction was unhelpful, the two categories not being mutually exclusive.

Part Two: Consent

11.5 Each of the offences in Part 1 deals with a different type of conduct, but the common factor is that all require: (i) the absence of the victim's consent and (ii) the absence, on the part of the perpetrator, of a reasonably held belief that the victim was consenting. Consent is defined in s 12 as 'free agreement'. Mere compliance or acquiescence, or even saying 'yes', may not always amount to consent. In *HM Advocate v SM*,[1] which involved conduct prior to the 2009 Act, the Court held that evidence from the complainer that she had agreed to sexual intercourse in order to defuse a situation in which she had been assaulted and abducted did not amount to evidence of consent in any real sense. The Court also considered that the definition of consent as 'free agreement' in the 2009 Act, did not mark a departure from what was understood to be meant by consent under the pre-existing common law.

Section 13 of the Act sets out certain factual situations in which the law deems there to be no consent at all. These are not evidential presumptions; the section prescribes certain factual situations which, if proved, legally exclude the possibility of valid consent or 'free agreement' existing between the parties. These include where the conduct occurs at a time when the complainer is incapable of consenting because of the effect of alcohol or any other substance; or where the complainer agrees or submits to the conduct because of violence,

threats of violence, unlawful detention, or deception; or where the consent is expressed only by someone other than the victim. In addition, section 14 provides that 'a person is incapable, while asleep or unconscious, of consenting to any conduct.'[2]

The Act also provides guidance as to particular issues concerning consent or the lack thereof. Section 15 provides that 'consent to conduct does not, of itself, imply consent to any other conduct'[3] and that 'consent to conduct may be withdrawn at any time before, or in the case of continuing conduct, during, the conduct'. It also provides that 'if the conduct takes place, or continues to take place, after consent has been withdrawn, it takes place, or continues to take place, without consent.'[4]

For each of the Part 1 offences, it must also be proved that the accused had no reasonable belief that the complainer was consenting.[5] That means that it must be shown that the accused either knew that the complainer was not consenting or, at least, that if the accused believed the complainer to be consenting, that belief was not a reasonable one to hold. A genuine belief that the complainer was consenting is no longer a defence where that belief was unreasonable. Furthermore, a person is expected to take responsibility for establishing whether another person consents to sexual activity. The Act provides that when a determination is being made, by the court or jury, as to whether an accused's belief in a complainer's consent or knowledge was reasonable, 'regard is to be had as to whether the person took any steps to ascertain whether there was consent or, as the case may be, knowledge; and if so, what those steps were'.

1 2019 S.C.C.R. 255.
2 On the basis that consent requires to be continuing, consent expressed by the person in advance of falling asleep or becoming unconscious cannot not provide a defence, see: *GW v HM Advocate* 2019 S.C.C.R. 175.
3 Reflecting Baroness Hale's words in *R v C* [2009] UKHL 42 at para [27] '… it is difficult to think of an activity which is more person – and situation – specific than sexual relations. One does not consent to sex in general. One consents to the act of sex with the person at this time and this place. Autonomy entails the freedom and the capacity to make a choice of whether or not to do so'.; see also 'Two problems in the Sexual Offences (Scotland) Bill' article by James Chalmers 2009 SCL 553.
4 See *Mutebi v HMA* 2014 SCL 5 for one reported case where consent was purportedly withdrawn.
5 For the requirements of proof see: *Mohammed Maqsood v HM Advocate* 2019 S.C.C.R. 59.

Part Three: Offences in respect of mentally disordered persons

11.6 Part Three makes provision in relation to the capacity of persons with a mental disorder to consent to conduct. A mentally disordered person is incapable of consenting to any of the Part 1 offences where they are unable to: (i) understand what the conduct is; (ii) form a decision as to whether to engage in the conduct, or as to whether the conduct should take place; or (iii) communicate any such decision.[1]

1 Section 17(2).

Part Four: Offences against children

11.7 Part Four of the Act makes provision for offences against children. Separate offences arise in respect of young children (under 13 years of age) and older children (from 13 to 16 years of age).

The Act adheres to the premise that young children lack capacity to consent to sexual activity. That being so, sexual intercourse and other forms of sexual activity with a young child are deemed to have taken place without the child's consent, regardless of the circumstances. It is no defence to a charge in respect of a young child that the child consented. Neither is it a defence that the accused believed that the child had attained the age of 13.[1]

The offences relating to older children are based on the rationale that older children might have the mental capacity to consent to sexual conduct, but that they should not do so and, moreover, that they should be protected from adults who might choose to engage in such activity with them. The arguments in support of such a protective approach were summarised by the Scottish Law Commission thus:

> '… because of the relative immaturity of the child, doubts remain about the validity of the consent, especially where the other party concerned is older and more experienced than the child. What the law is seeking to prevent is the exploitation of the child's vulnerability to give consent without fully appreciating what is involved. The second aim of the law is to make a symbolic statement about child protection.'

The offences relating to older children are, therefore, intended to deal with the situation in which the perpetrator was an adult and the older child agreed to the conduct in question or, at least, where it cannot be shown that they did not consent. It is for that reason that the offences omit reference to words such as 'rape' or 'assault' which apply only where consent is absent, or deemed to be absent. Where an older child did not agree to the conduct the appropriate charge is one under Part 1, a conviction for which reflects the fact that the victim did not consent, and renders the offender liable to a higher sentence. In contrast with the position in respect of young children, certain defences are available to an accused who reasonably believed that an older child had attained the age of 16.[2]

Sexual intercourse and oral sex between under 16s is prohibited.[3]

1 Section 27.
2 Section 39; See, also, para 8.6, above.
3 Section 37.

Part Five: Abuse of positions of trust

11.8 Part Five of the Act deals with sexual abuse of trust. It is an offence for someone in a position of trust over a child (in this case under eighteen) or

a person with a mental disorder, to engage in sexual activity with that child or person.

SEXUAL OFFENCES AT COMMON LAW

11.9 Most sexual offences are now covered by the provisions of the Sexual Offences (Scotland) Act 2009. But the common law remains relevant because the Act is not retrospective and deals only with offences from 1 December 2010. Historical sexual offences represent a significant proportion of the cases prosecuted in the Scottish courts and so the common law is likely to remain relevant for many years to come and will continue to inform interpretation of the statutory regime.

Sexual assault at common law

The category of 'sexual assault' is a not a formal one, but it usefully groups together those offences in which there is a non-consensual intrusion into the sexual integrity of another. A sexual assault may involve considerable violence or very little; the assault element is to be found in the wrongful sexual contact rather than in incidental force used by the perpetrator.

Rape at Common Law

At common law rape was committed when a man had sexual intercourse with a woman by means of the overcoming of her will. The crime required penile penetration of the woman's vagina. Oral or anal penetration by the penis amounted to indecent assault, but not rape. Who was capable of committing common law rape? A male over the age of criminal responsibility could be guilty of rape. A woman could not commit rape herself but may have been art and part guilty of rape, as in a case where she assisted a man to commit rape on another woman. Remarkably, until the late twentieth century the rule was that a husband could not be guilty of the rape of his wife, other than by being guilty, art and part, of such a rape by a third party. That rule was stated by *Hume* and accepted by later commentators. But in *Stallard v HM Advocate*,[1] the High Court upheld the relevancy of a charge of rape where the husband was cohabiting with the wife at the time. In this case the court observed that attitudes had changed considerably since *Hume*'s time, and that wives were no longer bound to suffer excessive sexual demands on the part of their husbands. The court acknowledged that it may be harder to prove where the parties were still living together, but the principle that the wife need not have intercourse forced upon her remained applicable in such a case. The court said:[2] 'There is no doubt that a wife does not consent to assault upon her person and there is no plausible justification for saying today that she nevertheless is to be taken to consent to intercourse *by assault* (emphasis added)'.

1 1989 SCCR 248, 1989 SLT 469.
2 *Stallard* at 473.

*The **actus reus** of rape at common law*

11.10 At common law rape was committed where a man had intercourse with a woman through the overcoming of her will. This requirement was stated by *Hume* in the following terms: 'The knowledge of the woman must … be against her will, and by force'.[1] This emphasis on force had unfortunate implications in that it had been interpreted as requiring physical resistance on the part of women, which was translated in due course into an emphasis on injury sustained in the course of this resistance. Gradually, the law developed so that the importance of 'force' diminished. For example in *Barbour v HM Advocate*,[2] the court stressed that the amount of resistance put up was not the important matter; what really counted was that the woman remained an unwilling party throughout. Resistance, therefore, was significant only in that it was evidence of unwillingness.[3] The matter was put beyond doubt by a bench of seven judges in *The Lord Advocate's Reference (No 1 of 2001*[4]*)*. The accused had accepted that intercourse took place but argued that in the absence of evidence of force, there could be no conviction for rape. The trial judge upheld a submission of no case to answer, holding that the Crown had to establish that the accused had used force to overcome the will of the complainer, relying to some extent upon Hume's observations and the case law which followed thereon. In allowing the appeal and rejecting force as a prerequisite, the Lord Justice General said:

> 'In my view this court should hold that the general rule is that the *actus reus* of rape is constituted by the man having sexual intercourse with the woman without her consent … and *mens rea* on the part of the man is present where he knows that the woman is not consenting or at any rate is reckless as to whether she is consenting.'[5]

While the term 'free agreement' was introduced by the 2009 Act, the common law has long since recognised situations in which ostensible consent ought not to amount to actual consent because it was not freely given. For example, the use of threats to secure the victim's compliance amounted to rape.[6] And in *Barbour v HM Advocate*[7] the trial judge's charge included the following:

> 'What [the victim] was indicating was that she did not resist, she said she did not resist but she allowed these things to happen to her, but she emphasized … that she did not voluntarily agree and was not a willing participant. Now, there is nothing all that unusual about a rape where the victim does not resist physically as, for example, a case in this very courtroom a year ago where a girl submitted to intercourse without struggle because she had been menaced with a knife. That was a clear case of rape.'

And at common law it was rape to administer drink or drugs to a woman with a view to overcoming her resistance and to having sexual intercourse as a result.[8]

1 I, 302.
2 1982 SCCR 195.

3 See also *C v HM Advocate* 1987 SCCR 104, a case involving a charge of statutory rape.
4 2002 SLT 466, 2002 SCCR 435.
5 At para [44].
6 *Hume* I, 302, *Alison* I, 212; *Macdonald* p 121.
7 1982 SCCR 195.
8 *HM Advocate v Logan* 1936 JC 100, 1937 SLT 104. However, that case also determined that the nature of the drink or drugs required to be concealed from her if it were to be rape; a man who gave a drink to a woman, who knew that she was taking intoxicating drink, and who then had sexual intercourse with her when she was so drunk as to be unable to form the inclination to resist, did not commit rape. Similarly, a man who encountered a woman who was intoxicated and who had intercourse with her in the knowledge that the only reason she was doing so was because she was too drunk to know what she was doing, did not commit rape.

11.11 It was also the offence of rape for a man to induce a married woman to permit him to have sexual intercourse with her by impersonating her husband.[1] In general, however, inducing a woman to have sexual intercourse on the basis of a fraudulent misrepresentation did not amount to rape.[2] It was been held not to be rape if a man obtained intercourse on the basis of a false promise to marry,[3] nor did misrepresentations as to a man's circumstances negate consent. In the English case of *R v Linekar*[4] it was held that there is no rape where consent to intercourse was given on the strength of a fraudulent promise to pay for that intercourse.

1 Criminal Law (Consolidation) Scotland Act 1995, s 7(3).
2 *Fraser* (1847) Arkley 280. It may, however, have constituted the statutory offence set out in the Criminal Law (Consolidation) (Scotland) Act 1995, s 7(2)(b).
3 This point was considered in the well-known Australian case of *R v Papadimitropolous* (1957) 98 CLR 249. The accused misrepresented to a woman that he and she had gone through a marriage ceremony. Sexual intercourse based on her belief that she was married did not amount to rape.
4 [1995] QB 250, [1995] 3 All ER 69, CA.

*The **mens rea** requirement in rape at common law*

11.12 At common law, the *mens rea* of rape was, at one time, said to be the intention to have sexual intercourse through the overpowering of the woman's will, or recklessness as to the possibility that the act is performed against the woman's will.[1] If, therefore, a man believed that the woman consented to intercourse, then the *mens rea* of rape was absent. In *Spendiff v HM Advocate*,[2] the court considered the effect of the *Lord Advocate's Reference* on *mens rea* in rape reflecting that it was there said, '*Mens rea* on the part of the man [is] constituted by his knowledge that the woman is not consenting or at any rate by his subjective recklessness as to whether the woman is consenting'. The Court determined, rather tersely, that, 'The *mens rea* of rape was not changed nor, indeed, was it illuminated by the decision, nor were the means by which that could be determined so illuminated'.

In *McKearney v HM Advocate*[3] the Lord Justice Clerk said at paragraph [34]:

> 'Although the jury had clear evidence that the complainer did not consent to the intercourse and was frightened, even terrified, because of the [accused's] behaviour, there was ample evidence, including that of the complainer herself, that she said and did nothing to indicate to the [accused] that she was not consenting to intercourse. Thus there was clearly room for the jury to form the view that, although the complainer did not consent to the intercourse, and that therefore the *actus reus* was established, nonetheless the possibility that the [accused] acted in the belief that she was consenting was not excluded; the evidence led did not exclude that possibility. If he had acted in that belief then he would not have possessed the *mens rea* that is essential to the commission of the crime of rape.'

The difficulty with this otherwise simple proposition was that of misinterpretation on the part of the man of the woman's attitude. In the English case of *DPP v Morgan*[4] the House of Lords affirmed that an error on the man's part was a defence to a charge of rape, even if the error was one which no reasonable man would have made. In that case the accused alleged that they were told by a woman's husband that any attempt on her part to resist sexual intercourse would not signify real resistance but was merely an aspect of sexual enjoyment on her part. The fact that no reasonable man would have believed this was relevant in deciding whether the accused really believed the woman was consenting, but was not, in itself, grounds for excluding the defence.

In *Meek v HM Advocate*[5] the High Court endorsed this view of unreasonable error, although earlier authorities had consistently required that an error be reasonable before it was capable of being accepted as a defence.[6] In practice juries were directed that the absence of reasonable grounds for a belief in consent was relevant to the question of whether the belief was actually held, as in *Jamieson v HM Advocate*.[7] It was held that a direction as to honest belief in consent was not necessary in every case, but only where the issue is raised by the evidence.[8] However, *McKearney* established that in any rape case in which there was no evidence of the use or threat of force at the time of, or immediately preceding, the sexual penetration, and the evidence provided some proper basis upon which the jury might hold that the accused believed that the woman was consenting to intercourse, specific directions on *mens rea*, including direction about actual, honest belief, were required.

1 'The crime of rape consists in the carnal knowledge of a woman forcibly and against her will. It involves that the act of the accused is consciously and intentionally or recklessly done against the woman's will': *Meek v HM Advocate* 1982 SCCR 613, 1983 SLT 280, per Lord President Emslie.
2 2005 1 JC 338, 2005 SCCR 522.
3 2004 JC 87, 2004 SLT 739, 2004 SCCR 251.
4 [1976] AC 182, [1975] 2 All ER 347.
5 1982 SCCR 613, 1983 SLT 280.
6 Eg *Crawford v HM Advocate* 1950 JC 67, 1950 SLT 279.
7 1994 SCCR 181.
8 *Doris v HM Advocate* 1996 SCCR 854, 1996 SLT 996.

11.13 The *Lord Advocate's Reference* also dealt with the issue of recklessness when forming a belief about the woman's consent. The Court approved the dicta in *Jamieson* at page 92 as follows: '… the question is whether he genuinely or honestly believed that the woman was consenting to intercourse. It will not do if he acted without thinking or was indifferent as to whether or not he had her consent. The man must have genuinely formed the belief that she was consenting to his having intercourse with her. But this need not be a belief which the jury regards as reasonable, so long as they are satisfied that his belief was genuinely held by him at the time'. Thereafter, the opinion continued:

> 'It may be noted that the implication of the court's decision in *Jamieson* was to distinguish between the man who failed to think about, or was indifferent as to, whether the woman was consenting (which might be described as subjective recklessness); and the man who honestly or genuinely believed that the woman was consenting but had failed to realise that she was not consenting when there was an obvious risk that this was the case. The latter might be described as objective recklessness,' concluding at paragraph [44], 'Standing the decision in *Jamieson* and in the absence of discussion of this topic in the present reference, "reckless" should be understood in the subjective sense to which I have referred earlier in this opinion'.

Accordingly, recklessness in rape was established if the perpetrator failed to think about, or was indifferent to, whether the woman consented. There remained a difficulty; the logic of *Meek* suggested that a man who formed a positive belief that the woman was consenting could not be guilty of rape, no matter how unreasonable that belief may have been in the circumstances; a man who failed to advert to or think about the risk of non-consent in circumstances which would raise doubt in the mind of the reasonable man, may, on this view, have been convicted. It is arguable, however, that the former was at least as culpable as the latter. Notwithstanding the apparent clarification afforded by the *Lord Advocate's Reference*, the issue remained a difficult one for both practitioners and the courts.[1] The matter was, however, finally resolved by the provisions of 2009 Act which require that any belief that the complainer consented is a reasonable belief. In recommending that a belief in consent ought to be reasonable, the Scottish Law Commission concluded[2] of the honest belief test:

> 'Fundamentally it has the effect that there is no rape even where a woman has indicated that she did not consent to sexual intercourse. As such, the test undermines respect for sexual autonomy. Moreover, allowing unreasonable belief about consent as a defence bolsters the legitimacy of myths and stereotypes about women and sexual choice. Further, the test sits uneasily with the general law of error in the criminal law, by which an error by the accused as to some essential element of a crime must be reasonable to elide mens rea.'

1 See 'Distress as corroboration of *mens rea*' article by James Chalmers 2004 SLT (News) 141, 'Redefined rape and the difficulties of proof' article by Margaret Scott QC 2005 SLT (News)

65; 'Sexual crimes and the problems of proof' article by Peter Ferguson QC 2007 SCL 1; the concerns were foreshadowed in the dissenting opinions of Lord McCluskey and Lord Marnoch in *The Lord Advocate's Reference (No 1 of 2001)*.

2 Report on Rape and Other Sexual Offences (Scot Law Com No 209, 2007) at Para 3.72.

Clandestine injury

11.14 The common law offence of clandestine injury was committed when a man had sexual intercourse with a sleeping or unconscious woman.[1] Such crimes were not rape because a woman in this state was held to have no will to be overcome. That rule was open to criticism on the basis that the wrong done to a woman who is raped while conscious and one who has non-consensual sexual intercourse inflicted on her while she is asleep or unconscious was difficult to distinguish. The offence was effectively abolished by the decision in *The Lord Advocate's Reference (No 1 of 2001)* with the recognition that the absence of consent, rather than the overcoming of the woman's will, was the essence of rape. In *McNairn v HM Advocate*,[2] Sheriff Gordon's commentary observed, '[This case] provides a clear statement of the proposition that evidence that the complainer was asleep at the relevant time is evidence from which a lack of belief in consent can be inferred; it is difficult to see the need to maintain the distinction in the common law [between rape and clandestine injury]'.

1 *Sweenie* (1858) 3 Irv 109; *HM Advocate v Grainger and Rae* 1932 JC 40, 1932 SLT 28; *Sweeney v X* 1982 SCCR 509.

2 2005 SCCR 741.

INCEST AND RELATED OFFENCES

11.15 Under the Criminal Law (Consolidation) (Scotland) Act 1995, the offence of incest is committed by any person, male or female, who has sexual intercourse with a person with whom he or she has a relationship listed in the statutory table.[1] The relationships, which are all ones of consanguinity or adoption are: a man's mother, daughter, grandmother, grand-daughter, sister, aunt, niece, great-grandmother, great-grand-daughter, adoptive mother or former adoptive mother, and adopted daughter or former adopted daughter. The equivalent relationships apply in the case of a woman. Relationships of the half-blood are included: it is therefore incest for a man to have intercourse with a woman who shares one parent with him.

1 Criminal Law (Consolidation) (Scotland) Act 1995, s 1.

11.16 The offence is committed by a male or female who has sexual intercourse with a person to whom he or she is related within the prohibited degrees. Proof of sexual intercourse is as in cases of rape. The prosecution does not have to prove that the accused knew of the relationship existing between

him and the other person; the onus of proving that he did not know that he was related within the prohibited degrees therefore rests upon the accused person. It is also a defence if intercourse took place without consent or if the parties were married at the time of the offence (as might be the case if a marriage recognised in Scotland as valid had taken place abroad). The offence of incest is restricted to those cases where sexual intercourse takes place.

In terms of s 2, sexual intercourse between step-parent and step-child is an offence if the child is under the age of 21 at the time at which intercourse takes place, or had at any time before reaching the age of 18 years lived in the same household as the step-parent and had been treated by him as a child of the family. Defences to this offence are listed in s 2 of the 1995 Act.

OFFENCES AGAINST PUBLIC MORALITY

11.17 Public morality offences are those offences which might not involve a victim in the normal sense of the term, but which nonetheless entail criminal liability on the grounds that they cause offence to the community at large. This is obviously a controversial area, and it is in respect of these offences that the greatest disagreement is likely to occur between the advocates of legal moralism and those who disfavour any regulation of consensual adult sexual behaviour.

Obscene material

11.18 Subject to the exceptions of child pornography and extreme pornography,[1] it is not an offence merely to possess obscene material (for example, an obscene book, magazine, or video cassette),[2] even if there is an intention ultimately to supply the material to the public. It is an offence, however, to display such items in such a position that it can be seen by a member of the public, or to publish, sell or distribute obscene material.[3] The publication or distribution of obscene material was formerly prosecuted at common law, as a form of shameless indecency;[4] the offence was committed even if the material was kept hidden, so long as it was in immediate readiness for sale and would be displayed to members of the public on request.[5] However, in *Webster v Dominick*[6] (discussed below), the court determined at paragraph [56] that, 'The crime [of public indecency] does not extend to consensual sexual conduct committed in private; nor to the private showing of indecent films and videos; nor to the selling of indecent publications. Nor does it extend to conduct witnessed only by persons who wish to see it … except perhaps where the conduct is such as to offend even members of a consenting audience. On this view, indecent exposure … which was found to have offended some of those present, would continue to be criminal.' Accordingly the issue is whether offence is caused, and the extent of that offence. There are no modern Scottish precedents involving the prosecution of publishers purely of the written word

on grounds of obscenity; the causes célèbres of English law, such as the *Lady Chatterley's Lover* trial, have not had their counterpart in Scotland. Although the individual may possess almost all forms of pornography, access to it is legally restricted. The importation of obscene articles is an offence under customs legislation,[7] and it is also an offence to send obscene matter through the post.[8] Under s 127 of the Communications Act 2003, it is an offence to send by means of a public electronic communications network a message that is grossly offensive or of an indecent, obscene or menacing character.

1 The Civic Government (Scotland) Act 1982, ss 51A–51C criminalises the possession of extreme pornography, being pornography which explicitly and realistically depicts an act taking life, or resulting in severe injury, or rape, or sexual activity with a corpse or an animal.
2 *Sommerville v Tudhope* 1981 JC 58, 1981 SLT 117.
3 Civic Government (Scotland) Act 1982, s 51.
4 As to which see below. Cf, however, *Sommerville v Tudhope* 1981 JC 58, 1981 SLT 117, which suggests that 'trafficking' in obscene material may also be an offence at common law.
5 *Scott v Smith* 1981 JC 46.
6 2005 1 JC 65, 2003 SLT 975, 2003 SCCR 525.
7 Customs Consolidation Act 1876, s 42.
8 Postal Services Act 2000, s 85.

Child pornography

11.19 The growing use of children in pornography is a social evil which is widely regarded with particular abhorrence, and this category of pornography is now totally illicit. The use of internet, file sharing software and social media mean that the dissemination of such material is easier. Under s 52 of the Civic Government (Scotland) Act 1982 it is an offence to take or permit to be taken or make[1] an indecent photograph or pseudo photograph[2] of any child under the age of 18,[3] to distribute or show such a photograph, to have with a view to distribution or showing such a photograph, or to publish an advertisement for it. It is a defence if the accused proves that they had a legitimate reason for distributing or showing or having the photograph in their possession, or that he was unaware of its nature. Section 52A of the Civic Government (Scotland) Act 1982 provides that it is an offence to have in one's possession an indecent photograph of a child under 18. It is a defence to that charge for the accused to prove that he had it legitimately, that he had not seen the photograph and did not know or suspect it was indecent, or that it was sent to him without prior request and he had not kept it for an unreasonable time; the latter defence means that a person receiving such an item must dispose of it. The *mens rea* is that the act of taking or making should be a deliberate act with knowledge that the image made is, or is likely to be indecent.[4]

The context in which a photograph was taken is relevant to whether it was taken deliberately or accidentally; the context will not inform the decision about whether it is decent or indecent.[5] The legislation does not define indecency, and this will therefore be determined by the court.[6] The Crown will normally

have to lead expert evidence to establish that the subject of the photograph is under the age of 18.[7]

The Protection of Children and Prevention of Sexual Offences (Scotland) Act 2005[8] made specific provisions to criminalise the causing or inciting provision by a child of pornography,[9] the controlling of a child involved in pornography[10] or the arranging or facilitating provision of child pornography.[11]

1 'To make' is to be given its ordinary meaning; see *Smart v HM Advocate* 2006 JC 119, 2006 SCCR 120 at para [19].
2 A pseudo-photograph is an image 'whether produced by computer graphics or otherwise howsoever, which appears to be a photograph' (s 52(2A)); all subsequent references to photographs include reference to pseudo-photographs.
3 The age was formerly sixteen until substituted by Protection of Children and Prevention of Sexual Offences (Scotland) Act 2005; there are special provisions dealing with children aged sixteen and seventeen at s 52B.
4 *Smart v HM Advocate* 2006 JC 119, 2006 SCCR 120 at paras [20]–[22].
5 *Bruce v McLeod* 1998 SCCR 733.
6 Expert evidence on the matter is unlikely to be allowed: see *Ingram v Macari* 1983 JC 1, 1982 SCCR 372.
7 *Griffiths v Hart* 2005 JC 313, 2005 SCCR 392 at para [19].
8 Otherwise the Protection of Children etc (Scotland) 2005.
9 Section 10.
10 Section 11.
11 Section 12.

Offences involving 'indecency'

11.20 Until 2005, the common law recognised the crime of shameless indecency. The proposition that all shamelessly indecent conduct was criminal appears in *Macdonald*,[1] and was repeated with approval by judges in a number of cases.[2] The nature of shameless indecency as a crime was challenged in *Watt v Annan*.[3] The proprietor of a hotel allowed members of a private club to meet at his hotel where they viewed a film described by the sheriff as 'of a degree and nature liable to deprave and corrupt'. The High Court, relying on dicta in *McLaughlan v Boyd*[4] concluded that any form of conduct could be shamelessly indecent, depending on the nature of the conduct, the circumstances in which it took place and the necessary criminal intent. The scope of that offence left a great deal to the discretion of the court in individual cases. Standards of decency change, and the imprecise nature of this offence caused understandable concern amongst civil libertarians who argued that the only proper test of criminality in this context should be whether any person has been involuntarily harmed by the conduct in question.

1 Page 150.
2 Eg by Lord Clyde in *McLaughlan v Boyd* 1933 SLT 629; *R v HM Advocate* 1988 SCCR 254, 1988 SLT 623.
3 1978 JC 84, 1978 SLT 198.
4 1934 JC 19, 1933 SLT 629.

11.21 Despite concerns, shameless indecency formed the basis for a variety of offences; the crime could take the form of the provision of some sort of sexually stimulating spectacle or article, or the performance of an indecent act with another person.

For example, in *HM Advocate v RK*,[1] the judge repelled a plea to the relevancy of a charge of shameless indecency alleging that the accused had sexual intercourse with a girl who had been his foster daughter; the allegation was that the intercourse took place when she was between 16 and 18 years of age. Lord Mclean held that such conduct would be repugnant to society until the complainer was 18, or had left the family home whichever was later. In *Carmichael v Ashrif*,[2] the accused was charged with conducting himself in a shameless and indecent manner towards two school girls to whom he showed a pornographic film.

The uncertain limits caused some judicial concern; in *Paterson v Lees*,[3] the Lord Justice General said:

> 'The term "shamelessly" has been glossed in ways which take it beyond its normal meaning and hence beyond the meaning which, one might suppose, *Macdonald* would have intended it to bear when he framed his proposition in 1866. As a result, the crime which the adverb is meant to define has become amorphous, with any limits being hard to discern'.

1 1953 JC 16, 1953 SLT 67.
2 1985 SCCR 461.
3 1999 JC 159 at 161, 1999 SCCR 231 at 232.

11.22 Separately, it was an offence to engage in lewd, indecent and libidinous practices towards a child under the age of puberty. In law that was taken to be age 12 for a girl and age 14 for a boy. The offence covered a broad range of conduct including engaging in indecent conduct in the presence of a child and a 'French kiss' of a school girl by her teacher. As with shameless indecency, however, the offence was regarded as being vague and, indeed, there was considerable overlap between the two offences.

Certain of the criticisms of the two offences were addressed in the important case of *Webster v Dominick*,[1] in which a bench of five judges took the opportunity to survey and review the law, concluding that the decisions in *McLaughlan* and *Watt* had created a crime which 'rested on unsound theory, has an uncertain ambit of liability and lays open to prosecution some forms of private conduct the legality of which should be a question for the legislature.'[2] That paragraph concludes 'It is time that this court put it right'.

The Lord Justice Clerk in the first place determined that indecent conduct directed against a specific victim, who was within the class of persons whom the law protected, fell within the crime of lewd, indecent and libidinous practices. Where the indecent conduct involved no individual victim, it ought to be

criminal only where it affronted public sensibility. Thus the Court recognised the crime properly described as public indecency.

1 2005 1 JC 65, 2003 SLT 975.
2 *Webster* at para [43].

11.23 The corollary of the decision in *Webster* which defined public indecency, was that behaviour deemed to be indecent but taking place other than in public then fell to be covered only by the offence of lewd, indecent and libidinous practices, and only in respect of the class of victims to whom that offence applied. That was put beyond doubt by the observations of the Lord Justice Clerk at paragraph [49]:

> 'In the modern law, where indecent conduct is directed against a specific victim who is within the class of persons whom the law protects, the crime is that of lewd, indecent and libidinous practices. It may be committed by indecent physical contact with the victim, but it need not. It may be committed by the taking of indecent photographs of the victim (*HM Advocate v Millbank*[1]); or by indecent exposure to the victim (*Lockwood v Walker*[2]); or by the showing of indecent photographs or videos to the victim; or by other forms of indecent conduct carried out in the presence of the victim. It may be committed, in my opinion, by means of a lewd conversation with the victim, whether face to face or by a telephone call, or through an internet chat-room. In each case, the essence of the offence is the tendency of the conduct to corrupt the innocence of the complainer.'

The offence of lewd, indecent and libidinous practices was abolished by the 2009 Act[3] but the common law offence of public indecency remains. On the basis that public indecency was regarded by the Court, in *Webster*, as a public order offence, the Scottish Law Commission considered it to beyond the scope of legislation in respect of sexual offences. In *Webster* the Court held that the *actus reus* of public indecency has two elements: (i) the act itself; and (ii) the effect of it on the minds of the public. The conduct need not be committed for sexual gratification and in that connection the offence may be contrasted with that of *sexual* exposure under the 2009 Act[4] which requires that the exposure was 'sexual',[5] and that the exposure was for the purpose of obtaining sexual gratification, or for the purpose of humiliating, distressing or alarming the complainer.

Insofar as the public element is concerned, the test is not whether the conduct occurs in a public place in any technical sense; it could take place on a private occasion if it occurred in the presence of unwilling witnesses, or on private premises but visible to the public. The crime of public indecency does not extend to consensual sexual conduct committed in private, nor to the private showing of indecent films, nor the selling of indecent publications, nor to conduct witnessed only by persons willing to see it.

Whether a particular act is indecent depends on the circumstances judged by social standards that may change; it should be judged by the standards applied

by the average citizen in contemporary society.[6] While the absence of the requirement to establish that the conduct was sexual and done for a relevant purpose means that the offence of public indecency may continue to apply to certain 'indecent' but non sexual conduct, much of the conduct previously prosecuted as public indecency is now encompassed by offences under the 2009 Act. In practice the offence is now rarely encountered.

1 2002 SLT 1116, 2003 SCCR 771.
2 1910 (J) SC 3.
3 Section 52(a)(iii).
4 Sections 8, 25 and 35.
5 As defined at s 60(2) of the 2009 Act.
6 *Webster* at paras [51]–[58].