In the best interests of the child? Prosecutions brought against children under the Sexual Offences Act 2003

Sexual Offences Reform in 2003

In January 2003, the Labour government introduced the Sexual Offences Bill before the House of Lords to reform the law on sexual offences in the United Kingdom.[1] One of the primary concerns of the Bill was that children should be afforded the highest level of protection from sexual abuse. However, it was not just adults who were deemed capable of sexually abusing children. Lawmakers were also concerned with protecting children from another profile of potential offender: other children.

The Bill sought to cast the net as wide as possible in relation to child sexual abuse. Through subsections 5 to 9 and in subsection 13, all sexual activity involving persons under 16 was to be criminalised. This approach was criticised by parliamentarians concerned by the risk of "over-criminalisation" and that the "ordinary" and "experimental" sexual behaviour of adolescents would be wrongfully punished under the law.[2]

As the Lord Chancellor, Lord Falconer's responses to such criticism reveal how the government intended the 2003 law to function. As Lord Falconer put it, "one must criminalise certain activities that, on the facts of a particular case, would never merit a prosecution" in order to be able to prosecute "terrible crimes".[3] He accepted that it would be "wholly inappropriate" to bring prosecutions against children

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[1] Sexual Offences Bill 2003, accessible at https://publications.parliament.uk/pa/ld200203/ldbills/026/2003026.htm

[2] Baroness Mallalieu, in *Hansard,* HL Second Reading, Col.853; Baroness Walmsley in *Hansard,* HL Report Day 1, Col.1102

[3] *Hansard,* HL Second Reading, Col. 875

engaging in sexual activity in the vast majority of circumstances, and that the law should therefore be applied with a "light touch".[4]

The question remained as to when it would be appropriate to prosecute child sexual behaviour. This essay provides an analysis of whether the Sexual Offences Act (SOA) 2003 has been applied to children with the "light touch" intended at drafting. As will be shown, the failure of lawmakers to provide further clarity on the circumstances in which a prosecution should be brought has led to an uneven and undesirable application of the law which fails to adequately protect the best interests of all the children involved. The primary reason has been a reliance upon the term 'exploitation' as a determinant factor in prosecutorial decisions, which has proved to be wholly inappropriate in the context of children's behaviour. The study will conclude that the SOA 2003 must be amended to ensure that the vulnerability and circumstances of the child offender are adequately considered under the law.

The Meaning of 'exploitation'

During debate, Lord Falconer clarified the government's intention when he told the House of Lords that a prosecution should only be viewed as necessary when the case involved either "exploitation or coercion" on the part of the child perpetrator.[5]

Coercion, as a legal term, has been applied with relative clarity. The Oxford Dictionary defines coercion as "forcing another person to do something".[6] This meaning has been reflected in statute, with s76 of the Serious Crime Act 2015 defining coercion in such terms. This clearly understood meaning has resulted in a

[4] *Hansard,* HL Second Reading, Col.875; *Hansard,* HL Committee Day 6, Col 591
[5] *Hansard,* HL Report Day 1, Col.1108
[6] Oxford Dictionary, Oxford University Press (2009)

consistent pattern of prosecutions being brought against children for sexual offences involving coercive behaviour, that is the use of threats of violence to force another child to engage in sexual activity.[7]

The use of a clearly understood legal term in the context of sexual offences has helped the provisions of the 2003 Act be applied consistently. However, the same could not be said for the use of the term 'exploitation'.

The Lord Chancellor made no attempt to clarify the meaning of 'exploitation' during the Bill's passage through Parliament, nor did he give any indication as to how the term should be applied in the context of sexual activity between children. Yet the Crown Prosecution Service (CPS) as the prosecutorial body of the jurisdiction were still required to use the element of exploitation as a key determinant factor when deciding whether to charge a child.

The published CPS guidance notes that prosecutors should have careful regard to the following factors in identifying the "fine line between sexual experimentation and offending" in children's sexual behaviour: the relative age of both parties, the existence and nature of any relationship, the sexual and emotional maturity of both parties and whether the child consented to the activity, and whether there was any element of seduction, breach of responsibility, or other exploitation as disclosed by the evidence.[8]

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[7] See cases: R v Bentley (Daniel John) [2006] EWCA 1383; R (on the application of G) v Burnley Magistrates Court [2007] EWHC 1033; R v Pountney (Ben Craig) [2010] EWCA 2605; R v M [2010] EWCA 42; R v W [2012] EWCA 2455; R v W (Christopher John) [2012] EWCA 1447; R v Crossland (Jacob) [2013] EWCA 2313; R v K, D & M [2013] EWCA 649; R v K [2014] EWCA 2907; R v Chidlow (Patrick Robert) [2015] EWCA 363

[8] Crown Prosecution Service, 'Youth Offenders' <https://www.cps.gov.uk/legal-guidance/youth-offenders> accessed 13th August 2019

Furthermore, if we analyse the published cases where charges have been brought it is clear that prosecutors have applied the existence of exploitation to be dependent on four main elements regarding the position of the victim.

i) A significant age gap between the accused and the victim

Westlaw lists 341 cases involving a charge under ss5-8 of the SOA 2003, relating to sexual activity with a child under the age of 13. Of these, 49 concern a defendant under the age of 18. The average age gap between the defendant and the victim in these cases is four and a half years.[9]

The judicial review case of *S* is critical in understanding the reliance of the CPS on age disparity in the decision to prosecute.[10] The applicant in *S* argued that the CPS's decision to bring a prosecution had been incorrect due to the absence of any exploitation and it was therefore inconsistent with the CPS's own guidelines.[11] The case concerned the sexual activity between a 15-year-old and a 12-year-old, which was accepted to have been consensual. The challenge failed due to the judge's understanding that the Crown had a case that it was exploitative behaviour, and that this was purely due to the disparity in ages between the two parties involved.[12] As this case involved no coercion and seemingly no other form of exploitation, it is clear that for the CPS a stark contrast in age is enough to affect the decision to prosecute on its own.

[9] For the purposes of this calculation, in cases involving multiple victims (5) the age of the youngest victim has been taken as relevant in determining the average
[10] R (on the application of S) v DPP [2006] EWHC 2231
[11] Ibid, at [32]
[12] Ibid, at [32-34]

ii) The perpetrator is in a position of trust, or exercises a degree of responsibility, with regards to the victim

Whilst an age gap is often present, it is not considered to be the sole factor in identifying exploitation. In 10 out of the 49 relevant cases on *Westlaw,* the fact that the victim trusted the perpetrator or was their responsibility has been the driving force behind the decision to prosecute. This position has mainly arisen in the context of a family relationship, for example between siblings. In *R v AA,* the defendant was charged with multiplied sexual offences against a child under 13. At sentencing, the judge observed that he had "no doubt that these offences started out with a child-like sexual curiosity, but that the offender was soon exploiting the trust placed in him for his own sexual gratification".[13] Whilst we must not take a judge's remarks to indicate the policy of the CPS, it is significant that the Attorney General referred to "an abuse of trust" as one of the aggravating factors when summarising the case for the prosecution.[14]

iii & iv) Social circumstances or mental capabilities of the victim rendering him/her particularly vulnerable

There will be instances when a child's family or homelife will be so troubled that they may become particularly vulnerable to those who claim to want to help them, but who are actually intending to take an unfair advantage. This was the narrative in the case of *Igbal.*[15] The 10-year-old victim was said to have an isolated life on a housing estate, with the prosecution noting that she received no protection and very little attention from her guardian Aunt. The judge concluded that the defendant must

[13] R v AA [2016] EWCA 1663
[14] Ibid, at [13]
[15] R v Igbal (Mohammed) [2017] EWCA 1145

quickly have realised that her personal situation was not one in which there would be any effective constraint upon him in sexually persuading the girl. The defendant was convicted for what the judge described as “significantly planned” sexual abuse.

The best interests of the accused child

With this definition it is clear that the CPS have brought prosecutions in line with a primary aim of the 2003 Bill, to ensure that children were afforded the widest possible protection from peers who may seek to sexually exploit them. However, it is submitted that the application of the law has failed to function in a way which takes into account the circumstances, intentions and awareness of the accused child.

On reading the uncomfortable details of a large number of the cases brought against young offenders under the Act, one could be left asking: why should we afford protection to children who sexually abuse other children? Undoubtedly these crimes often result in devastating and long lasting consequences for the victims of abuse. However the law makes little allowance for the fact that the perpetrators are, themselves, children. Any child, even one accused of such a serious crime, deserves special dispensation under the law. This protection is set out in the UN’s Convention on the Rights of the Child. Article 3(1) states that in all actions concerning children, administrative authorities and legislative bodies must take the “best interests of the child” to be a “primary consideration”.[16] This should be read in conjunction with Art 40(1), which emphasises the need for States Parties to recognise the right of every child alleged to have broken the law to “be treated in a manner consistent with the promotion of the child’s sense of dignity and worth”.[17] As will be shown, the current

[16] UNCRC, Art 3(1)
[17] Ibid, Art 40(1)

law takes no account of the mindset and the circumstances of the child accused. The law can therefore not be said to take the 'best interests of the child as a primary consideration'.

Age: A Difficult Concept

The CPS deems a significant gap in age between the complainant and the accused to be an indication of exploitation. This concern is based on the understanding that these two children will be at different stages of development, with the older at a more advanced stage than the younger. This view was articulated by the Home Office consultation paper, which stated that children need protection "as they are physically and emotionally dependent and not yet fully psychologically mature".[18]

Implicit in this policy is the idea that a child may be of such formative development that they may not be capable of understanding that they are being exploited. It surely then is only right to question whether a child accused is sufficiently developed to understand that they are capable of exploiting another. Exploitation is not a simple concept. It requires a person to take an unfair advantage over another for their own personal gain. There are a number of cases that have been prosecuted as 'exploitative' in which the child accused may well have had difficulty in understanding the presence of the defendant's vulnerability and that they were in possession of an unfair advantage.

Age, when understood in purely numerical terms, is an unsatisfactory factor upon which to base our understanding of exploitation between children. An important exemplary case in this regard is *R v H.*[19] A 12-year-old was accused of s5 offence

[18]Home Office, *Setting the Boundaries: Reforming the Law on Sex Offences* (2000), p33
[19] R v H [2018] EWCA 541

against his 5-year-old half-brother. The court's report described the victim as being "much smaller and younger, and therefore vulnerable". However, the sole emphasis on the numerical age gap loses credibility when we consider the information provided to the court regarding the child accused's level of development. It was heard that the 12-year-old had experienced a number of traumatic events which had contributed to his offending behaviour, and had a "significant impact on his emotional, mental and psychological development".[20] The defendant was described as "emotionally immature for his age".[21]

Of course, it is not intended to question whether this behaviour can be described as harmful. The intention is rather to highlight the problem that emerges when the numerical ages of the parties is the sole focus of a prosecutorial decision without a wider consideration of their levels of emotional development or maturity. In this case there is a clear possibility that the perpetrator may have been at such a low level of development that he may have had difficulty in understanding both the victim's vulnerability and his own position of advantage over him. Therefore, can his actions, in causing the victim to engage in sexual activity, reasonably and fairly be described as *exploitative*?

Regrettably, it cannot be said with any certainty whether the emotional maturity of the perpetrator is taken consideration in *every* case. The CPS decision will only come to light if it results in a prosecution. It is, however, right to say that if these factors are not considered in *any* case then the law is not functioning as Parliament intended. There are, in fact, many cases similar to *R v H.*[22] For example in *S,* it was accepted by the court that the defendant was "most likely functioning at

[20] Ibid, at [7]
[21] Ibid, at [10]
[22] See cases: R v Stott (Shane Michael) [2017] EWCA 370 (unreported); R v H [2015] EWCA 1579; R v S [2009] EWCA 1969

the age of someone who is at least five to eight years younger than his chronological age".[23]

"Limited Comprehension" of the Unfair Advantage?

The problem with the current applied legal definition of *exploitation* also extends to a lack of consideration for the accused's troubled social environment or mental capabilities in a number of cases.

For instance, in one case a child defendant was shown to have had an extremely troubled upbringing which may have affected his offending behaviour.[24] It was stated that he had been "seriously emotionally deprived" and was of "below average intelligence".[25] These problems had largely been a result of his mother's death at an early stage of his life, whilst his natural father had physically abused him. The court report also noted that the child in question had in fact been referred to the Children and Young Family Services for the county because of earlier concerns over his safety and level of care, but it was accepted that this failed to result in any "substantial intervention or support".[26] Although his offending behaviour was harmful, it seems improper that the CPS would not consider alternatives to prosecution in the case of an "extremely troubled and deprived" child who had seemingly been failed by other public authorities.

The case of *Elsegood* provides further support to this point.[27] The author of a pre-sentence report observed that the offender was incapable of demonstrating any level of insight into the impact upon his victim. Significantly, she considered that this was primarily due to his learning disability, rather than a callous disregard for the

[23] R v Stott [2017] EWCA 370, at [14]
[24] Attorney General's Reference (No 11 of 2008) [2008] EWCA 1149
[25] Ibid, at [26]
[26] Ibid
[27] R v Elsegood (Jordan Lee) [2016] EWCA 1757; see also - R (on the application of W) v Caernarfon Youth Court [2013] EWHC 1466

consequences of his behaviour. She believed the offender had a “very limited comprehension” of the unlawful nature of his behaviour, and that his conduct could be attributed to “sexual motivation and exploration”.[28] Again, the mental capacity of the child accused was seemingly not given due consideration.

Cause for Substantive Reform

The definition of exploitation applied by the CPS focuses heavily on the circumstances of the victim, recognising their vulnerability through the presence of an age gap, that they trusted the perpetrator or due to their own social circumstances or mental development. The conclusion of this study is that this definition of exploitation is an improper one to be applied in the context of child offenders. It fails to provide adequate consideration for the circumstances of the child perpetrator. Factors such as the offender’s emotional development and their own social circumstances should surely have an impact on the law’s assessment of whether they have *exploited* another. As has been shown, these elements have not been given adequate weight in a number of cases, and the law on sexual offences committed by children therefore operates in a way which is contradictory to the UN’s concern for the ‘best interests of the child’, and as a counter to Parliament’s intention that the law should only interfere in cases of genuine coercion and exploitation.

It is submitted that Parliament should seek to enact an offence of ‘Sexual Activity with a Child by Coercion or Exploitation’ as an amendment to the SOA 2003, and as applicable only to persons under the age of 18. The offence would use the established definitions of ‘coercion’ and ‘exploitation’ in determining when such activity is to be criminalised, but significantly there would be a new emphasis on the

[28] R v Elsegood, at [14-15]

mind of the offender. The provisions would include a *mens rea* requirement that the offender had *knowledge* of the presence of an unfair advantage over the victim bestowed upon them by the comparative vulnerability of the victim.

Effecting such a reform would provide clarity to the law on sexual offences, and therefore allow children to more effectively regulate their conduct, and even become more attuned to the vulnerabilities of others by doing so. The offence would also remain true to the primary aim of Parliament in passing the SOA 2003, in that it would continue to afford protection to children in the face of predatory adults, as well as from other children with genuine exploitative tendencies.[29] It is submitted that it would be in the 'best interests of the child' if a new law be produced in the following terms:

Sexual Activity with a Child by Coercion or Exploitation

1) *A person commits an offence if he causes any person under the age of 16 to engage in sexual activity through the use of either:*
   i) Coercion; or
   ii) Exploitation
2) *For the purposes of this section, 'coercion' is present when a person, in order to induce or compel another to engage in sexual activity, uses violence, intimidation or threatening behaviour.*
3) *For the purposes of this section, 'exploitation' is present when a person under the age of 18 (Child A) makes use of an unfair advantage they have over another child (Child B) who is in a position of vulnerability, either by reason of:*

[29] Adults would still be charged under ss.5-9 in the current 2003 Act where the complainant was under the age of 13

i) their relative ages;

ii) Child A's position of trust or responsibility over Child B;

iii) Child B's social or familial circumstances; or

iv) Child B's limited mental or emotional capabilities

and when Child A has knowledge as to the existence of his unfair advantage over Child B.

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