Law Reform Commission of Canada
Commission de réforme du droit du Canada

REPORT

sexual offences

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Canada

REPORT ON
SEXUAL OFFENCES

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Law Reform Commission of Canada

Commission de réforme du droit du Canada

November 1978

The Honourable Otto Lang,
Minister of Justice,
Ottawa, Ontario.

Dear Mr. Minister:

In accordance with the provisions of Section 16 of the *Law Reform Commission Act,* we have the honour to submit herewith the report with our recommendations on the studies undertaken by the Commission on sexual offences.

Yours respectfully,

Francis C. Muldoon, Q.C.
Chairman

Jean-Louis Baudouin, Q.C.
Vice-Chairman

Gérard V. La Forest, Q.C.
Commissioner

Judge Edward James Houston
Commissioner

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ON
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Judge Edward James Houston, Commissioner

Secretary

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Introduction

In a working paper published on June 6 last, this Commission presented to the Canadian public a proposal for the reform of part of the *Criminal Code* dealing with sexual offences. That working paper generated numerous discussions in the press and the media. Since the end of June, the Commission has, moreover, carried out large-scale consultations with organizations, groups and individuals concerned with the subject. Those consultations have borne fruit in two ways. On the one hand, they enabled the Commission to fill some lacunae and correct certain inadequacies in its working paper and in the text of the new sections proposed. On the other hand, they afforded the Commission an opportunity to confirm that many individuals and institutions are in agreement with the fundamental principles of the reform, subject to minor changes.

The legislative changes which the Commission recommends in this Report must be viewed in the broader context of its whole work in criminal law. Whether they concern general principles of law, criminal procedure or particular problems (theft and fraud, offences against the administration of justice, homicide, etc. . .), the Commission's efforts are all directed towards its ultimate purpose: the drafting of a new *Criminal Code*.

Nevertheless, the Commission is aware that certain improvements in the *Criminal Code* should be made immediately. It is in this spirit that the present recommendations are put

forward. The Commission reserves the right, however, to integrate at some later time the contents of this Report on the reform of sexual offences into its future proposals for a new *Criminal Code*. In that case, further modifications in the text of the *Code* may become necessary at that time.

Two preliminary observations must be made in this regard. The first concerns sentences. Initially, the Commission intended not to discuss the problem of sentences for sexual offences on the ground that changes under this head should be made in the broader context of sentencing generally, and that in its Report to Parliament on "Guidelines on Dispositions and Sentences in the Criminal Process" the Commission had already made certain recommendations of a general nature on this subject. Nevertheless, after reflection and in the interest of completeness, the Commission has decided to include provisional recommendations on sentences. As will be seen, these are confined exclusively to sentences for sexual offences and do not relate to sentencing in general.

The second preliminary observation concerns the classification of offences. For purposes of this Report, and for these purposes only, the Commission has followed the classification contained in the present *Criminal Code*. The problem of the classification of offences is, however, the subject of an ongoing study to be published later by the Commission.

It is, then, with these two reservations in mind that the Commission now presents its proposal for changes in the law concerning sexual offences, to the Parliament of Canada.

The Commission expresses its thanks, to representatives of women's groups and associations, rape crisis centres, the Canadian Bar Association, the Canadian Association of Provincial Court Judges, the Clarke Institute of Psychiatry, the Canadian Association of Chiefs of Police, the Canadian Association of Crown Prosecutors, l'Association des Sexologues du Québec, among others, for their cooperation. The Commission also conveys its gratitude to all those members of the Canadian public who by letter or telephone have made their opinions known to the Commission.

FIRST PART

DESCRIPTION OF THE REFORM

REPORT
ON
SEXUAL OFFENCES

CHAPTER I

Basis and Structure of the Reform

Law reform must not be restricted solely to matters of style. It should serve a real need; it should strive to adapt the letter of the law to the realities of society.

As the Commission expressed in Working Paper 22, there are three fundamental reasons why the part of the *Criminal Code* dealing with sexual offences stands in urgent need of reform.

First, this part of the *Criminal Code* is a compilation of disparate sections which do not reflect consistent views of the problem of sexual offences. The Commission believes that, especially in criminal law, legislation prohibiting certain types of behaviour of a general, rather than purely technical, nature ought to be readily understandable by the public. Yet it is abundantly apparent that the present provisions of the *Criminal Code* are far from clear.

Secondly, the language used in the existing *Code* is outmoded and archaic. Expressions such as "*of previously chaste character*", "*carnal knowledge*", etc., have been the subject of judicial interpretations which have gradually clarified their exact meaning. They are, however, scarcely appropriate nowadays.

Thirdly, there can be no doubt that social attitudes in matters of sexual behaviour have obviously drastically changed since the promulgation of the *Criminal Code*. Admittedly, various major changes have already been made in the *Code*, such as the amendments in 1968 relating to homosexuality or those in 1975 dealing with the proof of previous sexual behaviour in the case of rape victims. Further changes, however, are necessary. Notwithstanding the obvious biological difference between men and women, the Commission is dedicated to a more egalitarian application and exposition of the law. Why, for example, does the law of sexual offences persist by and large in characterizing men as the "aggressors" and women as the "victims"? Why does it enshrine a stereotyped image of masculine and feminine roles? Why, with a measure of paternalism, does the law contain so many "protective" measures with regard to women? In the course of its consultations, the Commission ascertained that the public is ready to put aside these anachronisms and to have these offences restructured and adapted to modern conditions.

Given these three reasons, reform can still be justified on principles conforming to the general pattern of our existing penal system and the present structure of the *Criminal Code*. The result of the consultations conducted by the Commission on this score was clear and unequivocal. There was total agreement on the validity of the three cardinal principles outlined in Working Paper 22.

I. Protecting the integrity of the person

This principle applies not only to sexual offences, but also underlies a great many of the provisions of the *Criminal Code* and in fact embodies the fundamental philosophy of our criminal justice system.

The integrity of the human person should not be violated. Consequently, no individual should be forced to submit to a sexual act to which he or she has not consented. In sexual relations, therefore, consent must be of the essence. Sexual activity must be consensual and not procured by force or trickery; otherwise it constitutes a direct violation of the integrity of the human person.

II. Protecting children and special groups

The development of human sexuality is a gradual process. Its full realization presupposes the achievement of an equilibrium between body and spirit, between physical growth and mental and emotional maturation. Our society believes, and justly so, that the law must protect those who have not attained full sexual autonomy or who have not yet achieved this equilibrium. Children must therefore be protected from sexual exploitation and corruption until they have arrived at a degree of maturity which will enable them to foresee the consequences of their acts and take important personal decisions with full and clear appreciation of the facts, or at least until they come to the age at which that degree of maturity should be presumed.

III. Safeguarding public decency

Finally, sexuality is an intimate matter. The perception of one's own sexuality and of the sexuality of others varies from person to person. It is not therefore legitimate to force others to

witness acts which are essentially private. This applies even where a particular mode of sexual behaviour is not itself prohibited. In other words, it is not sexual behaviour itself or any specific type of it but rather its public exhibition which society seeks to repress, according to this third principle.

Recommendation 1

The Commission recommends that the reform of sexual offences be based on these three fundamental principles:

(1) protecting the integrity of the person,

(2) protecting children and special groups,

(3) safeguarding public decency.

CHAPTER II

Formulation of the Reform

1. Changes in the general structure of the *Code*

In the present *Criminal Code*, the law relating to sexual offences is organized in terms of two sets of rules: those defining the offences; and those specifying their limits or which (from the standpoint of procedure and form) set the legal framework applicable to such offences.

The rules of the first category are set forth in sections 143 and 144 (*rape*); 145 (*attempt to commit rape*); 146 (*sexual intercourse with a female person under fourteen and/or between fourteen and sixteen years*); 148 (*sexual intercourse with a feeble-minded person*); 149 (*indecent assault of a female person*); 150 (*incest*); 151 (*seduction of a female person between sixteen and eighteen years of age*); 152 (*seduction under promise of marriage*); 153 (*sexual intercourse with a step-daughter or female employee*); 154 (*seduction of a female passenger on board a vessel*); 155 (*buggery and bestiality*); 156 (*indecent assault on a male person*); 157 (*gross indecency*); 166 (*parent or*

guardian procuring defilement); 167 (*householder permitting defilement*); 168 (*corrupting a child*); 169 (*indecent act*); 170 (*nudity*); 171(1)(*b*) (*indecent exhibition*); 173 (*trespassing at night*); 175(1)(*e*) (*vagrancy by person previously convicted of sexual offence*).

The rules of the second category are contained in sections 147 (*exceptions in favour of male persons under the age of fourteen*); 158 (*exceptions in favour of husband and wife*).

Sections 159 to 165, which deal with offences tending to corrupt morals, are not examined by this Report. They deal with that difficult problem of pornography entwined with publication, publicity and public morality which deserves special analysis and examination.

Section 172 (*interfering with or obstructing a minister of religion*) has nothing whatsoever to do with sexual offences, and its presence in this part of the *Code* is anomalous. It should therefore be placed under the heading of nuisances, probably as section 176.1. The same applies to section 174 (*the use of dangerous and volatile substances*), which might become section 176.2. The provisions of section 171 (*causing disturbance, indecent exhibition, loitering*), except those of paragraph (1)(*b*) should likewise be removed from the ambit of sexual offences and replaced under the heading of nuisances as subsection 176(3). Finally, only paragraph (1)(*e*) of section 175 ought to be retained within the chapter on sexual offences, subject to the changes that the Commission recommends.

By contrast, the provisions dealing with *soliciting* (section 195.1) for the purposes of prostitution should come within the chapter on sexual offences.

Section 154, (*seduction of a female passenger by the master or owner of a ship*) should be removed altogether from the *Code*. This section is a prime example of a manifestly anachronistic provision of the last century protecting immigrant women from abuse of authority by ships' captains. It no longer has a place within the *Criminal Code* of Canada in the second half of the twentieth century.

Recommendation 2

The Commission recommends:

(1) that section 172 of the *Criminal Code* be withdrawn from the chapter on sexual offences and incorporated as section 176.1 in the chapter on nuisances,

(2) that section 174 of the *Criminal Code* be withdrawn from the chapter on sexual offences and incorporated as section 176.2 in the chapter on nuisances,

(3) that section 171 of the *Criminal Code*, with the exception of paragraph 1(*b*), be withdrawn from the chapter on sexual offences and incorporated as subsection 176(3) in the chapter on nuisances,

(4) that paragraph 175(1)(*e*) of the *Criminal Code* be retained in the chapter on sexual offences subject to substantive changes,

(5) that section 154 be repealed.

II. Redefinition of offences

A. *Rape and indecent assault*

In Working Paper 22 the Commission questioned the propriety of retaining "rape" as an offence. Consultations conducted by the Commission have confirmed its doubts for the following reasons: First of all, rape as presently defined in the *Criminal Code* is only one of several forms of criminal assault. Our consultations have confirmed that the predominant legal and behavioural characteristic of rape is not for the offender its sexual but rather its aggressive aspect, its violation of the physical integrity of the human person. In the Commission's opinion the law should reflect this reality.

In the second place, the Commission has come to the conclusion that the very use of the word "rape" attaches a profound moral stigma to the victims and expresses an essentially irrational folklore about them. Admittedly, little benefit can be expected from the mere substitution of one word for another. The Commission's proposals however go far beyond mere verbal reform of the law.

In the third place, the existing definition of rape covers only vaginal penetration. In the Commission's opinion all acts of penetration, vaginal, oral or anal, and all acts of sexual aggression regardless of form should come within the same scope of legal sanction, since they all constitute severe violations of the integrity of the person, violations which society cannot and must not tolerate. The definition should thus be extended to those other acts.

In Working Paper 22 the Commission had suggested that there should be only one type of offence (sexual assault) and that the question of whether there had been penetration and whether force had been used should be taken into account only in sentencing. Consultations conducted by the Commission, however, as well as widespread criticism in the press have led the Commission to revise its view.

First, as noted earlier, the aggravating factor of violence should be underlined by legislation in the definition of the offences. It is not enough to do this by means of the sentence imposed. The distinction between the mere touching of sexual organs and actual sexual aggression is one not merely of degree but of kind. It should accordingly be reflected in the very definition of the offence itself and not only in the severity of the sentence.

Second, from a practical standpoint, the task of prosecuting, defending and adjudicating would be greatly and justly simplified by the creation of two distinct offences.

Last, the separation of sexual assaults into two distinct offences corresponds more closely to reality since it outlaws specifically and separately two types of behaviour which are really quite different in nature: (1) mere sexual contact unaccompanied by violence or threats; (2) sexual assault accompanied by violence or threats.

Recommendation 3

The Commission recommends the creation of two distinct sections to deal separately with the two types of prohibited sexual conduct, namely sexual interference and sexual aggression.

The second problem confronting the legislator is whether it is necessary to retain penetration as a distinct element of one of the offences.

The Commission has not altered its stand in this regard, and the great majority of its consultations have clearly demonstrated that its original opinion on the matter was justified. To retain penetration as a distinct element of one of the offences would be to emphasize the sexual character of the proscribed behaviour rather than to stress the aspect of violence or threatened violence. To conserve this feature of the law would increase the risk of having the concept of "rape" reappear, albeit under a different name, and of accomplishing therefore no more than a nominal reform. Furthermore, even if penetration is invariably an aggravating element, there are other modes of sexual misbehaviour which are no less abhorrent even though penetration is not involved. Finally, elimination of the requirement of penetration would represent a step towards greater respect for the equality of the sexes and, in consequence, a more egalitarian concept of law, and contribute to the increased reporting and prosecution of sexual aggressions.

The Commission, accordingly, is persuaded to opt for the creation of two distinct offences. The first, "sexual interference", would consist of any touching of another person for a sexual purpose without his or her consent. The second, "sexual aggression", would involve any act of sexual interference accompanied by bodily injury or threat of bodily injury.

Recommendation 4

The Commission recommends that the offences of "rape" (section 143), "attempt to commit rape" (section 145), "indecent assault" (sections 149 and 156) and "gross indecency" (section 157) be repealed and replaced by those of "sexual interference" and "sexual aggression", to be defined in the following terms:

Section 1 — Sexual Interference

Every one who, for a sexual purpose, directly or indirectly touches another person without the consent of that person is guilty

(*a*) of an indictable offence and liable to imprisonment for five years, or

(*b*) of an offence punishable on summary conviction.

Section 2 — Sexual Aggression

Every one who uses or threatens to use violence in the course of or for the purpose of sexual interference is guilty of an indictable offence and liable to imprisonment for ten years.

Section 3 — Consent

(1) Consent obtained by misrepresentation as to the character of the act or the identity of the accused is not consent for the purposes of sections 1 and 2.

B. *Immunity of Spouses*

The present formulation of section 143 of the *Criminal Code* makes the commission of an offence of rape impossible between

a husband and his wife. This exception reflects an outlook no longer in vogue which, it has been observed, takes for granted a husband's right to sexual intercourse with his wife without her consent. The Commission in Working Paper 22 recommended the abolition of this immunity in the case of husbands and wives who are legally or actually separated. At the same time the Commission questioned the wisdom of eliminating the exception in the case of husbands and wives still cohabiting with each other.

The arguments for and against eliminating this special immunity are sufficiently well known to require nothing more than short summary here. On the one hand, it is argued that because the value to be protected is the integrity of the person, the law should admit no exception on the mere pretext that an official act has sanctioned a legal relationship between two persons. Is not making an exception in this case tantamount to indirectly countenancing the right of each marriage partner to the forced sexual submission of the other? On the other hand, without impugning the validity and soundness of this thesis, in principle, exponents of the opposite view advance arguments of a practical nature. Is there not a danger that such an accusation may serve as a weapon in the hands of marriage partners bent on avenging themselves on each other? Moreover, how would the commission of the act be proved in the case of husbands and wives still living together? Lastly, is it the business of the criminal law to meddle with a question which is by its very nature strictly private and which might better be settled by other means and processes than those of criminal justice (marriage counsellors, psychological counselling, community agencies, etc.)?

The great majority of those consulted by the Commission on this question favoured total abolition of the spousal immunity. Difficulties of proof do not appear to be insurmountable and the danger of groundless accusations made from motives of revenge or as preliminaries to divorce or separation proceedings may be counter-balanced by stricter exercise of discretion in assessing

the appropriateness of prosecutions. Furthermore, as experience has amply demonstrated, groundless or ill-founded prosecutions have little chance of passing through the filtering processes implicit in our legal system and present-day criminal procedure.

Recommendation 5

The Commission recommends that the spousal immunity contained in section 143 of the *Criminal Code* be abolished.

C. *Protection of minors, the feeble-minded and special groups of persons*

Many of the provisions of the present *Criminal Code* aim at protecting children, minors and other special groups of persons against sexual abuse. No one would seriously question the need for regulation in this domain. Be that as it may, serious efforts should be made to reorganize and restructure this part of the *Code*.

The *Code* in its present state extends its protection to the following persons:

(1) unmarried female persons under the age of fourteen (subsection 146(1)),

(2) unmarried female persons "of previously chaste character" between the ages of fourteen and sixteen (subsection 146(2)),

(3) unmarried female persons who are "feeble-minded" (section 148),

(4) female persons between the ages of sixteen and eighteen, "of previously chaste character", "seduced" by a male person of eighteen years of age or more (section 151),

(5) unmarried female persons "of previously chaste character" and less than twenty-one years of age, "seduced" by a male person of twenty-one years of age or more under promise of marriage (section 152),

(6) female persons "of previously chaste character" under the age of twenty-one, compelled to have sexual intercourse with a male person in whose employment they are or on whom they are dependent (section 153),

(7) female persons under the age of fourteen, or fourteen years of age or more, against defilement or illegal sexual intercourse procured by a parent or guardian (section 166),

(8) female persons under the age of eighteen, sexually exploited in premises occupied by a householder (section 167).

(9) children, when exposed in the home to sexual immorality which endangers their morals (section 168).

This simple enumeration of offences penalized by the *Criminal Code* demonstrates the lack of any clear or consistent

principle. Although those provisions of the *Code* may not evince any real legislative policy on sexual offences, they do nevertheless share a common objective: to protect minors and others considered as weak by the legislator against the ill-effects on their maturation and balanced development of premature sexual activity. The implication of the existing law is evident: in eight out of the nine offences protection is extended exclusively to female persons. Equally noteworthy, too, is the obsolescence of such expressions as "of previously chaste character" and "is more to blame than".

The two proposed offences of sexual interference and sexual aggression afford protection to all individuals irrespective of their age or sex. This being so, it is necessary to determine the special cases in which criminal law should outlaw sexual contact or intercourse unaccompanied by violence or fraud and so provide additional protection purely on the grounds of age or incompetence.

(1) *Minors*

As the Commission pointed out in its Working Paper, there is no valid reason despite changes in moral standards for lowering the minimum age at which the law provides absolute protection. The Commission believes that this age, set at fourteen years at present, should be retained regardless of the capacity of the child or adolescent to "consent".

Recommendation 6

The Commission recommends the retention of the prohibition as to age contained in subsection 146(1) of the present *Code*.

The prohibition should, however, apply equally to both sexes and not be limited to sexual intercourse alone.

At the same time the Commission finds itself in disagreement with the philosophy expressed in the last phrase of section 146 of the *Criminal Code*, which regards the offence as one of strict liability. As the law now stands, the accused must be found guilty even though he believed in good faith that the young person was over fourteen years of age. There are several cases on record in which the judge felt obliged to convict, despite the accused's unawareness of the young person's being under age. The Commission understands the motives which led Parliament in this case to make an exception to the general rule requiring proof of criminal intent or at least of carelessness. Upon careful reflection, however, the Commission is of the opinion that a compromise solution with a reverse onus of proof and with a negligence requirement is fair, and thus preferable, in these circumstances. In making this recommendation the Commission is aware that it is recommending an exception to the general rule proposed in its Report "*Our Criminal Law*". Under the special circumstances here, however, the Commission thinks such an exception is justified, because it would be more just.

As for persons sixteen years of age or more, the *Criminal Code* as it now stands protects those of the female sex, "of previously chaste character", from having sexual intercourse with men not their husbands (subsection 146(1)). Protection is likewise afforded to female persons "of previously chaste character" seduced by men eighteen years of age or more (section 151). A series of other provisions extends protection to women less than twenty-one or less than eighteen years of age, as the case may be (sections 152, 153, 166, 167, 168). Moreover, the federal *Juvenile Delinquents Act* and various provincial statutes on youth and child welfare, which are outside the scope of the *Criminal Code*, do accord to young people as much other protection as the law can provide.

At the present time eighteen is considered to be the age of legal majority in most of the provinces of Canada. The evolution of moral standards in modern society and the earlier maturation of adolescents in our times have led the Commission to believe that criminal law should also recognize the age of eighteen as constituting the dividing line between children or adolescents and adults as regards sexual offences.

Unlike children under the age of fourteen, whose protection under the law is absolute, persons between fourteen and eighteen years of age should in the Commission's opinion enjoy a qualified form of legal protection under the *Criminal Code*.

The formulation of subsection 146(2) requires that the female youth be "of previously chaste character" and that the accused be in the particular circumstances of the case "more to blame than the female person". These two conditions, it is generally recognized, severely limit the practical application of the section, as is eloquently revealed by the infrequency of indictments under the section.

For certain individuals between fourteen and eighteen years of age premature sexual initiation can have serious consequences. Legislation on juvenile delinquency protects them against interferences both from adults or other adolescents.

When two adolescents engage in sexual acts, it is perhaps inappropriate to treat the matter with great severity, since in many cases it is the natural outcome of normal sexual development. The consequences of such conduct will usually be far more effectively dealt with by family or child welfare law, in family or juvenile courts operating under existing provincial legislation.

Insofar as adult offenders are concerned, the Commission recommends the adoption of section 5 below as well as the retention of the offence of contributing to juvenile delinquency. If draft legislation to replace the *Juvenile Delinquents Act* contains no such provision, the Commission recommends that it be included in the *Criminal Code*.

With regard to cases involving persons under the age of fourteen, the Commission believes, for reasons already outlined, that a defence of reasonable diligence with a reverse onus of proof is justified.

Recommendation 7

The Commission recommends the enactment of the following sections:

Section 4 — Sexual Interference with Persons Under Fourteen Years of Age

Every one who, for a sexual purpose, directly or indirectly touches a person under the age of fourteen years, with or without the consent of that person, is guilty of an indictable offence and liable to imprisonment for five years.

Section 5 — Sexual Interference Due to Dependency

(1) Every one who, for a sexual purpose, directly or indirectly touches a person fourteen years of age or older but under eighteen years of age, whose consent was obtained by the exercise of authority or the exploitation of dependency is guilty of an indictable offence and liable to imprisonment for five years.

Section 6 — Due Diligence — Spouses

(1) An accused is not guilty of an offence under sections 4 or 5 if, after the exercise of reasonable diligence, proof of which lies upon him, he believed at the time of the offence the person to be older than the age specified in those sections.

(2) Sections 4 and 5 do not apply to conduct between spouses.

(2) *Mentally handicapped persons*

At present this category of persons enjoys only partial protection under the law. Section 148 of the *Criminal Code* applies exclusively to those of the female sex and only to cases of actual sexual intercourse. The protection is based on the premise that a mentally handicapped individual is incapable of giving real and valid consent to the act.

Consultations with specialists on this question have confirmed the Commission's own opinions. The mentally handicapped, like other persons, have a right to sexuality. The law ought not therefore to protect them except insofar as their handicap prevents them from giving a valid consent and from realizing the consequences of their own acts.

It is the Commission's opinion, therefore, that beyond the general protection that all persons enjoy under the law the mentally handicapped should not be afforded special protection except insofar as their handicap has been exploited and insofar as they were incapable of giving consent. The determination of this question of fact must be left in each case to the discretion of the trier of fact.

Recommendation 8

The Commission recommends the enactment of the following section for possible incorporation as subsection (2) of section 3:

Section 3 — Consent

(1) . . .

(2) Whether or not valid consent is given by a mentally handicapped person for the purposes of section 1 is a question of fact to be determined by the trier of fact.

The foregoing text may not be indispensable in view of the Commission's recommendation that the present section 148 be repealed. The Commission, however, considers it useful as a means of emphasizing the fact that a mentally handicapped person must be treated on an equal footing with others and must be protected only if he or she is incapable of giving valid consent.

(3) *Other persons in relations of dependency*

A number of sections in the present *Criminal Code* outlaw sexual intercourse obtained by the exploitation of relationships of dependency, whether by blood or by employment. One of these, incest, represents a special type of offence, and merits separate examination. That occurs later in this chapter. Accordingly, we shall for the moment confine our remarks to situations wherein the dependency is the result of employment.

Cases of this type come within the purview of paragraph 153(1)(*b*) of the *Criminal Code*. Here again the *Criminal Code* affords protection only to female persons, under twenty-one years of age and "of previously chaste character". The accused may, moreover, be acquitted if, in the judgment of the court, the alleged "victim" of exploitation is "more to blame" than himself.

As the Commission has already pointed out in Working Paper 22, this double limitation is quite inappropriate if the purpose of the prohibition is to prevent the use of a dependency relationship for obtaining sexual favours. It is equally illogical to restrict its application to actual sexual intercourse. To remain true to the legislator's purpose, it would be necessary to extend the prohibition to all other forms of sexual activity as well.

This provision of the *Criminal Code* dates back to a period when the protection afforded by labour laws and labour relations legislation was slight or non-existent. Today, individuals dismissed from employment because of refusal to submit to their

employers' sexual importunities have more effective means of redress. The proposed sections on sexual interference and sexual aggression as well as those affording protection to minors are adequate to cover the other cases where protection is needed.

Recommendation 9

The Commission recommends that paragraph 153(1)(*b*) be repealed.

D. *Incest*

Section 150 of the *Criminal Code* defines incest as sexual intercourse between two people who by blood relationship are either parent and child, brother and sister, half-brother and half-sister, or grandparent and grandchild. Incest is an indictable offence, carrying with it a maximum penalty of fourteen years imprisonment. No offence is deemed to have been committed, however, where the parties do not know that they are blood relatives.

Practical court experience has shown that the overwhelming majority of incest trials concern illicit intercourse between fathers and daughters at the age of puberty or during the period of adolescence. By contrast, the judicial record is mostly silent on prosecutions for incest between persons over the age of majority.

In its Working Paper 22, the Commission recommended that incest between consenting adults should no longer qualify as an offence. It was thought that incestuous relations not involving

children or adolescents did not deserve to be treated with the full rigour of the criminal law. This recommendation elicited numerous letters and considerable comment on the part of the public. The Commission even received one petition signed by some three hundred people asking: "Please do not take incest out of the *Criminal Code*!". Despite the evident sincerity of such correspondents, the Commission continues to believe that incest between consenting adults ought no longer to fall within the purview of criminal justice. This position is based on several grounds.

As outlined above, the reform of laws dealing with sexual offences should be based on three fundamental principles: (1) the protection of the integrity of the person; (2) the protection of children and special groups; and (3) the safeguarding of public decency.

It is not the function of the law to intervene in the private lives of citizens and to attempt to cover all sexual behaviour. Certain forms of sexual behaviour are regarded by many as sinful, morally wrong, or objectionable for reasons of conscience, or of religious or cultural tradition. Certainly incest is universally regarded as repugnant behaviour. But the criminal law does not, and indeed should not, cover all such actions. As was said in the 1957 Report to the British Parliament of the Committee on Homosexual Offences and Prostitution (the Wolfenden Report):

> Unless a deliberate attempt is to be made by society, acting through the agency of the law, to equate the sphere of the crime with that of sin, there must remain a realm of private morality and immorality which is in brief and crude terms, not the law's business.

Accordingly, in the absence of any exploitation of authority or dependency, it is felt that incestuous behaviour ought not be treated and punished as a criminal act.

Nor can it be argued, within this framework, that the genetic risk of in-breeding justifies the intervention of the criminal law.

The substance of this argument is that sexual relations between those who are related by blood create a serious risk of genetically defective children. In the first place, the available scientific evidence is controversial and does not support the contention that the offspring of blood-related parents are necessarily more likely to be born with genetic defects. But even if this contention could be made out, we would still have to ask whether this is an appropriate problem for the criminal law. It should be remembered that the law does not intervene to prohibit marriage and subsequent procreation by persons who are not related but who may exhibit genetically serious mental or physical disabilities. Nor does the law permit compulsory sterilization of such persons.

As to the argument that the criminal prohibition of incest is necessary for the protection of the family, it must be asked whether the criminal law provides an appropriate solution for the problem. Incest is above all a family disturbance: it is not a cause but a symptom or result of a disturbance within the family, a disturbance generally present before the offence took place. The criminal law and the criminal process are notoriously weak in dealing with family problems. This is true even in situations involving general prohibitions, such as cases of family assault, of which assault upon a spouse and child abuse are two examples.

The Commission believes that incest should above all be a matter of social and psychological treatment; secondly, a matter of regulation by family and child welfare law, and only thirdly, a matter for the criminal law. The Commission further believes that the only valid basis for the intervention of the criminal law is the protection of children and adolescents from the abuse of authority and from interference with their right to mature unmolested toward sexual self-determination.

As the law now stands, such protection is not necessarily afforded: the provisions of a *Code* are limited in scope and section 150 defines restrictively the degrees of kinship within which sexual relations are prohibited as incestuous. Moreover, the offence as it is presently defined contains no element of either violence or exploitation, the two elements the law seeks to

repress in dealing with sexual offences. Finally, the present law does not extend the same protection from exploitation to male and female persons.

Under the scheme proposed by the Commission, children under fourteen years of age are protected by the absolute prohibition against sexual interference, whether with or without consent. However, in order to reinforce the legal protection of adolescents between the ages of fourteen and eighteen, already proposed, from exploitation of dependency or exercise of authority, it is suggested that such exploitation or exercise of authority be *presumed* where the young person is between fourteen and eighteen years of age and the adult accused shares with the former a close degree of kinship. This position is consonant with the abolition of the crime of incest between persons of equal status, of majority or minority, but goes no further. It would emphasize that the essence of the offence is the exploitation of a minor grandchild, child, sibling, niece or nephew. The new formulation would thereby retain the protection now accorded to the young by section 150 (incest). Indeed it would widen the family circle beyond the present provision so as to bring the brothers and sisters of a parent under its ban, since these persons are frequently in a position to exploit young people. Such an approach provides an appropriate response to the growing concern for the exploitation of children, a concern which is evidenced, for example, by the upcoming Year of the Child in 1979.

As to consensual relations between brothers and sisters between the ages of fourteen and eighteen, it should be remembered that such relations presently come within the definition of "sexual immorality or any similar vice" within the *Juvenile Delinquents Act*. Thus such behaviour is presently dealt with as a form of juvenile delinquency rather than as a criminal offence, and the Commission believes that the juvenile court is the appropriate forum for such problems. Should the juvenile offender be transferred to the ordinary criminal courts, the presumption of exploitation would not apply because the juvenile offender's age would have been less than eighteen years at the time at which the delinquency was alleged to have occurred.

The Commission is aware that its recommendation may well elicit strong opposition from certain sectors of the public, if only because of the age-old stigma attached to incest. It also acknowledges that in the final analysis it will be up to Parliament to assess public opinion and decide whether decriminalizing incest between adults would be impolitic at present.

Recommendation 10

The Commission recommends that incest between consenting adults should not be the object of criminal prohibition and therefore recommends that section 150 of the *Criminal Code* be repealed.

The Commission further recommends the enactment of the following text as subsection (2) of section 5 on the offence of sexual interference due to dependency:

Section 5 — Sexual Interference Due to Dependency

(1) . . .

(2) For the purpose of subsection (1), actual or legal authority or dependency shall be presumed to exist if the accused is of the age of eighteen years or older and is, to his or her knowledge by blood relationship the parent, brother, sister, half-brother, half-sister, grandparent, uncle or aunt of the other person.

E. *Buggery, bestiality and acts of gross indecency*

The offences of buggery, bestiality and gross indecency are defined in sections 155 and 157 of the *Criminal Code*. Since the 1968 amendments to the *Code* two of these offences are no longer absolutely prohibited. The prohibition against buggery and acts of gross indecency no longer applies to acts committed in private between husbands and wives or between persons over twenty-one years of age. These exceptions are provided for in section 158.

The Commission is fundamentally in agreement with the purposes of these provisions. Most of its suggestions in this regard are aimed, therefore, rather at reorganizing the existing law than at effecting any substantive change in it.

Buggery and gross indecency would fall within the purview of the sections concerning sexual interference or sexual aggression, when accompanied by violence. Bestiality would still be covered by the various laws for the protection of animals either enacted by the provinces or contained in the *Criminal Code* itself (for example, sections 402 ff.). Furthermore, regulations for safeguarding public decency continue to prohibit the commission of these acts in public places or in public view. Finally, provisions for the protection of children and adolescents up to the age of eighteen prohibit these offences with regard to such persons. All of those provisions are therefore no longer required.

Recommendation 11

The Commission recommends that sections 155, 157 and 158 of the *Criminal Code* be repealed.

F. *Offences tending to corrupt morals and disorderly conduct*

Acts tending to corrupt morals and disorderly conduct go counter to one of the basic postulates of the proposed reform: the safeguarding of public decency.

As the Commission pointed out in Working Paper 22, the public are entitled to protection against overt displays of sexuality. The consultations conducted by the Commission in this regard reveal total unanimity on this point.

Nevertheless, the reform put forward now by the Commission is only partial. It has chosen not to concern itself with obscenity, a problem of such complexity as to deserve separate treatment and one on which the Commission has so far reached only tentative conclusions.

(1) *Exhibitionism*

The general formulation of section 169, which prohibits the commission of indecent acts, is applied in practice to the phenomenon of exhibitionism. Properly speaking, compulsive behaviour of this kind falls within the province of psychiatry. Nonetheless, the text of the present *Code* imposes criminal sanctions because it is perpetrated in a public place or with intent to insult or offend. Admittedly in the circumstances treatment of the offender would seem to call for psychology or psychiatry rather than criminal justice. All the same, the public unquestionably has a right to be protected against acts outraging its sense of public decency.

Recommendation 12

The Commission recommends the retention of section 169 of the *Criminal Code*.

(2) *Public nudity*

The text of section 170 was adopted in reaction to the Doukhobor use of public nudity as a means of political demonstration because section 169 (dealing with exhibitionism) was judged inadequate.

The prohibition of public nudity as defined in the section is qualified. To constitute an offence, nudity must offend public decency or public order (subsection 170(2)). Furthermore, the consent of the Attorney General is required for the prosecution of the offence (subsection 170(3)).

Recommendation 13

The Commission recommends the retention of the section on nudity, although it recognizes that the section may give rise to some difficulties in its selective and local application.

(3) *Indecent exhibitions*

All in all, section 171 of the *Criminal Code* is more closely related to "nuisances" than to sexual offences. Its presence in this part of the *Code* might appear anachronistic, were it not for paragraph (1)(*b*), which deals with indecent exhibitions in public. The paragraph is obviously closely tied in with the law on obscenity, to which reference has already been made elsewhere and, therefore, the Commission does not here express its opinion.

Recommendation 14

The Commission recommends, pending general reform of the law on obscenity, the retention, for the time being, of paragraph 171(1)(*b*).

(4) *Trespassing at night*

Section 173 of the *Criminal Code* makes "prowling at night" an offence. The section can apply to numerous situations, though in the majority of cases it has been used to control voyeurism. Voyeurism, like exhibitionism, is essentially a compulsive mode of behaviour whose treatment calls primarily for psychological intervention.

Recommendation 15

The Commission recommends the retention, for the time being, of section 173 of the *Criminal Code*.

G. *Soliciting*

The Commission in this Report makes no specific recommendation concerning prostitution and the keeping of common bawdy-houses.

The Commission indicates, however, that section 195.1 is subject to various interpretations. It appears, on the one hand, that certain legal authorities have interpreted the text as having no application to male prostitutes. Such an interpretation clearly belies the fact that male persons can and do engage in furnishing their own sexual services for gain. Therefore, so that the law may evenhandedly meet reality, the text ought to be clarified to apply to both sexes.

On the other hand, the question arises whether the section incriminates the prostitute's client, as well as the prostitute, when the former "solicits" the services of the latter. The

problem is clearly one which transcends the frame of reference of sexual offences. Its resolution calls for a more comprehensive study.

Recommendation 16

The Commission recommends the enactment of the following text, to replace section 195.1:

Section 7 (*Criminal Code* section 195.1) — Soliciting

Every person, whether male or female, who solicits any person in a public place for the purposes of prostitution is guilty of an offence punishable on summary conviction.

CHAPTER III

Rules Supplemental to the Formulation of Offences

A complete reform of the law dealing with sexual offences must do more than simply re-define the offences themselves. There exists, in fact, a number of other legal rules which must also come under careful examination. Some of these have already been considered in connection with the definition of sexual offences: for example, the provision allowing a person accused of sexual contact with a person under fourteen or between fourteen and eighteen years of age to prove that he believed the victim to be over the age in question. In Working Paper 22 the Commission examined two other questions: (1) the examination of the victim and the publicity of the proceedings; and (2) vagrancy.

A. *Examination of the victim and publicity*

For a victim of rape or other sexual assault, the judicial process, it has often been affirmed, can be almost as agonizing as the offence itself. Indeed the victim of such offences is often an

object of morbid curiosity. In addition the public nature of the proceedings obliges the victim to reveal intimate, private facts under oath. This only adds to the severe psychological stress already suffered.

Besides, certain segments of the press for the sake of cheap sensationalism exploit the misfortune of pain and embarrassment of public exposure. In sex offence trials, more perhaps than in any other trials, the conflict of interest between the public's right to know and the victim's right to privacy becomes hard to resolve.

A number of modifications in the *Criminal Code* introduced in 1975 somewhat alleviated the victim's plight. Thanks to the provisions of section 142 cross-examination of victims as to their previous sexual conduct is strictly regulated. The Commission, in its 1974 Report on Evidence, had already made recommendations along these lines.

Concerning the problem of publicity surrounding trials of sexual offences, sections 441, 442(1), 465(1)(*j*) and 467 of the present *Code* provide various rules designed to limit the publicity of such proceedings.

In Working Paper 22 the Commission proposed to extend this protection to both the victim and the accused. For the victim the protection could go so far as to prohibit all mention of his or her name in any publication. For the accused the Commission considered that his or her identity should be likewise concealed until such time as the court gave permission to reveal it or until the accused had been convicted.

Consultations and discussions launched by the Commission on this subject brought to light considerable differences of opinion. Some of those consulted felt that the problem of publicity, far from being limited to trials for sexual offences, should be examined in the wider context of criminal prosecutions in general. Others believed that an exception in cases of sexual offences would be quite unjustified and that the legal process should not intervene to limit or restrain the public's right to information. In the light of this controversy, the Commission

concluded that discussion could not be profitably pursued within the specific context of sexual offences. Consequently, the Commission refrains from making any recommendation for the present other than that the provisions already in force be maintained. It reserves the right, however, to examine the entire problem in a subsequent study and to make specific recommendations with regard to sexual offences.

B. *Vagrancy*

Paragraph 175(1)(*e*) of the *Criminal Code* makes it an offence for anyone previously convicted of rape, buggery, bestiality or gross indecency, illicit sexual intercourse with persons under fourteen or between fourteen and sixteen years of age, or the indecent assault of a female, to loiter or wander in or near a school ground, playground, public park or bathing area.

Essentially, paragraph 175(1)(*e*) is a preventive legal measure designed to keep sexual offenders from frequenting places where the temptation to repeat an offence might be particularly strong. In its present wording, however, the section presents serious problems of substance. It reflects, first of all, the incomprehension, suspicion and social ostracism to which sexual offenders are often victim even after paying their debt to society. It also shows that society considers them as recidivists and presumes their guilt. By the same token, would it not be equally logical to bar those convicted of armed robbery from entering a bank ever after? Moreover, the section establishes no connection between the specific sexual offence of which the individual was convicted and the prohibition it imposes on him. If there is some logic in preventing a person convicted of indecent assault on young boys from loitering around a school or playground, the same prohibition is hardly appropriate in the case of one found guilty, say, of bestiality. It appears to the Commission that restrictions upon the freedom of movement of

individuals in such cases should be specific in scope, limited in time, and logically connected with the type of offence of which such individuals were previously convicted.

Restrictions of this kind could be more effectively imposed in the form of probation orders or special restriction orders at the time of conviction as the court deems appropriate.

Recommendation 17

The Commission recommends that paragraph 175(1)(*e*) be repealed and that the following section 175.1 be enacted in its place:

Section 8 (*Criminal Code* paragraph 175(1)(*e*)) — Loitering and Wandering in Public Places.

(1) In convicting an accused under sections 1, 2, 4, and 5, the court may issue an order restricting the access of the accused during a period not exceeding five years from his or her provisional or final discharge, to certain public places, school grounds, playgrounds, public parks or public bathing areas.

(2) Every one who contravenes such an order is guilty of an offence punishable on summary conviction.

Recommendations

The Commission recommends:

1. that the reform of sexual offences be based on these three fundamental principles:

- protecting the integrity of the person,
- protecting children and special groups,
- safeguarding public decency;

- *See* page 8.

2. (1) that section 172 of the *Criminal Code* be withdrawn from the chapter on sexual offences and incorporated as section 176.1 in the chapter on nuisances,

(2) that section 174 of the *Criminal Code* be withdrawn from the chapter on sexual offences and incorporated as section 176.2 in the chapter on nuisances,

(3) that section 171 of the *Criminal Code*, with the exception of paragraph (1)(*b*), be withdrawn from the chapter on sexual offences and incorporated as subsection 176(3) in the chapter on nuisances,

(4) that paragraph 175(1)(*e*) of the *Criminal Code* be retained in the chapter on sexual offences subject to substantive changes,

(5) that section 154 be repealed;

• *See* page 11.

3. that two distinct sections be created to deal separately with the two types of prohibited sexual conduct, namely sexual interference and sexual aggression;

• *See* page 13.

4. that the offences of "rape" (section 143), "attempt to commit rape" (section 145), "indecent assault" (sections 149 and 156) and "gross indecency" (section 157) be repealed and replaced by those of "sexual interference" and "sexual aggression", to be defined in the following terms:

SECTION 1 — Sexual Interference

Every one who, for a sexual purpose, directly or indirectly touches another person without the consent of that person is guilty

(*a*) of an indictable offence and liable to imprisonment for five years, or

(*b*) of an offence punishable on summary conviction.

SECTION 2 — Sexual Aggression

Every one who uses or threatens to use violence in the course of or for the purpose of sexual interference is guilty of an indictable offence and liable to imprisonment for ten years.

SECTION 3 — Consent

(1) Consent obtained by misrepresentation as to the character of the act or the identity of the accused is not consent for the purposes of sections 1 and 2.;

• *See* page 14.

5. that the spousal immunity contained in section 143 of the *Criminal Code* be abolished;

• *See* page 17.

6. that the prohibition as to age contained in subsection 146(1) of the present *Code* be retained;

• *See* page 19.

7. that the following sections be enacted:

SECTION 4 — Sexual Interference with Persons Under Fourteen Years of Age

Every one who, for a sexual purpose, directly or indirectly touches a person under the age of fourteen years, with or without the consent of that person, is guilty of an indictable offence and liable to imprisonment for five years.

SECTION 5 — Sexual Interference Due to Dependency

(1) Every one who, for a sexual purpose, directly or indirectly touches a person fourteen years of age or older but under eighteen years of age, whose consent was obtained by the exercise of authority or the exploitation of dependency is guilty of an indictable offence and liable to imprisonment for five years.

SECTION 6 — Due diligence — Spouses

(1) An accused is not guilty of an offence under sections 4 or 5 if, after the exercise of reasonable diligence, proof of which lies upon him, he believed at the time of the offence the person to be older than the age specified in those sections.

(2) Sections 4 and 5 do not apply to conduct between spouses.;

• *See* page 22.

8. that the following section be enacted for possible incorporation as subsection (2) of section 3:

SECTION 3 — Consent

(1) . . .

(2) Whether or not valid consent is given by a mentally handicapped person for the purposes of section 1 is a question of fact to be determined by the trier of fact.;

• *See* page 23.

9. that paragraph 153(1)(*b*) be repealed;

• *See* page 25.

10. that incest between consenting adults should not be the object of criminal prohibition and that section 150 of the *Criminal Code* be repealed; also, the enactment of the following text as subsection (2) of section 5 on the offence of sexual interference due to dependency:

SECTION 5 — Sexual Interference Due to Dependency

(1) . . .

(2) For the purpose of subsection (1), actual or legal authority or dependency shall be presumed to exist if the accused is of the age of eighteen years or older and is, to his or her knowledge by blood relationship the parent, brother, sister, half-brother, half-sister, grandparent, uncle or aunt of the other person.;

• *See* page 29.

11. that sections 155, 157 and 158 of the *Criminal Code* be repealed;

• *See* page 30.

12. that section 169 of the *Criminal Code* be retained;

• *See* page 31.

13. that the section on nudity be retained although it recognizes that the section may give rise to some difficulties in its selective and local application;

• *See* page 32.

14. that pending general reform of the law on obscenity, paragraph 171(1)(*b*) be retained, for the time being;

• *See* page 32.

15. that, for the time being, section 173 of the *Criminal Code* be retained;

• *See* page 33.

16. that the following text be enacted to replace section 195.1:

SECTION 7 (*Criminal Code* section 195.1) — Soliciting

Every person, whether male or female, who solicits any person in a public place for the purposes of prostitution is guilty of an offence punishable on summary conviction.;

• *See* page 34.

17. that paragraph 175(1)(*e*) be repealed and that the following section 175.1 be enacted in its place:

SECTION 8 (*Criminal Code* paragraph 175(1)(*e*)) — Loitering and Wandering in Public Places

(1) In convicting an accused under sections 1, 2, 4 and 5, the court may issue an order restricting the access of the accused during a period not exceeding five years from his or her provisional or final discharge, to certain public places, school grounds, playgrounds, public parks or public bathing areas.

(2) Every one who contravenes such an order is guilty of an offence punishable on summary conviction.

• *See* page 38.

As the preceding recommendations will entail a reorganization of Part IV of the *Criminal Code* and of some other sections in the *Code*, the Commission further recommends:

18. the amendment of section 138 by abolishing the definition of "guardian";

19. the repeal of sections 139 to 141, 143 to 158 and 166 to 168;

20. the retention of sections 142, 159 to 165, 169, 170, 171(1)(*b*), 173, 176 to 178, 441, 442, 465 and 467;

21. the relocation, elsewhere in the *Code*, of the following sections:

- section 171, except paragraph (1)(*b*), to become subsection 176(3),
- section 172 to become section 176.1,
- section 174 to become section 176.2,
- paragraph 175(1)(*d*) to some other appropriate place.

SECOND PART

TEXTS AND COMMENTARY ON THE REFORM

DRAFT LEGISLATION

SECTION 1 — Sexual Interference

Every one who, for a sexual purpose, directly or indirectly touches another person without the consent of that person is guilty:

(*a*) of an indictable offence and liable to imprisonment for five years, or

(*b*) of an offence punishable on summary conviction.

EXPLANATORY NOTES

SECTION 1 — Sexual Interference

This and the following section replace either totally or in part the present section 143 (rape), section 145 (attempt of rape), section 149 and section 157 (gross indecency). Section 1 prohibits "less serious" sexual conduct. Section 2 prohibits the more serious offences involving violence or the threat of violence.

"For a sexual purpose" — The inclusion of this phrase establishes the sexual nature of the offence. Earlier consideration had been given to the suggestion that no sexual element should remain, that slightly expanded offences of assault would suffice. The Commission felt, however, that the sexual character of the offence made it different in kind, not just degree, from other forms of assault and that it should, therefore, form part of the definition of the offence. The accent that is put on the intention of the accused is in conformity with the general principles of criminal law.

"For a sexual purpose" was preferred to such other phrases as

"sexual contact" or "sexual gratification". It was pointed out in our consultations that there could be a sexual "touching" or "contact" (as might occur in a bar-room brawl) without any sexual purpose. "Sexual gratification" was not used because it indicated satisfaction and motive which might not be present. Even where the motive of the offender might be to humiliate and degrade, his purpose is nonetheless "sexual" and is therefore covered by the section.

"Directly or indirectly" — This phrase is used to avoid disputes where the "touching" is indirect through the use of an object or another intermediary. The section is clearly intended to cover such conduct.

Sanction — *Section 1 creates a hybrid offence which maintains the present maximum of five years for indecent assault. Because there are numerous circumstances in which the conduct should not go unnoticed but is not so serious as to warrant proceeding by indictment, the possibility for the prosecutor to proceed by way of summary conviction is provided.*

SECTION 2 — Sexual Aggression

Every one who uses or threatens to use violence in the course of or for the purpose of sexual interference is guilty of an indictable offence and liable to imprisonment for ten years.

SECTION 2 — Sexual Aggression

Section 2 creates an indictable offence punishable by a maximum of ten years. This is more than the present maximum for indecent assault but less than that for rape. It is the same as for attempted rape. Given present sentencing trends and the concern that the high maximums for rapes might adversely affect verdicts, the ten-year maximum is thought adequate.

"Aggression" — This word was used in section 2 because it characterizes neatly and comprehensibly what distinguishes this offence from that created by section 1. It is an offence involving violence or the threat of violence, and the focus is on that aspect of the offence. The word "assault" was not used because it is a technical term which could lead to misunderstanding, particularly by the general public.

One effect of this approach was to not include proof of bodily or psychological harm as legal elements of the offence. Such matters could, however, be properly considered in sentencing.

SECTION 3 — Consent

(1) Consent obtained by misrepresentation as to the character of the act or the identity of the accused is not consent for the purposes of sections 1 and 2.

(2) Whether or not valid consent is given by a mentally handicapped person for the purposes of section 1 is a question of fact to be determined by the trier of fact.

SECTION 3 — Consent

This section clarifies the term "consent" used throughout the draft legislation. The phrase "nature and quality" now used in this context has been replaced by "character" and "identity". This terminology should avoid potential problems. It covers conduct where the "character" of touching is misrepresented, (e.g., where an otherwise proper gynecological examination is performed for sexual or voyeuristic purposes).

The second paragraph deals with the consent of mentally handicapped persons. It is intended to allow sexual expression for the mentally handicapped while protecting them from improper exploitation. These objectives, the Commission thinks, are best met by leaving the complex question of validity of consent to the trier of fact in light of all the particular circumstances.

SECTION 4 — Sexual Interference with Persons Under Fourteen Years of Age

Every one who, for a sexual purpose, directly or indirectly touches a person under the age of fourteen years, with or without the consent of that person, is guilty of an indictable offence and liable to imprisonment for five years.

SECTION 4 — Sexual Interference with Persons Under Fourteen Years of Age

This section replaces the present subsection 146(1). Its purpose is to protect minors from premature sexual experience, particularly involving older persons.

SECTION 5 — Sexual Interference Due to Dependency

(1) Every one who, for a sexual purpose, directly or indirectly touches a person fourteen years of age or older but under eighteen years of age, whose consent was obtained by the exercise of authority or the exploitation of dependency is guilty of an indictable offence and liable to imprisonment for five years.

(2) For the purpose of subsection (1), actual or legal authority or dependency shall be presumed to exist if the accused is of the age of eighteen years or older and is, to his or her knowledge by blood

SECTION 5 — Sexual Interference Due to Dependency

This section replaces totally or in part sections 150, 151, 152, 153 and 154. It is intended to protect persons from sexual exploitation by those on whom they are in some way dependent. This is different from the present law in that the offence focuses also on dependency. The section applies equally to men and women.

The protection of this section extends only to the age of eighteen. Beyond that age, although a dependency situation could be used to obtain consent for sexual favours, the proper solution is

relationship the parent, brother, sister, half-brother, half-sister, grandparent, uncle or aunt of the other person.

through civil legislation such as Labour Codes, but not the criminal law. However, in relation to subsection (2) such exploitation of a young person shall be presumed where the accused is close kin, knows it and is of the age of eighteen years or older.

SECTION 6 — Due Diligence — Spouses

(1) An accused is not guilty of an offence under sections 4 or 5 if, after the exercise of reasonable diligence, proof of which lies upon him, he believed at the time of the offence the person to be older than the age specified in those sections.

(2) Sections 4 and 5 do not apply to conduct between spouses.

SECTION 6 — Due Diligence — Spouses

Subsection (1) of section 6 creates a defence of reasonable belief as to age. This is a change from the present law where mistake, reasonable or otherwise, is no excuse. Two valid policy considerations had to be reconciled. First, as a general rule the criminal law should punish only advertant conduct. Second, society has an interest in protecting minors from improper sexual activity with adults. The strict liability of the present law has led to cases of clear injustice. However, it was felt that in this area a higher onus of reasonable conduct should be required of citizens. The draft section allows a defence for the reasonably mistaken accused, thereby moderating the effects of the present law, but does impose a higher standard of liability for this offence than should generally be required. This exception is recognized and justified on policy grounds.

Subsection (2) is to prevent the application of sections 4 and 5 to married couples where one is or both are under the age of eighteen.

SECTION 7 (*Criminal Code* section 195.1) — Soliciting

SECTION 7 — Criminal Code *section 195.1) — Soliciting*

Every person, whether male or female, who solicits any person in a public place for the purposes of prostitution is guilty of an offence punishable on summary conviction.

With the inclusion of the words "whether male or female" it is intended to remove any doubt as to the application of this section to male prostitutes.

SECTION 8 — (*Criminal Code* paragraph 175(1)(*e*)) — Loitering and Wandering in Public Places.

SECTION 8 — (Criminal Code *paragraph 175(1)*(e)) — *Loitering and Wandering in Public Places*

(1) In convicting an accused by virtue of sections 1, 2, 4 and 5, the court may issue an order restricting access of the accused during a period not exceeding five years from his or her provisional or final discharge, to certain public

This section is taken from paragraph 175(1)(e) *of the* Criminal Code *(vagrancy) but adapted in such a way as to restrict the prohibition to a court order and for a period not exceeding five years.*

places, school grounds, playgrounds, public parks or public bathing areas.

(2) Every one who contravenes such an order is guilty of an offence punishable on summary conviction.