

FALSELY ACCUSED

THE CPS - SEXUAL OFFENCES AND CHILD ABUSE

Principle

The CPS attaches particular importance to cases involving allegations of child abuse.

This guidance deals specifically with charging practice in relation to offences of abuse against children. For information on:

- public interest factors
- key principles
- definition of abuse

as well as evidential and procedural matters (**refer to child abuse and child witnesses, elsewhere in this guidance**).

Guidance

Charging practice: general

You will adopt the same criteria for selecting the appropriate charge(s) as set out in the Code for Crown Prosecutors.

For sexual offences generally **<refer to sexual offences, elsewhere in this guidance>**. For assaults generally (**refer to the charging standard on offences against the person elsewhere in this guidance**).

In some cases there may be differences in the accounts given by the child and the defendant. It may be appropriate to select the charges based upon a defendant's admissions provided that the charges reflect the seriousness of the offending. This may save a child witness from giving evidence.

It may be difficult to link incidents complained of to specific dates because the child simply cannot remember or be definite. In such a situation, you should charge between a wide period, perhaps using the child's birth date as a point to identify either the beginning or end of behaviour complained of. It is also useful to try to use school or public holidays, such as Easter and Christmas, as a reference point.

You should take care when framing charges involving more than one defendant or child witness. Defendants and/or counts can only be joined in accordance with common law rules and Rule 9 Indictment Rules 1971, where there are points of similarity (**Archbold 1-154a**). When applying these rules you should be alert to the possibility of collusion between a number of child witnesses.

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Applications may be made to separate accused and counts so that a child witness has to give evidence on more than one occasion. You should always try to argue that the matter should be heard together by reference to the cases of *R v P [1991] 2AC 447* and *R v Downey [1995] 1 CR App R 547*. For the approach the courts adopt in relation to severance in cases involving sexual misconduct refer to **(Archbold 1-170)**.

Child Cruelty: Charging practice

This offence is contrary to Section 1 Child and Young Person Act 1933 **(Archbold 19-291)**. It deals with various forms of cruelty which result in unnecessary suffering or injury to health, namely:

- assault;
- ill treatment;
- neglect;
- abandonment;
- exposure.

The offence is particularly relevant in cases of cruelty over a period of time. You should choose with care the form of cruelty: *R v Hales [1969] 53 CR App R 36* and *R v Beard [1987] 85 CR App R 395*. It may be preferable to have two or more alternative allegations in order that the conduct complained of is appropriately described **(Archbold 19-294)**.

The charge is inappropriate where a serious assault has been committed. You should charge the most suitable offence against the person. If violence has been used, you need to decide upon the degree used and the explanation given by the defendant. It is possible that lawful chastisement will be raised as a defence and you will have to consider carefully whether such action was reasonable **(Archbold 19-185)**.

A specific charge of assault is likely to be more appropriate where:

- a weapon has been used, whether it is a recognised one such as a knife or something adapted for the purpose such as a belt buckle, flex or pipe;
- excessive physical violence is used, such as extreme shaking or swinging the child against a wall.

You will need to exercise careful judgement where it is alleged that a teacher, nursery worker or nanny has beaten or ill treated a child in their care and control. Even if a local authority has a policy not to allow smacking by registered child minders, it may be permissible for them to do so particularly where parental permission is specifically given *Sutton London Borough Council v Davis TLR 17.03.94*.

The right of reasonable chastisement by a teacher has been restricted by Section 548 Education Act, 1996 **(Archbold 19-185)**.

For the use of reasonable force by a member of staff of a school see Section 550A Education Act 1996 **(Archbold 19-40)**.

Indecency with children: Charging practice

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See Section 1 Indecency with Children Act 1960 (**Archbold 20-272**). This section creates a single offence which may be committed in different ways. It prohibits an act of gross indecency involving a child. The "act" does not mean that physical contact is necessarily required, but the behaviour must be directed in some way towards a child.

Depending on the circumstances you may charge the offence in place of, or as an alternative to, indecent assault. It is particularly suitable where the defendant has invited a child to touch him rather than the defendant making an assault on the child.

If the allegation does involve behaviour without contact then you must have evidence of indecency towards a victim. You must be able to prove that an accused knew that a child was aware of the behaviour, that it was directed towards the child and pleasure or satisfaction was gained by the accused from the knowledge that the child was watching. This applies even if there was no attempt to attract their attention *R v Francis [1988] 88 CR App R 127*.

Taking indecent photographs of children: Charging practice

Two statutes create offences which fall to be considered:

- Section 1 Protection of Children Act 1978 (**Archbold 31-107**)
- Section 160 Criminal Justice Act 1988 (**Stones Justices Manual 8-28270**)

Section 1 is aimed at the taking and distributing of photographs. Section 160 allows prosecution for possession, even if there is no intention to distribute. In each case the child has to be under the age of 16. DPP consent is required for both these offences.

If a person downloads an image from the Internet, he "makes" a photograph for the purposes of Section 1(1)(a) (**Archbold 31-108**).

Indecent photographs will sometimes come to light when seizures of material are made under the Obscene Publications Act 1959 (**Archbold 31-62**). Where the offence contrary to Section 1 or Section 160 above can be proved, you should always consider charging them (in addition to any offence under the Obscene Publications Act 1959) in order to reflect the dimension that the material involves children.

In the absence of the child, proof of age of the child in the photograph will be particularly difficult. Sometimes it will simply be a case of looking at the photograph in order to satisfy yourself that it is a child that has been photographed. Section 2(3) of the Protection of Children Act provides help, in that a person is to be taken as having been a child at any material time if it appears from the evidence as a whole that the child was then under the age of 16 (**Archbold 31-109**).

Harmful publications: Charging practice

See the Children and Young Persons (Harmful Publications) Act 1955 (**Stones Justices Manual 8-22445**). Prosecutions under this Act are rare. It is a summary only offence. A prosecution for one of the offences involving an

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indecent photograph will often be more suitable. Attorney General's consent is required.

Child abduction: Charging practice

There are a number of offences which may be appropriate when children are abducted. The suitable offence will depend on the circumstances of the abduction and the motive. The offence of the abduction of a child under 16 by parents or others connected with the child, with a view to removal from the United Kingdom is created by Section 1 Child Abduction Act 1984 (**Archbold 19-311**). The situation where someone other than a parent or person connected to the child unlawfully detains the child is dealt with by Section 2 of the Act (**Archbold 19-313**).

Offences of abduction of girls in different circumstances, the most common of which being for the purpose of sexual intercourse, are created by Sections 19 and 20 of the Sexual Offences Act 1956 (**Archbold 20-178**).

Kidnapping is an offence at common law (**Archbold 19-333**). Kidnapping of children will often give rise to difficult issues of consent. Where a child is very young, absence of consent can be inferred. In the case of older children, you will need to consider evidence of sufficiency of understanding and intelligence. For a comprehensive review of the law in relation to kidnap refer to *R v D [1984] AC 778*. DPP consent is required.

You must always bear in mind the sentencing powers available to the court. In particular the passing of a longer than normal sentence under Section 80(2)(b) Powers of Criminal Courts (Sentencing) Act 2000 (**Archbold 5-141**). A child abduction offence has been held to not be a "sexual offence": *R v Dootson [1994] Crim LR 702*. It may however be a "violent offence" *R v Newsome [1997] 2 CR App R [S]69*.

Procedure

Responsibility of areas

Area should ensure that:

- child abuse cases are given preferential treatment in the review process;
- intervals between the key stages of the prosecution process are the minimum consistent with the completion of all relevant tasks for which The CPS is responsible;
- the highest standards of timeliness are achieved in relation to telephone answering and correspondence;
- preferential treatment is given to the delivery of instructions to counsel on child abuse cases;
- counsel is notified in instructions of the importance of according priority to child abuse cases.

Areas will maintain records of time taken to deal with child abuse cases from charge by the police to final disposal.

Areas will ensure that child abuse cases are dealt with by lawyers and caseworkers of appropriate experience.

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Casework location

Abduction of a child by a parent from third party will be dealt with according to the decision of the CCP/(ACCP London) or designated officer.

Consents

The consent of the Attorney General is required for a prosecution under the Children and Young Persons (Harmful Publications) Act 1955. The CCP will decide the action and subsequent work in connection with such cases.

The consent of the Director is required for an offence under Section 1 of the Child Abduction Act 1984 (see Section 4(2) of the Act). The consent of the Director is required for an offence of kidnapping if it was committed against a child and by person connected with the child (see Section 5 of the Child Abduction Act 1984).

The consent of the Director is required for any offence under the Protection of Children Act 1978 (see Section 1(3) of the Act).

The consent of the Director is required for an offence under Section 160 of the Criminal Justice Act 1988 (See section 160(4) of the Act.).

For the offence of abuse of position of trust contrary to Section 3 Sexual Offences (Amendment) Act 2000, see the **Sexual Offences** elsewhere in this guidance.

Further information

Archbold 1-154a

R v P [1991]2AC 447

R v Downey [1995] 1 CR App R 547

Archbold 1-170

Archbold 19-291

R v Hales [1969] 53 Cr. App R 36

R v Beard [1987] 85 Cr. App R 395

Archbold 1-185

Sutton London Borough Council v Davis TLR 17.03.94

Archbold 19-40

Archbold 20-272

R v Francis [1988] CR App R 127

Archbold 31-107

Stones Justices Manual 8-28270

Archbold 31-108

Archbold 31-62

Archbold 31-109

Stones Justices Manual 8-22445

Archbold 19-311

Archbold 19-313

Archbold 20-178

Archbold 19-333

R v D [1984] AC 778

Archbold 5-141

R v Dootson [1994] Crim LR 702

R v Newsome [1997] 2 CR App R [S]69

Section 5 of the Child Abduction Act 1984

Section 1(3) Protection of Children Act 1978

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Buggery and Gross Indecency

Code Considerations

Where an act of non-consensual buggery takes place, the public interest requires the prosecution of an offence of rape unless exceptional circumstances exist. For consensual buggery **<refer to charging practice, below in this section>**.

Similar public interest considerations apply in respect of gross indecency as for consensual buggery **<refer to charging practice, below in this section>**.

The Law

Definition of buggery

See Section 12 Sexual Offences Act 1956 (**Archbold, 20-121**).

Definition of gross indecency

See Section 13 Sexual Offences Act 1956 (**Archbold, 20-133**).

The offence of rape was restated in Section 142 of the Criminal Justice & Public Order Act 1994 to include anal sexual intercourse with another man without consent. Where anal intercourse takes place without consent, you should charge rape contrary to Section 1 of the Sexual Offences Act 1956 and not buggery contrary to Section 12 of that Act **<refer to Sexual Offences - Rape, elsewhere in this guidance>**.

Registration of Sex Offenders

Part 1 of the Sex Offenders Act 1997 applies to buggery and gross indecency subject to some exceptions (**Archbold, paragraph 20-271j**).

Age of consent

The Sexual Offences (Amendment) Act 2000 came into force on 8 January 2001. It amends the Sexual Offences Act 1956 and 1967 to reduce the minimum age of consent at which a person may lawfully consent to buggery and to certain homosexual acts from 18 to 16 in England and Wales.

No offence is committed by a person under 16 where he or she engages in buggery or certain homosexual acts with a person 16 or older (Section 12 (1AA) Sexual Offences Act 1956). It is important to note that this does not effect the liability of a person aged 16 or over who engages in such with a person under the age of consent. Furthermore, both parties remain liable if they are both under 16.

Prosecution of 16 & 17 year olds

Acts which occurred before 8 January 2001 are still potentially liable for prosecution. However, unless the case is highly exceptional it is unlikely that it would be in the public interest to proceed with such prosecutions. If you have a case which involves the potential prosecution of 16 or 17 year olds, and you

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consider that a prosecution is still in the public interest, this must be submitted for consideration through your Chief Crown Prosecutor to Director, Casework.

Consent of the Director of Public Prosecutions

It is important to note that the consent of the Director is required for proceedings against any male for offences of buggery or gross indecency with another male; or for aiding, abetting, counselling, procuring or commanding those offences where either male was under the age of consent. Section 1 (2) (b) of the Sexual Offences (Amendment) Act 2000 has amended Section 8 of the Sexual Offences Act 1967 so that consent is now required where either man was under 16 at the time of the offence rather than under 21.

However, for offences which took place **before** 8 January 2001 (the commencement date of the Sexual Offences (Amendment) Act 2000), consent of the Director is still required where either man was under 21.

Time limits

For guidance see (**Archbold, 20-126**).

Charging Practice

For guidance see **<Sexual Offences - Rape, elsewhere in this guidance>**.

Where non-consensual buggery is alleged to have taken place and anal rape is to be charged, this will also apply where the parties are married. Consent to vaginal intercourse does not imply consent to anal intercourse. Where anal intercourse takes place without consent and the evidential criteria is satisfied, a prosecution for rape will normally follow.

Specimen charges

For guidance see **<Sexual Offences - Rape, elsewhere in this guidance>** and **<Drafting the Indictment, specimen charges, elsewhere in this guidance>**.

Joinder

For guidance see **<Sexual Offences - Rape elsewhere in this guidance>** and **<Drafting the Indictment, joinder, elsewhere in this guidance>**.

Penalty Provisions

The different penalty provisions in respect of both buggery and gross indecency create distinct offences. You should, therefore, make this clear in the particulars of the indictment (**Archbold, 20-123 & Archbold 20-137**).

Where allegations of gross indecency are made against two or more men, it is often preferable to charge each in a separate count.

Procuring an act of gross indecency

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Section 13 of the Sexual Offences Act 1956 also includes an allegation of procuring the commission of an act of gross indecency (**Archbold 20-139**). Such a charge may be more appropriate than one of indecent assault where the evidence of threat or hostile act towards another male is unclear.

Offences in Public

The public interest requires the prosecution of an offence of male rape unless exceptional circumstances exist. You have greater discretion where there has been consent in fact but not in law for example, where the act does not take place in private.

It will usually be in the public interest to prosecute if the conduct gives rise to the mischief that the law is aimed at preventing. Where the offending factor is that the conduct took place in public, the principal mischief is the shock, distaste or outrage that might be experienced by members of the public witnessing the conduct; or any potentially corrupting effect on a spectator. Where age is the relevant factor, the mischief is the seduction or corruption of the young.

Relationship between Parties

You will need to consider the relationship of the parties. A stable relationship, in itself, does not predispose towards or against a prosecution. It may mean that there is no exploitation of one party by the other, which would be a factor against prosecuting. On the other hand, there is a greater likelihood of repetition, which would be a factor in favour of prosecution.

Where the parties are of approximate equality and maturity, then notwithstanding that an offence of consensual buggery or gross indecency has been committed, you will take the following factors into account when deciding whether the public interest requires a prosecution:

- the age and relative ages of the parties involved;
- whether there is any element of seduction or corruption;
- whether there is any breach of trust;
- whether there has been any exploitation of position or influence;
- whether the offence represents a transitory phase of adolescent exploration;
- the likely sentence.

Public toilets

Where the conduct would have been legal but for the fact that it took place between two males in a public lavatory, factors in favour of a prosecution include:

- likelihood of members of the public witnessing the conduct;
- concern or complaints expressed by members of the public to the police about a particular lavatory;
- likelihood of members of the public coming to regard the lavatory as unsafe to use or offensive;
- likelihood of the lavatory becoming a site frequently used for homosexual conduct.

Acts of gross indecency in public toilets can be a nuisance and this will be a public interest factor when considering a prosecution. Where the toilets are known for

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such behaviour, a caution may not be appropriate in cases in which a caution would otherwise be appropriate. This will need to be discussed with local police.

Privacy

Section 1(2) of the Sexual Offences Act 1967 states that a homosexual act in private between consenting adult men is not an offence. Section 1(2) provides that an act is not done in private if, *inter alia*, more than two persons take part or are present. There are no provisions for the regulation of private homosexual acts between consenting adult women or for private acts between consenting heterosexual adults.

Section 1(2) was successfully challenged under Articles 8 and 14 in *ADT v UK, (2001) 31 E.H.R.R. 803*. The acts, which took place at the home of one of the defendants, came to light when the police found video recordings on a search of the home. The charge related to the acts rather than the making of the videotapes.

The Court considered that the sole element which could give rise to doubt about whether the applicant's private life was involved was the video recording of the acts. The Court found it unlikely that the applicant, who had hidden his sexual orientation and had requested anonymity, would knowingly be involved in publication of the tapes.

Although ADT has not yet led to a change in our domestic legislation, cases must be reviewed carefully to ensure that prosecution is necessary and that there is an exemption under Article 8(2). Factors to consider include those that may bring the acts into the public arena such as the number of participants and the degree of organisation involved. Other factors to consider would include any vulnerability of the parties involved or whether there was any physical harm.

Evidence of previous acquittals

<refer to *R v Z [2000] 2 A.C. 483 - evidence of previous acquittals, Sexual Offences - Rape, elsewhere in this guidance*>

Consent - sexual offences generally

<refer to consent - sexual offences generally, in Sexual Offences - Rape, elsewhere in this guidance>.

Character of victim - previous sexual history

Sections 41-43 of the Youth Justice & Criminal Evidence Act 1999 apply to buggery **<refer to Character of victim - previous sexual history, in Sexual Offences - Rape, elsewhere in this guidance, and *R v A - Complainant's sexual history, in Sexual Offences - Rape, elsewhere in this guidance*>.**

Buggery of an animal

This offence is rare. The general public disgust in such actions should be balanced against:

- whether the act was committed in private; and
- whether it is likely to be repeated.

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A prosecution will generally follow if any of the following factors are present:

- injury to the animal;
- commercial exploitation of the animal;
- involvement of children in the offence.

A prosecution is less likely if the offence is an expression of the defendant's inadequacy and other measures can be taken to avoid repetition.

Casework location

Non-consensual buggery (anal rape) involving unusual violence or repeated attacks should be referred to the CCP for liaison with Casework Directorate, regarding the location of the case; see **<Casework Level and Location; Cases to be referred or notified to the CCP, elsewhere in this guidance>**.

Useful links

Archbold 20-121

Archbold 20-133

<Sexual Offences - Rape, elsewhere in this guidance>

Archbold 20-271j

Archbold 20-123

Archbold 20-137

Archbold 20-139

ADT v UK (2001) 31 EHRR 803

R v "Z" [2000] 2 AC 483

R v "A" (17May2001)(HoL)

v1.1

Code for Crown Prosecutors - Considerations

As a matter of law, a boy or girl under the age of 16 cannot consent to an act which would otherwise be an assault. However, if the victim did in fact consent, this would be relevant when considering the public interest in prosecuting.

The relevant factors include:

- Age of the defendant in relation to the victim;
- The emotional maturity of the victim and whether the sexual relationship was entered into willingly;
- The relationship between the parties and the existence, or otherwise, of any duty of care or breach of trust; **<refer to Sexual Offences - Abuse of Trust, elsewhere in this guidance>**
- Any element of seduction;
- Whether the victim encouraged the defendant in any way.

The Law

Definition of indecent assault

- On a woman: Section 14 Sexual Offences Act 1956 (**Archbold, 20-144**)
- On a man: Section 15 Sexual Offences Act 1956 (**Archbold, 20-156**)

Registration of sex offenders

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Part 1 of the Sex Offenders Act 1997 applies, subject to exceptions (**Archbold 20-271j**)

Charging Practice

If there is any doubt about the circumstances of indecency, a separate charge for common assault should also be alleged, **<refer to assault, below in this guidance>**.

Averment of age in indictment

Although not essential for an offence under section 14(1) (**Archbold 20-145**) age is usually averred as a matter of practice where the girl is under 16. However, because of the change in sentencing powers, consideration must always be given to specifying the age of the girl in older cases (**Archbold 20-147**).

The age is usually averred in the particulars of the indictment where a male victim is under 16.

Specimen charges

For guidance **<refer to Sexual Offences - Rape; Specimen Charges and Drafting the Indictment; Specimen Charges, both elsewhere in this guidance>**.

Joinder

For guidance **<refer to Sexual Offences - Rape; Joinder and Drafting the Indictment; Joinder both elsewhere in this guidance>**.

Assault

See (**Archbold, 20-151 and 20-162**), and **<Offences against the Person, elsewhere in this guidance>**.

Evidence of previous acquittals

<refer to *R v Z [2000] 2 AC 483* - evidence of previous acquittals and Sexual Offences - Rape, elsewhere in this guidance>.

Consent

A boy or girl under the age of 16 cannot consent in law, (**Archbold, 20-152**) and **<refer to bona fide belief as to age of victim, below in this section>**.

Bona fide belief as to age of victim

In *R v K [2001] 3 W.L.R. 471, HL*, it was held that a defendant was entitled to be acquitted where the victim was under 16 if the defendant held an honest belief that the complainant was 16 years or over. It was accepted that the belief did not have to be held on reasonable grounds. It is important to note, however, that whilst the belief did not need to be reasonable provided it was honest and genuine, the reasonableness or unreasonableness of the belief was **not**

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irrelevant. The more unreasonable the belief, the less likely it was to be accepted as genuine, (**Archbold, 20-153**).

The House of Lords also emphasised that nothing in the judgment had any bearing on a case in which the victim did not consent **in fact**. Section 14(2) provides that a girl under the age of 16 cannot in law give any consent. However, she may consent in fact. If it is shown that she did not consent, and that the defendant did not genuinely believe that she consented, any belief by the defendant concerning her age is irrelevant, since her age is relevant only to her capacity to consent.

Once the prosecution has proved that the victim was under 16, if the defence is raised that the defendant had a genuine belief that the complainant was 16 or older, the burden will be on the prosecution in the usual way to disprove that belief. It is likely to be clear from the police interview or from cross-examination of the complainant that this is the nature of the defence.

Although the offence before the House of Lords was indecent assault of a woman, the judgment applies equally to Section 15 of the 1956 Act (indecent assault on a man).

Character of victim - previous sexual history

Section 41 of the Youth Justice & Criminal Evidence Act 1999 apply to these offences. **<refer to Sexual Offences - Rape; Character of Victim - previous sexual history and Sexual Offences - Rape; R v A - complainant's sexual history, elsewhere in this guidance>**.

Useful links

<Sexual Offences - Abuse of Trust>

Archbold 20-144

Archbold 20-156

Archbold 20-271j

<Offences against the Person (Section 5) >

Archbold 20-145

Archbold 20-147

<Sexual Offences - Rape; specimen charges>

<Drafting the Indictment; specimen charges>

<Sexual Offences, Rape; Joinder>

<Drafting the Indictment; Joinder>

R v Z [2000] 2 AC 483

Archbold 20-152

R v K [2000] 3 WLR 471,HL

Archbold 20-153

<Sexual Offences - Rape; Character of Victim - Previous Sexual History>

<Sexual Offences - Rape; Complainant's Sexual History>

Indecent Assault

Code for Crown Prosecutors - Considerations

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As a matter of law, a boy or girl under the age of 16 cannot consent to an act which would otherwise be an assault. However, if the victim did in fact consent, this would be relevant when considering the public interest in prosecuting.

The relevant factors include:

- Age of the defendant in relation to the victim;
- The emotional maturity of the victim and whether the sexual relationship was entered into willingly;
- The relationship between the parties and the existence, or otherwise, of any duty of care or breach of trust; **<refer to Sexual Offences - Abuse of Trust, elsewhere in this guidance>**
- Any element of seduction;
- Whether the victim encouraged the defendant in any way.

The Law

Definition of indecent assault

- On a woman: Section 14 Sexual Offences Act 1956 (**Archbold, 20-144**)
- On a man: Section 15 Sexual Offences Act 1956 (**Archbold, 20-156**)

Registration of sex offenders

Part 1 of the Sex Offenders Act 1997 applies, subject to exceptions (**Archbold 20-271j**)

Charging Practice

If there is any doubt about the circumstances of indecency, a separate charge for common assault should also be alleged, **<refer to assault, below in this guidance>**.

Averment of age in indictment

Although not essential for an offence under section 14(1) (**Archbold 20-145**) age is usually averred as a matter of practice where the girl is under 16. However, because of the change in sentencing powers, consideration must always be given to specifying the age of the girl in older cases (**Archbold 20-147**).

The age is usually averred in the particulars of the indictment where a male victim is under 16.

Specimen charges

For guidance **<refer to Sexual Offences - Rape; Specimen Charges and Drafting the Indictment; Specimen Charges, both elsewhere in this guidance>**.

Joinder

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Assault

See (**Archbold, 20-151 and 20-162**), and **<Offences against the Person, elsewhere in this guidance>**.

Evidence of previous acquittals

<refer to *R v Z [2000] 2 AC 483* - evidence of previous acquittals and Sexual Offences - Rape, elsewhere in this guidance>.

Consent

A boy or girl under the age of 16 cannot consent in law, (**Archbold, 20-152**) and **<refer to bona fide belief as to age of victim, below in this section>**.

Bona fide belief as to age of victim

In *R v K [2001] 3 W.L.R. 471, HL*, it was held that a defendant was entitled to be acquitted where the victim was under 16 if the defendant held an honest belief that the complainant was 16 years or over. It was accepted that the belief did not have to be held on reasonable grounds. It is important to note, however, that whilst the belief did not need to be reasonable provided it was honest and genuine, the reasonableness or unreasonableness of the belief was **not** irrelevant. The more unreasonable the belief, the less likely it was to be accepted as genuine, (**Archbold, 20-153**).

The House of Lords also emphasised that nothing in the judgment had any bearing on a case in which the victim did not consent **in fact**. Section 14(2) provides that a girl under the age of 16 cannot in law give any consent. However, she may consent in fact. If it is shown that she did not consent, and that the defendant did not genuinely believe that she consented, any belief by the defendant concerning her age is irrelevant, since her age is relevant only to her capacity to consent.

Once the prosecution has proved that the victim was under 16, if the defence is raised that the defendant had a genuine belief that the complainant was 16 or older, the burden will be on the prosecution in the usual way to disprove that belief. It is likely to be clear from the police interview or from cross-examination of the complainant that this is the nature of the defence.

Although the offence before the House of Lords was indecent assault of a woman, the judgment applies equally to Section 15 of the 1956 Act (indecent assault on a man).

Character of victim - previous sexual history

Section 41 of the Youth Justice & Criminal Evidence Act 1999 apply to these offences. **<refer to Sexual Offences - Rape; Character of Victim - previous sexual history and Sexual Offences - Rape; *R v A* - complainant's sexual history, elsewhere in this guidance>**.

Useful links

**<Sexual Offences - Abuse of Trust>
Archbold 20-144**

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Archbold 20-156

Archbold 20-271j

<Offences against the Person (Section 5) >

Archbold 20-145

Archbold 20-147

<Sexual Offences - Rape; specimen charges>

<Drafting the Indictment; specimen charges>

<Sexual Offences, Rape; Joinder>

<Drafting the Indictment; Joinder> *R v Z [2000] 2 AC 483*

Archbold 20-152 *R v K [2000] 3 WLR 471,HL*

Archbold 20-153

<Sexual Offences - Rape; Character of Victim - Previous Sexual History>

<Sexual Offences - Rape; Complainant's Sexual History>

v1.1

Rape

Code for Crown Prosecutors - Considerations

Rape is so serious that a prosecution is almost certainly always required in the public interest.

The Law

Definition of rape

Definition of rape Section 1 Sexual Offences Act 1956 (**Archbold, 20-5**)

The offence applies to the rape of a woman or the rape of another man.

The offence of rape was restated in Section 142 of the Criminal Justice & Public Order Act 1994 to include anal sexual intercourse with another man without consent. Where anal intercourse takes place without consent, you should charge rape contrary to Section 1 of the Sexual Offences Act 1956 and not buggery contrary to section 12 of that Act.

Following *R v R [1992] A.C. 599* and the removal of the word "unlawful" from the definition of rape it is clear that a husband may be prosecuted for raping his wife.

A boy under 14 is now capable in law of sexual intercourse - Sexual Offences Act 1993, Sections 1 and 2 (**Archbold 20-23**).

A woman may be convicted as an aider and abettor.

Registration of Sex Offenders

Part 1 of the Sex Offenders Act 1997 applies (**Archbold 20-271A**).

Charging Practice

Where the victim is a woman and the intercourse is vaginal and anal, you should prefer separate counts of rape. You should include the words "per vaginam" or "per anum" as appropriate in the indictment.

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Where more than one man has raped the victim on the same occasion, all the defendants should be indicted in the same count with no reference to aiders and abettors. For example:

X is raped by A whilst held down by B. The indictment will alleged that "A and B raped X". If the defendants then change places and B rapes X whilst being held down by A, the particulars will alleged "A and B, on an occasion other than in Count 1, raped X".

Specimen charges

Many cases involving allegations of sexual offences will provide you with a choice of charge and also a choice of the number of charges.

A case involving sexual intercourse over a period of time may disclose sexual offences in addition to rape. You will, therefore, select those charges that accurately reflect the course of conduct over the period in question. Specimen charges will be called for and you will select allegations which, as far as possible, represent the start and end of the conduct as well as suitable allegations during the period in question. However, in doing so you must ensure that the charges you select reflect the seriousness of the offence, give the court adequate sentencing power and enable the case to be presented clearly to the court. **<See Drafting the Indictment, Specimen counts (and other aspects) elsewhere in this guidance>**.

You should also be careful not to overload the indictment. For example, if a number of sexual offences are disclosed in relation to number of victims, you should try and restrict the number of counts in relation to each victim whilst adopting the same criteria for selecting the appropriate charges as set out in the Code for Crown Prosecutors.

Joinder

In cases concerning sexual offences with more than one victim, you will pay careful attention to the rules of joinder in Rule 9 Indictment Rules 1971 (**Archbold 1-154a**). Notwithstanding the court's power to sever under Section 5(3) Indictments Act 1915, you will normally join in the same indictment counts founded on the same facts or forming part of a series of offences of the same or similar character. The fact that a judge may order separate trials should not deter you from applying the rules of joinder in cases where it is in the interests of justice to have all counts tried together.

Defence applications may be made to try the accused separately and to have separate counts considered in different trials. You should always try to argue that the matter should be heard together with reference to the cases of *R v P 1991 2AC 447* and *R v Downey 1995 1 CR App R 547*. This is on the basis that the victim will not have to give evidence on more than one occasion. For the approach the courts adopt in relation to severance in cases involving sexual misconduct refer to (**Archbold 1-170**).

Alternative charges

You should use alternative counts sparingly and only where there is doubt concerning the issues. For example, if the evidence to support penetration of a victim is unclear, an alternative count of attempt would be appropriate.

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Evidential considerations

Rape can be a difficult offence to prove without a reliable admission. False and/or malicious complaints are sometimes made and you will need to exercise care when reviewing such allegations. Delay in reporting the offence and the character of the complainant will, in particular, need to be looked at with care.

Corroboration is not essential but is always looked for. You will need to look carefully at any medical or scientific evidence. However, it is important to note that eyewitness corroboration is rarely available given the very nature of the offence.

It is essential that you always bear in mind the fact that rape is an offence of grave personal violation and a decision not to prosecute should never be made without a thorough consideration of the background and circumstances. It is also important to discuss with the police the availability of further evidence.

***R v Z [2000] 2 A.C. 483* - evidence of previous acquittals**

When reviewing cases of rape and other sexual offences, you should bear in mind the House of Lords judgment in *R v Z*. In this case the House of Lords allowed evidence to be adduced of an earlier acquittal where it was probative of the offence being tried. The House held that provided a defendant was not placed in double jeopardy, evidence that was relevant on a subsequent prosecution was not inadmissible because it showed or tended to show that the defendant was, in fact, guilty of the offence of which he had been earlier acquitted, (**Archbold 4-160**).

Although *R v Z* was a rape trial, the principle applies to any offence including non-sexual offences.

Consent - sexual offences generally

Consent will be an important factor when deciding not only what offence to charge but also whether it is in the public interest to prosecute <**refer to consents - rape offences, below in this section**>. You will, therefore, need to consider this aspect of any case with great care. Sometimes consent is given, or appears to be given, but the law does not treat it as effective consent.

The law does not allow a person's consent to sexual activity to have effect in the following situations:

- where the person giving consent did not understand what was happening and so could not give informed consent, for example in the case of a child or someone suffering from a severe mental disability;
- where the person giving consent was under the relevant age of consent.

These two situations are different. In the first, the apparent consent is not treated as real consent because the person consenting did not understand enough to give real consent. This is a question of fact. In the second, consent is real as a matter of fact but the law does not allow it to count.

Consent - rape offences

Where the victim has consented in fact but not in law you may consider appropriate alternative offences. Examples include offences such as incest or

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unlawful sexual intercourse (in the case of a female victim) or, where consensual intercourse with a male under the age of consent, the offence of buggery <**refer to consent - sexual offences generally, above in this section**>.

Character of victim - previous sexual history

Sections 41-43 of the Youth Justice & Criminal Evidence Act 1999 (**Archbold 8-123k-123q**) came into effect on 4 December 2000. The sections restrict the circumstances in which evidence or questions about a complainant's sexual behaviour beyond the circumstances of the alleged offence can be introduced in rape or in certain other sexual offence trials. It is essential that prosecutors are robust in dealing with applications under Section 41.

At the trial of a person charged with a sexual offence as defined by Section 62 of the YJCEA 1999 (**Archbold 8-55x**) no evidence may be adduced or questions asked in cross-examination by or on behalf of the accused about any sexual behaviour of the complainant except with the leave of the court, (**Archbold 8-123k-123q**).

Such evidence will only be permitted if statutory criteria are met and the court considers that it may reach an unsafe conclusion on an issue to be decided in the case if such evidence were not to be heard. Any questions asked or evidence to be adduced must relate to a specific instance of behaviour.

Procedure for application to cross examine on previous sexual history

Section 43 sets out the procedure to be adopted when applications are made under Section 41. This involves adherence to time limits. The provisions are detailed and you should refer to <**Casework Bulletin 32/2000**> for detailed guidance.

When presenting cases it is vital to ensure that you are aware of Section 41(5) so that evidence is not unintentionally adduced by the prosecution that will allow the defence the opportunity to seek to adduce evidence of sexual behaviour of the victim in rebuttal of that prosecution evidence.

Keeping the victim informed

CPS has a responsibility to ensure that the victim is made aware of the outcome of any ruling by the trial judge to adduce evidence of previous sexual behaviour. However, it will be important that the decision is communicated in such a way that it does not amount to coaching or rehearsing of the evidence of the witness. Prosecutors should also ensure that the defence advocate is made aware of the extent of the information that is to be given to the complainant.

If the court grants leave to cross-examine a complainant about previous sexual behaviour, it will be essential to review the position relating to special measures (when they are available). It may be necessary to make an application to the court for one or more of the special measures provided by the YJCEA or to apply to vary a pre-existing direction.

In reaching this decision it will be important to obtain the views of the witness about how the evidence may be presented, given that the nature of the potential cross-examination may be more intimate than was first anticipated.

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R v A - complainant's sexual history (House of Lords)

Sections 41-43 of the YJCEA were considered in the House of Lords case of *R v A* (17 May 2001). The House held that a prior consensual relationship between the complainant and the defendant might in some circumstances be relevant to the issue of consent. However, all the Law Lords accepted that the complainant must not be treated unfairly. The judgment emphasizes "the presumption of exclusion" under the YJCEA. Consequently, prosecutors should encourage the court to consider Section 41 in the context of the judgment overall. To do otherwise may lessen the practical effect of the reforms contained in Section 41.

You should refer to **<Casework Bulletin 21/2001>** for detailed guidance on *R v A*.

In *R v M [EWCA] 1644*, the Court of Appeal considered an interlocutory application that a previous sexual relationship with a third party was relevant to his defence. The Court of Appeal rejected this, considering that to allow the cross-examination of this would be to "*elicit material by the backdoor to impugn the credibility of the complainant as a witness*". This is, therefore, a very useful case for prosecutors.

Casework Location

Rape, (including buggery offences - **<see Buggery/Gross Indecency Between Men, elsewhere in this guidance>**) involving unusual violence or repeated attacks, such as a serial rapist, should be referred to the CCP for liaison with Casework Directorate regarding the location of the case **<see Cases to be referred or notified to the CCP, elsewhere in this guidance>**.

Useful links

<Archbold 20-5>

<Archbold 20-23>

<Archbold 20-271> *R.v. R. [1992] AC 599*

<Drafting the Indictment - Specimen Counts, elsewhere in this guidance>

<Archbold 1-154a> *R.v. P [1991] 2 AC 447 R.v. Downey [1995] 1 Cr.App R.547*

<Archbold 1-170> *R.v. Z [2000] 2 AC 483*

<Archbold 4-160>

<Archbold 8-123k to 123q>

<Archbold 8-55x>

<Archbold 8-123k-123q>

<Casework Bulletin 32/2000>

<Casework Bulletin 21/2001> *R.v. M [EWCA] 1644*

<Buggery/Gross Indecency between men, elsewhere in this guidance>

<Cases to be referred or notified to the CCP, elsewhere in this guidance>

v1.2

Unlawful Sexual Intercourse

Code for Crown Prosecutors - Considerations

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The public interest requires the prosecution of an offence of unlawful sexual intercourse with a girl under 13 unless exceptional circumstances exist.

You may exercise considerable discretion in relation to offences under Section 6 of the Act.

The age of the defendant will be highly relevant. Even if the defendant is over 24, a prosecution may not be in the public interest if he had reasonable cause for believing that the girl was over 16.

The following factors will also be relevant:

- the relevant ages of the parties;
- the emotional maturity of the girl and whether she entered into a sexual relationship willingly;
- the relationship between the parties and whether there was an existence of a duty of care or breach of trust **<refer to Sexual Offences - Abuse of Trust, elsewhere in this guidance>**.

In summary, a man who is considerably older than the girl is likely to be prosecuted, especially if he owed her a duty of care; whereas it may not be necessary to prosecute a young man with whom the girl has been having a consensual relationship.

The Law

Definition of unlawful sexual intercourse

- by a man with a girl under 13, Section 5 Sexual Offences Act 1956, (**Archbold 20-63** and **Archbold 20-64**).
- by a man with a girl under 16, Section 6 Sexual Offences Act 1956, (**Archbold 20-74**).

Time limits

A prosecution for an offence committed under Section 6 (or an attempt to commit that offence) must be commenced within 12 months of the alleged offence.

Mistake as to age

Mistake as to the girl's age is not a defence other than the very limited defence provided by Section 6(3) ("the young man's defence") in relation to girls under 16 (**Archbold 20-87**.)

R v K [2001] 3 WLR 471, HL, which examined the offence of indecent assault, **did not** extend the defence of mistake as to age to the offence of unlawful sexual intercourse (**Archbold 20-70**).

Registration of sex offenders

Part 1 of the Sex Offenders Act 1997 applies to the Section 5 offence. It also applies to the Section 6 offence but not where the offender was under 20 (**Archbold 20-271j**).

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Charging Practice

A charge of unlawful sexual intercourse will normally be appropriate if a girl consents in fact to intercourse but she is under the statutory ages in Sections 5 and 6 of the Sexual Offences Act 1956.

The legislation is to provide protection for young girls. An underage female cannot be prosecuted as an accessory to the offence committed by a male who has unlawful intercourse with her (**R v Tyrrell 1894 1 Q.B. 710**).

Specimen charges

For guidance **<Refer to Sexual Offences - Rape: specimen charges and Drafting the Indictment: Specimen Charges, both elsewhere in this guidance>**.

Joinder

For guidance **<Refer to Sexual Offences - Rape: Joinder and Drafting the Indictment: Joinder, both elsewhere in this guidance>**.

Proof of age

It is for the prosecution to prove that the girl was under the relevant age. A certified copy of the birth certificate accompanied with evidence of identity is one way of proving age (**Archbold 20-73**).

Character of victim - previous sexual history

Section 41 of the Youth Justice & Criminal Evidence Act 1999 applies to these offences. **<refer to Sexual Offences - Rape: Character of Victim - Previous Sexual History and R v A - Sexual Offences - Rape: Complainant's Sexual History, in this guidance>**.

Useful links

Archbold 20-63

Archbold 20-64

Archbold 20-74

Archbold 20-87

Archbold 20-70 *R.v. K [2001] 3 WLR 471,HL*

Archbold 20-271j *R.v. Tyrrell 1894 1 QB 710*

Archbold 20-73 v1.1