

Women's Legal Landmarks

*Celebrating the History of Women and Law
in the UK and Ireland*

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Section 5(1) of the Criminal Law Amendment Act 1885

LOIS BIBBINGS

According to the long title of the Criminal Law Amendment Act, its object was ‘to make further provision for the Protection of Women and Girls, the suppression of brothels, and other purposes.’¹ Section 5(1) aimed at protecting girls from male sexual exploitation, an area of law, policy and practice which was a matter of particular concern in the last half of the nineteenth century, as it is in the early twenty-first century. It did so by raising the legal age of consent to 16 in the then United Kingdom of Great Britain and Ireland – at least in respect of unmarried girls, where the activity in question was penile-vaginal penetration (‘carnal knowledge’² in the legal language of the time).³

I. Context

Prior to the passing of the 1885 Act a number of individuals and groups had been concerned about the need to protect girls; there were fears about girls being led into prostitution and about ‘white slavery’;⁴ worries about innocents robbed of their virginity and anxiety about seduction and sexually motivated abduction.⁵

A key figure in terms of those who wrote and spoke about the treatment of girls in matters sexual was Christian social reformer and women’s rights campaigner Josephine Butler.

¹ The Act is perhaps best known for its ‘criminalisation’ of male homosexual acts. It created the offence of gross indecency which covered sexual acts between men that did not constitute buggery or where the latter offence could not be proved. Decriminalisation began in 1967.

² For a definition of ‘carnal knowledge’ see eg section 18 Offences Against the Person Act 1828, which provided that it required ‘Proof of Penetration only’.

³ The non-consensual offence of rape (which originally only covered penile-vaginal penetration) is not considered here.

⁴ In the nineteenth century the ‘white slave trade’ was at first used to describe fears about the abduction of unworldly working-class country girls who, having been lured to London with promises of employment in domestic service, were then drugged and kept in brothels. Subsequently it also referred to a supposed European traffic in girls lured to the Continent.

⁵ See eg Deborah Gorham, ‘The “Maiden Tribute of Modern Babylon” Re-Examined: Child Prostitution and the Idea of Childhood in Late-Victorian England’ (1978) 21(3) *Victorian Studies* 353.

In the 1860s–80s she focused her attention on prostitution and campaigned against the Contagious Diseases Acts of 1864, 1866 and 1869, which created an oppressive regime for many women and girls suspected of selling sex in specified locations connected to the Navy or Army; the statutes applied to England, Wales and Ireland.⁶ In 1883 the Acts were suspended⁷ and Butler's attention, along with that of some of her fellow campaigners, shifted to the need to protect girls from prostitution and white slavery – and to raise the age of consent for girls.

In terms of the legislative background to the 1885 Act, there had been various efforts to raise the age of consent for girls prior to 1885. For example, in 1861 Samuel Wilberforce, then Bishop of Oxford, attempted to raise the age of consent for penile-vaginal intercourse for girls, which was at this stage 12 (according to statutes in England and Wales and Ireland and under common law in Scotland).⁸ These efforts received some support but were unsuccessful. Consequently, when the Offences Against the Person Act 1861, which applied to England, Wales and Ireland,⁹ was passed, section 51 included the offence of 'unlawfully and carnally knowing any girl being above the age of 10 years and under the age of 12 years', leaving the age of consent unchanged – with arguments as to a girl's 'consent' to penetration being irrelevant (see, for example, *R v Ryland*¹⁰ where a man was convicted for attempt in relation to section 51 despite a girl's supposed consent). Section 50 included the more serious equivalent offence in relation to under-10s – consent was irrelevant here too. As to mistake regarding age, the Court for Crown Cases Reserved¹¹ in *R v Prince*¹² was of the view that sections 50 and 51 of the 1861 Act should be read in a manner consistent with section 55, which dealt with the abduction of girls, making such a mistake irrelevant. One of the powerful statements made in the case is worth quoting, not least as the law was, unfortunately, not to remain in this protective stance towards girls for long. Here Blackburn J in the leading judgment (with which 9 out of 16 of his fellow judges concurred) said:

It seems impossible to suppose that the intention of the legislature in those two sections [sections 50 and 51] could have been to make the crime depend upon the knowledge of the prisoner of the girl's actual age. It would produce the monstrous result that a man who had carnal

⁶In Scotland local and national measures had tended to become increasingly repressive both in relation to women identified as prostitutes and towards brothels at that time, but treatment in hospitals remained voluntary. See further, David G Barrie and Susan Broomhall, *Police Courts in Nineteenth-Century Scotland, Volume 2: Boundaries, Behaviours and Bodies* (Ashgate, 2014) 248–63.

⁷They were repealed, in large part as a result of the efforts of women's rights campaigners, by the Contagious Diseases Acts Repeal Act 1886. On opposition to them see Margaret Hamilton, 'Opposition to the Contagious Diseases Acts, 1864–1886' (1978) 10(1) *Albion: A Quarterly Journal Concerned with British Studies* 14.

⁸See the English Offences Against the Person Act 1828 section 17, the Offences Against the Person (Ireland) Act 1829 section 19 and in Scotland the offence of 'lewd, indecent and libidinous practices' which criminalised sexual conduct with pre-pubescent children – the legal age of puberty was 12 for girls and 14 for boys. See James Chalmers, 'Regulating Adolescent Sexuality: English and Scottish Approaches' (2011) 23(4) *Child and Family Law Quarterly* 450, 454.

⁹The common law in Scotland remained unchanged at this time.

¹⁰*R v Ryland* (1868) 11 Cox CC 101, 16 WR 941, 18 LT 538.

¹¹The Court for Crown Cases Reserved heard references from trial judges on points of law post-conviction. It consisted of all the common law judges who went on circuit, presiding over the assizes around the country. Generally, cases were heard by a panel of five judges, however, in some controversial or important cases or where the judges were very much divided, the matter could be considered by the full court. *Prince* was considered to be just such an important case but only 16 of the then pool of 18 male judges were available to consider it. See Lois S Bibbings, *Binding Men: Stories about Violence and Law in Late Victorian England* (Routledge, 2014) 15–16.

¹²*R v Prince* (1875) LR 2 CCR 154; 39 JP 676.

connection with a girl, in reality not quite ten years old, but whom he on reasonable grounds believed to be a little more than ten, was to escape altogether. He could not, in that view of the statute, be convicted of the felony, for he did not know her to be under ten. He could not be convicted of the misdemeanour, because she was in fact not above the age of ten. It seems to us that the intention of the legislature was to punish those who had connection with young girls, though with their consent, unless the girl was in fact old enough to give a valid consent. The man who has connection with a child, relying on her consent, does it at his peril, if she is below the statutable age.¹³

In 1871, alongside expressing concerns about girls tricked into prostitution, Josephine Butler had backed calls by a judge, Justice Willes, for the age of consent to penile-vaginal intercourse to be raised from 12 to 14 for girls.¹⁴ A Private Member's Bill in 1873, entitled the Seduction Laws Amendment Bill, included a number of changes to improve the protection for girls. Amongst them was a provision which aimed to raise the age of consent. But it, too, failed to pass.¹⁵ Shortly following this the Offences Against the Person Act 1875, which again applied to England, Wales and Ireland, repealed sections 50 and 51 of the 1861 Act and raised the age of consent for girls from 12 to 13. Section 4 made it a misdemeanour to carnally know and abuse a girl of 12 years of age 'whether with or without her consent'. The new more serious offence was included in section 3 and applied to girls under the age of 12. It seems probable that the view expressed by the majority in *Prince* continued to have authority for these provisions – as nothing to the contrary was either included in the 1875 Act or stated in the reported cases.

II. The Landmark

In 1881 a House of Lords Select Committee Report into the issues of child prostitution and what we would now refer to as the 'trafficking' of girls for the purposes of prostitution laid the basis for the 1885 Act. The Report found that vice was widespread, especially in London, and included proposals for law reform.¹⁶ Although much discussed, these were not destined to make a speedy passage into the statute books and kept foundering. Towards the end of March 1885 a third attempt to pass a bill based on the Report was made,¹⁷ with the age of consent set at 16, despite previous efforts to raise it still further to 17¹⁸ and with some arguing that it should be set at 18 or 21¹⁹ – but its progress again seemed uncertain.²⁰ The fact that section 5(1), along with other provisions in the 1885 Act which aimed at protecting women and girls, came to be law was probably, as others have argued, helped by a child-prostitution-related scandal that same year.

¹³ *ibid.*, 171–72.

¹⁴ See Josephine Butler, *The Constitution Violated. An Essay [Advocating the Repeal of the Contagious Diseases Acts 1866, 1868 and 1869]* (Edmonston and Douglas, 1871) 68, 137, 139–41.

¹⁵ For discussions of the Bill see HC Deb, 2 April 1873, vol 215, cols 468–488.

¹⁶ Report of the House of Lords Select Committee on the Law Relating to the Protection of Young Girls from Artifices to Induce them to Lead a Corrupt Life (1881).

¹⁷ HL Deb, 26 March 1885, vol 296 col 621.

¹⁸ See eg *The Times*, 27 June 1883, 11.

¹⁹ See eg Gorham, n 5 above, 364, 365.

²⁰ See eg the view expressed in *The Times*, 14 April 1885, 9.

The so-called ‘Maiden Tribute’ revelations arose from the machinations depicted in a series of articles written by the editor of the *Pall Mall Gazette*.²¹ William Thomas Stead, like Butler, had been a prominent campaigner against the Contagious Diseases Acts and was similarly concerned about the sexual exploitation of girls in the context of prostitution. Stead was determined to stage an undercover ‘investigation’ in order to expose the full extent of the problem already publicised by the Select Committee Report and bring about reform – but he opted for an alarming and immoral strategy to attempt this.

Headed ‘The Maiden Tribute of Modern Babylon’, Stead’s newspaper reports purported to evidence the fact that young girls were being sold to wealthy men – and it did so in sensationalist terms. The articles had been researched by Stead, along with a number of his fellow campaigners including Butler, although the latter was not implicated in the most disturbing of his researches. Investigations included, for example, women posing as prostitutes and infiltrating brothels in order to gather information, as well as attempts to purchase children for the purposes of prostitution. However, it was felt by Stead that something more concrete and more dramatic was needed. He decided to buy a girl from her parents and create the impression that he had had sexual relations with her. The girl in question, Eliza Armstrong, was 13 when she was purchased from her mother at Stead’s behest. Although she was told that Eliza would be going into service as a maid, it was assumed that the mother was aware that prostitution was the real purpose. Stead had the girl’s virginity confirmed by a midwife and then she was then taken to a brothel, where she was drugged and placed in a bedroom. There, Stead created the impression that the girl had been acquired for him and that sexual activity had occurred. This story was then published as part of the ‘Maiden Tribute’ articles, with the details changed so that Armstrong was given a pseudonym and Stead’s identity as the man for whom she was apparently bought was hidden. Reaction to the articles was considerable in terms of the general public, but it also had the effect of uniting the diverse groups who were already campaigning around the linked issues of child prostitution, the protection of girls from male sexual exploitation and, in particular, the age of consent for girls.

The story was published in early July 1885 as the age of consent measure progressed through Parliament. In early July campaigners, including Butler, made good use of the ‘Maiden Tribute’, keeping up the pressure for, amongst other things, the age of consent to be raised.²² Discussion in the Houses included mention of the *Gazette* revelations and concern as to whether the Bill when enacted would be adequate to deal with the problems the reports highlighted.²³ On 14 August 1885 the Bill passed and the age of consent in relation to girls for penetrative sex was raised to 16 in England, Wales, Scotland and the then united Ireland.

Section 5(1) provided that ‘any person’ who ‘[u]nlawfully knows or attempts to have unlawful carnal knowledge of any girl being of or above the age of 13 years and under the age of sixteen years’ was guilty of a misdemeanour and could be sentenced to up to two years imprisonment, with or without hard labour. The measure only applied to activity occurring

²¹ 6 July 1885, 1–6; 7 July 1885, 1–6; 8 July 1885, 1–5; 10 July 1885, 1–6.

²² See eg “Modern Babylon” – Meeting in Exeter Hall, *Pall Mall Gazette*, 17 July 1885, 11.

²³ See eg report of an exchange in the House of Commons in *The Times*, 11 July 1885, 8.

outside lawful wedlock.²⁴ The question of the girl's apparent consent was irrelevant because of her age. The 'Maiden Tribute' revelations were not enough, however, to prevent the inclusion of provision for mistake as to age. The defendant could be acquitted if he was able to satisfy the court that, despite the fact that the girl was in fact younger, he had 'reasonable cause to believe that the girl was above the age of sixteen years.' Consequently, *Prince* held no sway in relation to section 5(1). Section 4 created the equivalent offence where the girl was aged 12 or under, and here the offence was more serious and both consent and mistake as to age were irrelevant.

The impact of the Stead articles continued, however, most notably with a huge demonstration in Hyde Park on 22 August 1885 demanding enforcement of the new legislation, calling for the 'Protection of Young Girls' and expressing concerns about the abuse of girls by the wealthy.²⁵

III. What Happened Next

In the period from 1885 to the time of writing in early 2018 there have been a number of key developments in relation to the age of consent in the different and shifting jurisdictions of the United Kingdom. For example, in England and Wales the Criminal Law Amendment Act 1922 repealed the provision as to mistakes of age and replaced it with a so-called 'young man's defence', making a mistaken belief that a girl was over 16 a defence to the section 5(1) offence where a man of 23 or younger had 'reasonable cause to believe the girl was over the age of sixteen years' but only on 'the first occasion on which he is charged'.²⁶ Today in England and Wales the age of consent remains fixed at 16 (for penile-vaginal intercourse along with other forms of sexual activity – and this age now applies to all children), with the distinction between children aged under 13 and 13, 14 and 15-year-olds maintained. The Sexual Offences Act 2003 contains a long list of sexual offences against children and young people, encompassing far more than was envisioned as being criminal at the time of the 1885 Act. Section 9 criminalises sexual activity with a child under 16 – this is the closest equivalent to section 5(1) of the 1885 Act. A person aged 18 or over is guilty of the offence if they intentionally sexually touch (with sexual touching including but not limited to various forms of penetration) a person under the age of 16. Here the prosecution must prove that accused did not reasonably believe that the victim was 16 or over. However, where the offence is committed against a victim under the age of 13 reasonable belief about their age is not relevant. 'Consent' is, of course, irrelevant in both instances. Child sexual offences committed by under 18s (including conduct that would constitute 'sexual activity with a child' under section 9 if committed by an adult) are criminalised by section 13 which provides for lower penalties for such offenders.

²⁴ The marriageable age was taken to be the legal age of puberty (12 for girls and 14 for boys) until the Age of Marriage Act 1929 in England, Wales and Scotland and until the Age of Marriage Act (Northern Ireland) 1951 in Northern Ireland.

²⁵ See further, Gorham, n 5 above, 361; Judith R Walkowitz, *City of Dreadful Delight: Narratives of Sexual Danger in Late-Victorian* (University of Chicago Press, 1992) 104–05.

²⁶ Section 2 of the Criminal Law Amendment Act 1922.

In Scotland, developments in English law have not been generally applied (although the young man's defence was) and for a time there was an, in places, confusing mix of common law and statute. The law was then consolidated in the Criminal Law (Consolidation) (Scotland) Act 1995.²⁷ Today this area is governed by the Sexual Offences (Scotland) Act 2009. As in England and Wales, the Act includes a long list of sexual offences against children and continues to make a distinction between offences committed against under 13s and those aged 13–15, with the age of consent maintained at 16 in relation to penile penetrative and orogenital contact, although it has been argued that an age of consent of 13 essentially applies in some circumstances for other forms of sexual contact.²⁸ Section 28, which criminalises intentional or reckless intercourse (penetration of the vagina, anus or mouth with the defendant's penis) with an 'older child', is the descendant of section 5(1). There is no need to establish an absence of consent as the offence is committed regardless of whether or not the child 'consents.' However, a defendant can claim reasonable belief that the victim was 16 as a possible defence (section 39) – but the offence can only be committed by someone aged 16 or above. Such conduct involving 'older children' is provided for in sections 37 and 38. Section 37 creates the offences of intentionally or recklessly 'engaging while an older child in sexual conduct with or towards another older child' and 'engaging while an older child in consensual sexual conduct with another older child', meaning that two teenagers who engage in intercourse involving penetration of the vagina, anus or mouth could, in some circumstances, both be liable to be convicted of an offence.²⁹ Consent in this context is defined in section 38.

In (what was to become) Northern Ireland, the 1885 Act continued to apply, albeit with amendments. There were some changes in relation to the sections 5 and 4 offences, most notably in 1923 when the reasonable belief as to age provision in section 5(1) was removed³⁰ and in 1950 when the age of consent in relation to section 5(1) was raised to 17,³¹ and this remained the law until the twenty-first century.³² Now the Sexual Offences (Northern Ireland) Order 2008 harmonises sexual offences law in the North with that in England and Wales. In particular, it lowered the age of consent from 17 to 16 – with this applying to all sexual activity. The relevant section numbers differ, however. Articles 16 and 20 mirror sections 9 and 13 of the 2003 English and Welsh measure.

IV. Significance

Section 5(1) of the 1885 Act marked a major legal advance in efforts to protect girls – at least when it came to the letter of the law. And, despite a period of difference in Northern Ireland, 16 is still the age of consent for penile-vaginal intercourse within the UK. The notion of 'mistake' or 'reasonable belief' in relation to age has also endured in cases involving 'older child' victims, despite both the beginnings of efforts to responsabilise sexual behaviour in

²⁷ See further Chalmers, n 8 above.

²⁸ *ibid.*

²⁹ *ibid.*

³⁰ Section 2 of the Criminal Law Amendment Act (Northern Ireland) 1923.

³¹ Section 13 of the Children and Young Persons Act (Northern Ireland) 1950.

³² On the evolution of the law see further Lord Kerr in *R v Brown (Northern Ireland)* [2013] UKSC 43, [3]–[13].

other contexts³³ and an acceptance that ‘[w]hen the child is under 13 ... [the accused] takes the risk that she may be younger than he thinks she is. The object is to make him take responsibility for what he chooses to do.’³⁴ Reasonable belief, it seems, is also a legacy of the 1885 Act.

But some things have changed. Conceptions of the child and thinking around sex, sexuality and equality have shifted – and the figure of the teenager has emerged. Now, sexual offences legislation attempts to encompass a wider range of sexual activity than was envisaged in the latter years of the nineteenth century, it applies to and seeks to protect both girls and boys and is now attempting to grapple with consensual teenage sexual experimentation.

However, there are also similarities which might be drawn between the background to and context of the raising of the age of consent in section 5(1) and the present day. Indeed, debates around section 5(1) and, more broadly, the issue of male exploitation of girls, take on a different significance and a horrifyingly familiar hue in the light of revelations such as those relating to the sexual abuse of large numbers of girls in Rochdale.³⁵ Although some of the terminology might have shifted, the issues are all too similar: predatory males, white slavery, grooming, sexually motivated abduction, girls being lured into prostitution, the exploitation of the vulnerable. And there were other disturbing ideas then that seem to persist now, including notions of a knowing or even predatory sort of young female sexuality, sexually ‘precocious’ girls, girls taking advantage of men, and girl prostitutes.

In this context, it seems facile but is nevertheless important to say that, whilst criminal law reforms which attempt to address these issues are important, changes to law alone do not alter attitudes and behaviours. Moreover, it is social attitudes which lead to these kinds of offences being committed (then and now), that result in girls (and boys) continuing to be preyed upon by men (and sometimes women) and that lead to the letter of the law being under- or unenforced.

Further Reading

- Lois S Bibbings, *Binding Men: Stories about Violence and Law in Late Victorian England* (Routledge, 2014) chapter 1.
- James Chalmers, ‘Regulating Adolescent Sexuality: English and Scottish Approaches’ (2011) 23(4) *Child and Family Law Quarterly* 450.
- Deborah Gorham, ‘The “Maiden Tribute of Modern Babylon” Re-Examined: Child Prostitution and the Idea of Childhood in Late-Victorian England’ (1978) 21(3) *Victorian Studies* 353.
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- Louise A Jackson, *Child Sexual Abuse in Victorian England* (Routledge, 2000).

³³ See eg Jane Scoular and Maggie O’Neill, ‘Legal Incursions into Supply/Demand: Criminalising and Responsibilising the Buyers and Sellers of Sex in the UK’ in Vanessa Munro and Marina Della Giusta, (eds), *Demanding Sex: Critical Reflections on the Regulation of Prostitution* (Ashgate, 2008) 13–34.

³⁴ Lady Hale in *R v G* (*Secretary of State for the Home Department intervening*) [2008] UKHL 37, [46].

³⁵ See eg House of Commons Home Affairs Select Committee, *Child Sexual Exploitation and the Response to Localised Grooming* (HC 68-I [Incorporating HC 182, 2012–13], 10 June 2013).

