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Child Sexuality and Age of Consent Laws: The Netherlands Model

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The course of social change never runs smooth. The idea of sex education has been around since about 1850, mainly among feminists, free-thinkers and medical sexologists. As well as reflecting adult aspirations for children, it reflected attitudes to child sexuality. Calls for sex education peaked with the World League for Sexual Reform (ca 1921-31) and went into abeyance until the works of Kinsey, and Masters and Johnson gave a new legitimacy to sex research. The Women's Liberation Movement briefly contributed to revived demands for sex education with such publications as *Our Bodies Ourselves*.²

Recent initiatives have had doubtful success. In 1983, the Australian Federation of Family Planning Associations published this statement on sex education and child sexuality:

“Sexuality with responsibility” succinctly expresses what we in the FPA are trying to achieve in our sex education programs, whether we are teaching the young, the not-so-young or the elderly. The word “sexuality” is used in its broadest sense, involving its social biological, cultural and ethical aspects. Individuals are sexual

¹ Author of *Backlash? Balderdash!*, University of NSW Press, Sydney, 1994.

² The Boston Women's Health Book Collective, *Our Bodies Ourselves*, Simon and Schuster, New York, 1973.

beings from before birth, negotiating their way through a sexual learning process which is continuous, sometimes formal, but more often incidental, and constantly changing to meet the demands of the life-cycle.³

The FPA view was considerably in advance of current practice. After studying children aged 5-15 years in four cultures, Ronald and Juliette Goldman concluded:

One fact is abundantly clear. Children perceive it is the adults who have hang-ups about sex, and adults who deliberately or unconsciously withhold the information and knowledge the children seek.⁴

The reluctance to institute sex education derives from a corresponding reluctance to accept childhood sexuality.

Over the past decade, the feminist-inspired movement to publicise rape, domestic violence, child battering and child sexual abuse has overtaken the concept of children as sexual beings whose sexuality develops along an unbroken continuum into adulthood. In seeking to redress myths about victim-initiated contacts between adults and children, the movement treats the child as entirely sexless, lacking either the libido to participate in sexual activity or the maturity to consent to it, and sex education dwindles into protective behaviour courses that are either indifferent towards wider education or militate against it. This view revives (or perhaps continues) one strand of Victorian mythology about childhood innocence and ignorance that had been seriously criticised by its contemporaries.⁵

However, the age of consent laws that were instigated by feminists in the British legal tradition were less expressions of a belief in childhood innocence than part of a moral program to limit male sexuality in the home and in the streets and brothels, to protect women and girls by imposing a single standard of conduct on both sexes Æ the standard previously followed by women.⁶

³ Winder, R, 'The values underlying FPA sex education', in McCarthy, W (ed) *Teaching About Sex: the Australian Experience*, Allen and Unwin, Sydney, 1983, p 11.

⁴ Goldman, R and Goldman J, *Children's Sexual Thinking: a comparative study of children aged 5 to 15 years in Australia, North America, Britain and Sweden*, Routledge & Kegan Paul, London, 1982, p 323.

⁵ Ellis, H, *Studies in the Psychology of Sex*, Vol I, Random House, New York, 1937; *Auto-Eroticism*, 1913, pp 235-243; Vol II, Ellis, H, *Sex in Relation to Society*, Heinemann, 1937, Ch IV.

⁶ Banks, O, *Faces of Feminism*, Martin Robinson & Co, Oxford, 1981, pp 63-102; Faust, B, *Apprenticeship in Liberty: Sex, Feminism, and Sociobiology*, Angus & Robertson, Sydney, 1991, Ch 6.

Age-of-consent laws, by decreeing that consent is legally impossible below the prescribed age, work to make consent irrelevant and even unimaginable for both boys and girls. For example, one study of adults involved with law enforcement and/or helping professionals, identified seven false beliefs held by adults involved with children – that the child refrains from talking about sex with a parent because s/he the child enjoys it, that the child who does not resist is asking for sex and so on.

One issue which is common to all these cognitive distortions is that the adult never attempts to validate his [sic] beliefs with other adults.⁷ Why not validate the beliefs with children? In practice, men already involved with criminal charges will be handicapped for this form of reality testing because the children will be kept out of their reach, but in principle, asking the children's opinion should be conceivable, if they are thought to be able to hold one.⁸ Almost none of the child sexual abuse literature treats children as agents or developing sexual beings and certainly not as sexual agents.

Constantine and Martinson's anthology, *Children and Sex*, shows that, by 1980, a considerable body of evidence had been collected and analysed.⁹ The currently used umbrella term "child sexual abuse" obscures differences between the experiences of boys and of girls; between children's sexual contact with blood relatives, with friends of the family, and with strangers; between forced and unforced contact; and between various types of contact including exhibitionism, touching outside or inside clothes, kissing and cuddling, and penetration. "Child abuse" becomes an inchoate, toxic cloud and youthful consent to sexual experience with adults becomes unthinkable.

The lack of specificity in discussions of the problem over the past 10-15 years strongly suggests that both scientific concern with a disturbing phenomenon and compassionate concern to help children in the most appropriate way has turned into demonising and the creation of an area of anxiety to further the interests of the helping professions, as occurred previously with the discovery of physical abuse by pediatric radiologists.¹⁰ Thus a report by the Director of Public Prosecutions,

⁷ Abel, GG, Becker, JV, & Cunningham-Rathner, J, "Complications, Consent, and Cognitions in Sex Between Children and Adults", *International Journal of Law and Psychiatry*, Vol 7, 1984, p 101.

⁸ Constantine, LL and Martinson, FM (eds), *Children and Sex: New Findings, New Perspectives*, Little Brown, Boston, 1980.

⁹ Ibid.

¹⁰ Pfohl, SJ, "The 'Discovery' of Child Abuse", *Social Problems*, 1977 Vol 24, pp 310-323.

Victoria, is entitled 'Incest: a Crime Against *Children*' (my italics) when only five of a hundred cases involved male children.¹¹ The author was more concerned to establish that there had been multiple victims in 25 of the cases than to explore differences in the sex of the victims. Overall, his discussion focussed almost entirely on girls – justifiably so because incest is overwhelmingly a crime against *girls*¹² – but at the cost of failing to ask why girls should be more at risk than boys within the family and whether boys are more at risk outside it.

Doubtless the obscurantism that confuses types of sexual contact, sex of children, and outcomes, may be justified by the urgency of the problem for the worst cases, but it is not purely altruistic. As with the suffragette generation, the concern to protect children is tainted by misandry, refusal to recognise that worst and best cases occur and a denial of sexuality itself.

Much information on the ill-effects of early child-adult sexual contact comes from children who are in therapy or involved with legal proceedings, or from adults who have entered therapy. Such information probably represents the worst cases, particularly as there are twice as many studies of incest as of other contacts¹³ and incest seems to be the most detrimental form of child sexual abuse. The Kinsey team interviewed women not in therapy or legal processes about their total sexual experience, identifying a relatively large group (1075) who had experienced some sort of sexual encounter with an adult before the age of 13. Gagnon's retrospective re-analysis of the Kinsey interview material (333 subjects) compares worst and best cases, showing that repeated exposure to aggression over time is extremely disorganising into adult life. About 80 percent of women who experienced repeated coerced sexual contact before puberty experienced serious difficulties in adult life, but fewer than 7 percent of women with lesser types of sexual contact before puberty experienced difficulty.¹⁴ Some current activists against child sexual abuse misrepresent the best case/worst case contrast in these two accounts, quoting

¹¹ Heath, IW, *Incest: a Crime Against Children*, Director of Public Prosecutions, Victoria, 1985.

¹² Taylor, B (ed), *Perspectives on Paedophilia*, Batsford Academic and Educational, London, 1981, pp 44-45.

¹³ Constantine, LL, 'Early Sexual Experiences: a Review and Synthesis of Research', in Constantine, LL and Martinson, FM (eds) *Children and Sex: New Findings, New Perspectives*, Little Brown, Boston, 1980, p 219.

¹⁴ Kinsey, AC et al, *Sexual Behaviour in the Human Female*, NY Pocket Books, 1973; Saunders, WB, Philadelphia, 1953, pp 116-122; Gagnon, JH, 'Female Victims of Sex Offences', *Social Problems*, 1965, Vol 13, pp 176-192.

Gagnon as if he had said all adult-child contact was devastating, and condemning Kinsey as if he had dismissed all contact as trivial.¹⁵

Literature surveys reveal a variety of factors influencing the outcome of child-adult sexual contact including the age of the child, the relationship with the adult, sexual knowledge and attitudes of the child and the family and use of force.¹⁶ There is notably little comparison of boys' experience with girls', or of paedophile relationships with incestuous ones. Even so, there are strong hints that many boys who have experienced non-violent relationships with men who are not family members suffer few, if any, ill effects, while girls who have had incestuous relationships suffer profoundly.¹⁷

When Paul Wilson was writing about a Queensland paedophile, Clarence Osborne, who had suicided in 1979 rather than face criminal proceedings, a dozen adult men approached him with information about their happy and beneficial youthful relationships with Osborne to offset media claims that the man was a monster of perversion.¹⁸ Women who report well of such experiences are vanishingly rare. Blanche D'Alpuget, one of the very few women to discuss her experience without adopting a victim posture, says that it was both good and bad. It certainly wasn't neutral.¹⁹ D'Alpuget's relationship began when she was 12 and the man was 54; since he was a friend of the family, she was not in his power; the non-violent relationship was limited to kissing and masturbation. Apart from the age differential, the relationship lacked most of the features associated with intense suffering in girl victims.

¹⁵ Goddard, C, 'Keeping Perspective on Child Sexual Abuse', *Age*, 2 April 1993, p 13.

¹⁶ Constantine, LL, and Martinson, FM (eds) *Children and Sex: New Findings, New Perspectives*, Little Brown, Boston, 1980, pp 238-242; Haugaard, JJ and Repucci, ND, *The Sexual Abuse of Children*, Jossey-Bass, San Francisco, 1988, Ch 4; Abel, GG et al, 'Complications, Consent, and Cognitions in Sex Between Children and Adults', *International Journal of Law and Psychiatry*, Vol 7, 1984, p 92.

¹⁷ Ingram, M, 'Participating Victims: a Study of Sexual Offences With Boys', in Constantine, LL and Martinson, FM (eds), *op cit*, pp 177-199; Constantine, LL, *op cit* pp 225-231; Landis, JT, 'Experiences of 500 Children With Adult Sexual Deviations', *Psychiatric Quarterly Supplement*, 1956, pp 30, 91-109; Sandfort, T, *The Sexual Aspect of Paedophile Relations: The Experience of Twenty-five Boys*, Pan/Spartacus, Amsterdam, 1982, *passim*.

¹⁸ Wilson, P, *The Man They Called a Monster: Sexual Experiences Between Men and Boys*, Cassell Australia, North Ryde (NSW), 1981, pp 52-53.

¹⁹ D'Alpuget, B, 'The Taboo of Child Sexuality', *Australian Magazine*, 30-31 January 1993, p 14.

Current age-of-consent laws and policies ignore male/female differences yet Kinsey found that, while women and men did not differ in capacity for tactile arousal or orgasm, 33 bodies of data showed that males are conditioned by sexual experience more frequently than females – in particular, by psychogenic factors and visual arousal.²⁰ The other differences in sexual conduct recorded between the sexes stem largely from this one. Paul Gebhard, reviewing these findings, argued that the differences were only cultural but his argument is marginally worse than other ineffective attacks on Kinsey's conclusion.²¹

Since then, the so-called Sexual Revolution, and the emergence of the Women's Liberation Movement from the New Left, is a serendipitous experiment: women were given strong permissions to enjoy sex with the same frequency and on the same terms as men, and they rejected the notion, retreating into lesbianism, radical celibacy, puritanism and traditionally feminine models of sex.²² Even at the outset of the so-called sexual revolution, boys began intercourse earlier than girls and found sexual activity more satisfying²³ but events since then have revealed more subtle differences than frequency and satisfaction.

Girls mature physically before boys but boys seek sexual knowledge and experience earlier and more actively than girls (cruising). This being so, it seems that a uniform age of consent law for both sexes and/or an age of consent law that does not allow for the possibility of a consensual relationship will be discriminatory against boys and damaging for some children of both sexes. The Netherlands provides a model that avoids this risk.²⁴

The Netherlands have been undertaking a widespread, sustained revision of their morality laws under the guidance of the Advisory Commission on the Morality

²⁰ Kinsey, AC, et al, *Sexual Behaviour in the Human Female*, WB Saunders, Philadelphia, 1953, Ch 16.

²¹ Gebhard, PH, 'Sex Differences in Sexual Response', *Archives of Sexual Behaviour*, Vol 2, No 3, 1973, pp 201-202; Faust, B, *Women, Sex, and Pornography*, Penguin, Ringwood, 1981, Ch 3.

²² Faust, B, *Women, Sex, and Pornography*, Penguin, Ringwood, 1981, Ch 10; Faust, B, *Apprenticeship in Liberty*, Collins Anderson & Robertson, 1991, pp 362-376.

²³ Schofield, M, *The Sexual Behaviour of Young People*, Pelican, Harmondsworth, 1965, pp 45-55; Schofield, M, *The Sexual Behaviour of Young Adults*, Allen Lane, London, 1973 Ch 6.

²⁴ Dr Edward Brongersma, interviewed by Beatrice Faust, 27 Oct 1993, Overveen, The Netherlands. Dr Brongersma, a criminal lawyer and academic jurist, was a member of the First Chamber in 1950, when he was arrested under the 1911 Morality Law for having sexual relations with a 16-year-old boy. He served 12 months in goal, returning to parliament in 1963 and voting in the 1970 repeal of the section under which he had been convicted.

Laws which produced three interim reports: film censorship (1970), exhibitionism, nude recreation, and pornography (1973) and prostitution (1977). A final report on rape and assault and the protection of youth and dependent persons appeared in 1980. In 1970, the proscription on homosexual contact between an adult and a minor aged 16-21 years was repealed by a vote of 150 for to 5 against in the Second Chamber, and a unanimous pro vote in the First Chamber. Numerous revisions followed, including the repeal of film censorship for persons over 16 and changes in the regulation of exhibitionism and pornography.

Initially, the reforms were considered in the spirit of humanistic critique of laws that had arisen from nineteenth century moralism and employing evidence provided by modern penology and sexology. With the emergence of the women's movement, the critique became increasingly influenced by feminism.

Two principles shaped these reforms: protection of the citizen's right to choose his own sexual activities in private from interference by third persons and the protection of vulnerable groups of people in our society from the sexually directed desires of others.

In 1990, further revisions of the Morality Laws included a proscription against rape in marriage; widening the definition of rape to include, inter alia, penetration of the mouth and anus (that is, males are now covered); increased protection of the handicapped and of healthcare and social service clients; and a change in the prosecution of age-of-consent offences to equalise the treatment of cases involving boys and girls.

With non-violent penetration of minors under 12 years of age (boys and girls) the maximum punishment the judge may inflict is equal to the maximum punishment that at present can be incurred for carnal intercourse with a girl under the age of 12.

All non-violent sexual contact with a child over 12 years of age and under 16 will only be prosecuted upon complaint unless the perpetrator has authority over the child (the prerequisites for complaint now apply only to carnal intercourse with a girl of that age range).

That is, the age of consent remains 16 for both sexes but the possibility of consent between 12 and 16 is protected. A consenting child may refuse to complain while a child who wishes to complain may do so, and parents may complain on behalf of the child. The Child Protection Authority may complain on behalf of children in cases where they may have difficulty complaining against family members. Incest as such is not a punishable offence *Æ* the offence lies in the abuse of authority and the use

of violence. Section 165a of the *Code of Criminal Procedure* obliges the public prosecutor to ask the minor's opinion of the desirability of a prosecution. In exceptional cases the public prosecutor may over-ride a child's wishes.

The precedent for prosecution on complaint was found in Article 245 of the Penal Code of 1886, where prosecution of carnal intercourse of girls between 12 and 16 was permitted on complaint in order not to prejudice the possibility of rectifying the offence by marriage. The rationale was that girls might not want to prosecute potential bridegrooms. When feminists pressed for legislation to become sex-neutral, the 1990 reform changed carnal intercourse with a woman to sexual penetration of the body under Article 245. This left an anomaly because anal penetration of a boy could then only be prosecuted by complaint, but indecent touching (Article 247) could be dealt with by the police without complaint. Article 247 was amended to render those offences also prosecutable only by complaint.

Although the precise amendments that extended prosecution on complaint provisions to boys aged 12-16 were a fortuitous outcome of feminist concern for gender neutrality, they were consistent with the 1970 repeal of the proscription on homosexual contact between an adult and a minor aged 16-21 years. Thus far, the law has scarcely been tested and it will be interesting to see how this model works, and particularly whether there are more prosecutions on complaint from girls than from boys, which is what would be predicted from available evidence on the differential response of boys and girls to early sexual experience.