

Chapter 7

The Time Limit on Prosecutions for Underage Sexual Intercourse in the Sexual Offences Act 1956: A Continuing Problem

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Before 1 May 2004, offences concerning sexual intercourse with underage girls (under 16 but not under 13) were charged as unlawful sexual intercourse, contrary to section 6 of the Sexual Offences Act 1956 (SOA 1956). When the Sexual Offences Act 2003 (SOA 2003) came into force on 1 May 2004, that offence was repealed¹ and replaced with a new offence of sexual activity with a child.² But, the offence in the SOA 1956 still applies in relation to acts committed when that Act was in force, ie, up until 30 April 2004. In relation to men who, before then, had (possibly) consensual sex with girls³ who were aged 13 or over, but under 16, there arises a serious problem. There was a time limit for commencing prosecutions of one year from the alleged commission of the offence under section 6 of the SOA 1956,⁴ which has been assumed to continue to apply. So it has long been impermissible to charge anyone under section 6 of the SOA 1956, even in serious cases of older men who groomed young girls, and threatened or seduced them into silence for long periods of time.

In the years leading up to the SOA 2003, this unusual time limit proved to be tolerable only because it used to be evaded (!), namely by charging instead indecent assault under section 14 of the SOA 1956, for which the underage girl could also not give effective consent, but for which no time limit was provided in the statute. So ‘rough justice’ could still be done, and it frequently was.⁵ But the House of Lords in *J*⁶ belatedly decided by a 4–1 majority that

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¹ SOA 2003, Sch 6, [11].

² SOA 2003, s 9 and s 13.

³ The gender-specific limitations follows from the core definition of the offence, under SOA 1956, s 6(1): ‘It is an offence, subject to the exceptions mentioned in this section, for a man to have unlawful sexual intercourse with a girl not under the age of thirteen but under the age of sixteen.’

⁴ Section 37(2) gave effect to Sch 2 to the SOA 1956 which concerns modes of prosecution and maximum punishments for various listed offences. Paragraph 10(a) to Sch 2 lists the offence under s 6 and provided: ‘a prosecution may not be commenced more than twelve months after the offence charged’. The same limitation applies to attempts to commit the offence.

⁵ As noted by the House of Lords in *J* [2004] UKHL 42, [22], [53], while there had been no objection to prosecutors charging under s 14 in order to evade the time bar, trial judges developed the practice of observing the maximum two-year prison sentence that Parliament had attached to the offence under SOA 1956, s 6.

⁶ [2004] UKHL 42.

indecent assault under section 14 of the SOA 1956 could not be charged in cases of underage sexual intercourse⁷ so as to avoid the time limit attached to section 6 of the SOA 1956. The statute had to be read as a whole, it was said; and Lord Bingham thought it was impossible to interpret it as though it said that prosecutions for underage sex under section 6 had to commence within one year, but if they were not, they could still be prosecuted under section 14.⁸ The need for internal consistency went yet further; other acts which were ‘indecent assaults’ but were, in truth, preparatory measures towards underage sexual intercourse, were to be regarded as time barred by the decision in *J* too.⁹ So, if¹⁰ the drafters of the SOA 2003 were content to leave alone the time limit attached to section 6 of the SOA 1956 on the basis that charges under section 14 of the SOA 1956 could still be laid, then the decision in *J*, just a year or so after the SOA 2003 was passed, created a large legal vacuum that no policy maker had anticipated.

We should examine first the reasons for this time limit, which may partly lie in an underestimation of the harms of the offence itself. Then, we shall consider a plausible argument, based on a common law principle of statutory interpretation, that the time limit has *already* been removed for all proceedings for the offence under section 6 of the SOA 1956 since the SOA 2003 came into force. On the assumption that this interpretation might not be favoured by the courts, we shall then consider a plausible human rights argument which may be raised by determined complainants on suitable facts, which, if successful, would *mandate* that interpretation. But, we should rather pass legislation which unambiguously allows allegations of underage sexual intercourse committed up until 30 April 2004 still to be prosecuted under section 6 of the SOA 1956. Finally, we discuss why no such reform has already been considered. Some of these reasons might also defeat attempts at legislative reform today.

I The Reasons for the Time Limit

⁷ The convenient label ‘underage sexual intercourse’, unless otherwise specified, refers to (possibly consensual) sexual intercourse between males (often adult males) and girls who were aged between 13 to 15 years old at the time.

⁸ [2004] UKHL 42, [18].

⁹ *ibid.*, [25].

¹⁰ It is a big ‘if’, however; see Part II.

It is hard to state today what good reason there might have been for the time limit attached to section 6 of the SOA 1956. In *J*, two of their Lordships declined to articulate what policy objective it might have served.¹¹ Those of their Lordships in *J* who considered the point accepted that evidential problems many years after the event could not supply a reason for a time limit to be attached to this offence but to no other sexual offence. The most intuitive reason for having a time limit for the particular offence of unlawful sexual intercourse would seem to be to protect younger men from oppressive prosecutions. Lord Rodger imagined the prospects of a young man's consensual dalliances coming back to haunt him many years later, when he might have a family and career.¹² As far as one can tell, this also influenced the Criminal Law Revision Committee's recommendation as lately as 1984.¹³ But this cannot have been the entire explanation. For a start, Parliament in 1956 enacted a 'young man's defence' as a matter of substantive law,¹⁴ presumably to address some such concerns. But moreover, 'young man concerns' do not explain why the time limit was anywhere near as short as one year. The typical young man would hardly have much matured, or his life much changed, just one year after his offence.

More likely, the reasons for the time limit in the 1956 Act are rooted further back in history. Only since 1885¹⁵ has it been an offence for a male to have (possibly consensual) sex with a girl under 16, as opposed to sexual intercourse with a girl under 13. The increase in the age of consent was part of a series of measures aimed primarily against brothels, where many girls between the ages of 13 and 15 were working, rather than flowing from a concern for the wider welfare of young teenage girls in general. Indeed, it was apparently feared that the sort of girl who would agree to sexual intercourse at such a young age was unlikely to be of good character and, if finding herself pregnant, might seek to blame the wealthiest boy of her age known to her. Thus the offence originally carried a time limit of three months, so that any complaint would have to be made before the fact of the girl's pregnancy could be

¹¹ Namely, Lord Steyn and Lord Clyde, the latter of whom went so far as to say '*Whatever the precise reasoning behind the imposition of the time limit may have been ... it was still standing in the legislation when the present case arose*' [44] (emphasis added).

¹² *J*, (n 6), [58].

¹³ See its *Fifteenth Report on Sexual Offences* (Cmnd 9213, 1984) [5.22].

¹⁴ Section 6(3) of the Act provided: 'A man is not guilty of an offence under this section because he has unlawful sexual intercourse with a girl under the age of sixteen, if he is under the age of twenty-four and has not previously been charged with a like offence, and he believes her to be of the age of sixteen or over and has reasonable cause for the belief.'

¹⁵ Criminal Law Amendment Act 1885, s 5.

ascertained.¹⁶ This time limit, unsurprisingly, made the law *too* hard to enforce,¹⁷ and the duration of the limit was steadily raised.¹⁸

When one considers that (male) lawyers and judges were very slow to understand why females of any age might delay reporting sexual offences, and indeed held that all women were unreliable on matters relating to sexual offences,¹⁹ it is unsurprising that girls between 13 to 15 years old who, by their own account, agreed to sex were considered as especially untrustworthy. Little thought seems to have been given to the point that many girls seduced by older men, especially by those in positions of authority over them,²⁰ would have expected their truthful accounts to be disbelieved, and dismissed as childish fantasies, had they made them while they were still children. Today, happily, we seem better able to understand that children may be much slower than adults to alert the police to serious offences committed against them.²¹

Thus, much of the explanation of the time limit lies in a toxic mixture of misogyny, prejudice and ignorance. Yet there was probably more to it. If one assumes that underage sexual intercourse is essentially about illicit love affairs between two young people, then the harms from which the girl is being protected are mainly pregnancy or disease. Nowadays, bearing in mind that many offenders are much older than the underage girl, and might have trapped the girl into a longer term abusive relationship,²² or might have groomed girls from disadvantaged backgrounds (possibly also making them available to friends) we would describe the potential harms in much wider terms. In the words of Lady Hale, we would expect there to be damage to:

¹⁶ See the historical summary in the opinion of Lady Hale in *J*, (n 6), [74–76].

¹⁷ Presumably many girls tried to hide the fact of their pregnancy for as long as possible, for many offences were only uncovered when the girl would actually give birth; *ibid*, [76].

¹⁸ To 6 months by virtue of the Prevention of Cruelty to Children Act 1904, s 27. It was raised twice more by measures of 3 months, so that it already stood at 1 year when the offence was consolidated with that same time limit provided for in Sch 2 to the SOA 1956.

¹⁹ The requirement for the judge to give a corroboration warning in relation to their accounts was only abolished in England and Wales in Criminal Justice and Public Order Act 1994, s 32.

²⁰ It may also be assumed that there was less understanding that those inclined towards seducing children may actively seek employment which gives them contact with, or some power over, them.

²¹ Notably the Criminal Injuries Compensation Authority waives its usual time limit of 2 years (from the time of the offence) for all claimants who were under 18 years old at the time of an offence of violence. For them, the 2-year limit runs from the time when they first contacted the police. See *The Criminal Injuries Compensation Scheme* (MOJ, 2012) [88].

²² As Lady Hale put it in *J*, (n 6), [80]: ‘... sexual abusers commonly groom their victims by making them believe that their behaviour is normal. They make their victims fall in love with them.’

... their self-esteem, their capacity to form ordinary intimate relationships in the future, and their perceptions of how to live in families, all of which are so crucial to their own ability to be effective partners and parents in their turn. Those with professional experience of trying to pick up the pieces, sometimes many years after the event, are in no doubt of the gravity of the risks involved.²³

In other words, part of the very wrong of underage sexual intercourse is that the underage girl may be unable to appreciate for a long time that she *is* being exploited; and that she may be afraid or too immature to address the fact of her exploitation until a long time afterwards. The House of Commons Home Affairs Committee independently noted that, according to the Metropolitan Police, ‘significant numbers of complainants are aged between 30 to 40 years when they report experiences of childhood abuse’.²⁴

Arguably then, the offence of underage sexual intercourse was one of the most inappropriate of all to be time limited. Happily, in 2000, the Home Office, which in due course drafted the Bill which became the SOA 2003, commissioned an independent report which, *inter alia*, advised against any time bars for sexual offences.²⁵ There were no time limits for any of the offences in the SOA 2003, and the maximum penalty for the new offence of sexual activity with a child (by an adult) was substantially lengthened to 14 years imprisonment.²⁶

But this still leaves the problems which arise with prosecuting the more serious instances of underage sexual intercourse committed before the SOA 2003 came into force, which can only be prosecuted under the SOA 1956. First, and most fundamentally; are we really out of time to prosecute in all of these cases, where nothing other than underage sexual intercourse or incidental touching towards it can properly be alleged?

II Legal Challenges to the Time Limit

A Matter of Statutory Interpretation

Remarkably, it is arguable that the SOA 2003 *did* abolish the time limit which attached to section 6 of the SOA 1956, so that, since the Act came into force, offences properly chargeable under section 6 can now be heard without reference to it; but it takes some legal education to understand why it is arguable. Unfortunately nothing much was said of the

²³ *J*, (n 6), [78].

²⁴ Home Affairs Committee, *The Conduct of Investigations into past cases of Abuse in Children’s Homes* (Fourth Report, 2001/2) [88].

²⁵ *Setting the Boundaries: Reforming the Law on Sexual Offences* (Home Office, July 2000) [3.6.6].

²⁶ SOA 2003, s 9(2).

matter in *J*, because the time limit had unquestionably been in force when *J* was tried in 2001. Only Lord Steyn adverted to the future position, saying ‘Not surprisingly, Parliament abolished the time limit with effect from 1 May 2004 by the Sexual Offences Act 2003’.²⁷ Alas, this comment is ambiguous. But probably his Lordship meant only to say that Parliament had provided a new offence (sexual activity with a child), with no time limit, with effect from 1 May 2004; and not that Parliament had, as from 1 May 2004, *also* abolished the time limit which attached to the offence in section 6 of the SOA 1956.

This is how Parliament, in 2003, repealed the offence and the time limit in the SOA 1956. Schedule 6 to the Sexual Offences Act 2003, entitled ‘Minor and Consequential Amendments’, provides simply:

11. In the Sexual Offences Act 1956, omit—

- (a) sections 1 to 7, 9 to 17, 19 to 32 and 41 to 47 (offences), and
- (b) in Schedule 2 (prosecution, punishment etc.), paragraphs 1 to 32.

Thus the offence under section 6 SOA 1956 was to be ‘omitted’ by virtue of paragraph 11(a), and the time limit attached to it in Schedule 2 to the SOA 1956 by virtue of paragraph 11(b). Certainly Schedule 6 to the SOA 2003 means that these sections have no continuing force in respect of acts committed since 1 May 2004, when the SOA 2003 came into force. But Schedule 6 says nothing either way about their validity in respect of acts committed *before* 1 May 2004. For assistance on this, we must look at section 16 of the Interpretation Act 1978, which provides:

... where an Act repeals an enactment, the repeal does not, unless the contrary intention appears ... (b) affect the previous operation of the enactment repealed.

Applying section 16 of the Interpretation Act 1978 by itself, it would seem that the time limit still ‘operates’ whenever the offence does (ie, because that is what it ‘previously’ did) in respect of acts committed up until 30 April 2004. In *Silverwood*²⁸ the Court of Appeal was concerned with the analogous ‘omission’ of the offence of gross indecency with men,²⁹ along with the ‘omission’ of its belatedly attached time limit in section 7 of the Sexual Offences Act 1967, by virtue of the same Schedule 6 to the SOA 2003.³⁰ The Court referred to section 16 of the Interpretation Act 1978 and instantly concluded that both the offence and time limit

²⁷ *J*, (n 6), [28].

²⁸ [2015] EWCA Crim 2401, [12].

²⁹ Contrary to SOA 1956, s 13.

³⁰ Schedule 6 to the SOA 2003, [15].

still 'operate' together today (ie, as they 'previously' did) in respect of acts committed up until 30 April 2004.

However, this reading overlooks the important common law distinction between the repeal of substantive law and the repeal of adjectival law. Changes made to substantive law are indeed presumed not to have retrospective effect.³¹ But the laws of evidence, or any procedural bars to trial, are only addressed to the court *at the time when it tries an offence*, and statutory repeals of these laws are presumed to apply in respect of all future court proceedings, *irrespective* of the time of the alleged events themselves. Coincidentally, or perhaps not, the leading case on the retrospective extension of a time limit to prosecution concerned the first occasion on which the time limit for underage sexual intercourse was raised from three months to six months. The accused committed the offence when the time limit was only three months but was charged after five months, by which time it had been increased to six months. He argued, unsuccessfully, that he was protected by the time limit which applied at the time of his offence, but the new time limit was held to have effect, thus enabling the prosecution to proceed. In *Chandra Dharma*, Lord Alverstone CJ said:

The rule is clearly established that ... statutes which make alterations in procedure are retrospective. It has been held that a statute shortening the time within which proceedings can be taken is retrospective and it seems to me that it is impossible to give any good reason why a statute extending the time within which proceedings may be taken should not also be held to be retrospective ... [where statute] only alters the time within which proceedings may be taken, it may be held to apply to offences completed before the statute was passed. That is the case here. This statute does not alter the character of the offence, or take away any defence which was formerly open to the prisoner. It is a mere matter of procedure, and according to all the authorities it is therefore retrospective.³²

Chandra Dharma has not been doubted at common law, and a search of the Westlaw database reveals only cases where it has been considered or mentioned. The issue has apparently received more attention in Australia. The Australian High Court in 1958 recognised in principle the distinction between substance and procedure,³³ and in 1990, the High Court in *Rodway v The Queen* said that:

... the rule at common law is that a statute ought not be given a retrospective operation where to do so would affect an existing right or obligation unless the language of the statute expressly or by necessary implication requires such construction. It is said that statutes dealing

³¹ Retrospective criminal liability in this sense would in any event normally be incompatible with the ECHR, Art 7.

³² [1905] 2 KB 335, 338–39.

³³ *Maxwell v Murphy* (1957) 96 CLR 261.

with procedure are an exception to the rule and that they should be given a retrospective operation.³⁴

If Schedule 6 to the SOA 2003 falls to be read in the light of these authorities, then it arguably preserves the offence in section 6 of the SOA 1956 for acts committed up until 30 April 2004, *but simultaneously* removes the time limit for all proceedings *commenced* since 1 May 2004. There is nothing in the decision in *Silverwood* (where nothing at all was said of *Chandra Dharma*) which suggests that the enactment of section 16 of the Interpretation Act 1978 casts aside the decades-old distinction between substantive law and procedural law when it comes to the effects of repeal. Nor could such a claim be made. Section 16 of the Interpretation Act 1978 only speaks in terms of the law ‘operating’ as it ‘previously’ did; and the point is precisely that time limits only ‘operate’ *as they currently do or do not exist at the time of trial*, in determining whether the court currently has jurisdiction to hear the case. If that was ‘previously’ the nature of the ‘operation’ of the time limit in Schedule 2 to the SOA 1956 – that it only operated for as long as it had not been amended – then section 16 of the Interpretation Act 1978 does not support any proposition that the time limit continues to apply when trials are commenced from 1 May 2004. Speaking of the ‘operation’ of law may just as easily be a reference to the distinction between adjectival and substantive law as an abrogation of such a distinction.

But, there is still room for argument; for section 16 of the Interpretation Act 1978 also allows for a ‘contrary intention’ to ‘appear’ in any statutory repeal or amendment. It is not stated how explicitly any ‘contrary intention’ should need to ‘appear’. However, we might note that Schedule 6 to the SOA 2003 is entitled *Minor and Consequential Amendments*, which may carry the suggestion that all of the amendments are thought to be consequential as though by logic. Having repealed the offence under section 6 of the SOA 1956, it might have been thought to be a logical ‘consequence’ that the time limit should be removed too (what, after all, would be the point in leaving on the statute books a time limit to a non-existent offence?). For, whilst one might readily expect a contrary intention to the rule in *Chandra Dharma* to be explicitly expressed when a procedural or evidential rule is abolished *by itself*, maybe less explicitness is required when a procedural rule, attached to a particular offence, is abolished *alongside* that offence. It might be added that, the whole of Schedule 6 to the SOA 2003 seems to be an indiscriminate tidying-up exercise in removing both old offences and anything

³⁴ *Rodway v The Queen* (1990) 169 CLR 515, 518.

to do with those repealed offences; and that reading the whole package together might draw one to the conclusion that they were all meant to be abolished to the same extent.

Alas, there is no indication in the Explanatory Notes to the SOA 2003 or other sources exactly to what extent Parliament meant to abolish the time limit. Certainly, if the matter were thought to depend more generally to ascertaining Parliament's likely intention, then it is quite possible that Parliament intended the time limit to continue to apply to old cases, mistakenly thinking (as everyone did in 2003) that it could in any event continue to be evaded by charging defendants under section 14 of the SOA 1956. Properly speaking, the issue is whether a contrary intention 'appears' in the text of Schedule 6 to the SOA 2003, so that we should not need to second guess Parliament's intention. But it would be little surprise if some judges were to ask themselves the latter question first, and to be guided by the answer to that, such is the difficulty with deciding the former issue by itself.

So the success of the argument remains quite uncertain; and we proceed here on the basis that a court might reject it.

B The Human Rights Argument

There is a second line of argument which may succeed in the alternative. It arises if it can be said that a failure to prosecute a case of underage sexual intercourse can amount to a violation of the complainant's rights under Article 8 of the ECHR, and that removal of the time limit would enable the State to avoid the violation. Then it would follow that Schedule 6 to the SOA 2003 must be interpreted if 'possible' to remove the time limit for all proceedings commenced since the SOA 2003 came into force.³⁵ This would be a new argument for the courts; for it was assumed without argument in *J* that there was no human rights dimension to the application of the time limit.³⁶ An outline of the argument has already been suggested by this author,³⁷ but it can usefully be expanded here.

Member States must show some minimal degree of efficiency in investigating and prosecuting certain serious crimes against citizens in its jurisdiction, by virtue of the doctrine

³⁵ Section 3(1) of the Human Rights Act 1998 provides 'So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.'

³⁶ [2004] UKHL 42, [15].

³⁷ J Rogers, 'Fundamentally Objectionable?' (2007) 157 *New Law Journal* 1252.

of positive obligations. The best known case is *X and Y v Netherlands*,³⁸ in which it was held that a domestic rule which required victims of sexual offences to make a complaint in person represented an arbitrary barrier to prosecutions, and that its operation meant that the Netherlands violated Article 8 of the ECHR because it thereby failed effectively to prosecute activities which undermined the sexual autonomy of those unable to complain in person. The main strands to the positive obligations argument are that: (1) a duty effectively to prosecute cases of underage sexual intercourse allegedly committed may arise under Article 8 of the ECHR, (2) that the effect of the time limit in Schedule 2 to the SOA 1956, at least when read with the decision in *J*, is, at least in some cases, to prevent the possibility of effective prosecution, and (3) that there are no good countervailing reasons for the time limit.³⁹ In a domestic court, the final point would be that the legislation providing for the time limit can be read in a way that avoids the incompatibility.⁴⁰

On the first point, it should be noted that the complainant in *X and Y* wished to complain of rape, and so, although successful under Article 8 of the ECHR, she could also have succeeded in establishing a positive obligation arising under Article 3 of the ECHR. But it may be a stretch to say that complainants of (consensual) underage sexual intercourse have also been subjected to inhuman or degrading treatment as the terms are understood under Article 3. The issue then arises whether there can also be a positive obligation effectively to prosecute offences which may Article 8 but *not* also Article 3. However, at least in the present context, strong reliance may still be placed on a passage in *MC v Bulgaria*.⁴¹ Here, the First Section of the ECtHR said that the duty of effective investigations and prosecution under Article 8 extended to ensure effective deterrence against ‘grave acts where fundamental values and essential aspects of private life are at stake’, and it added that ‘children and other vulnerable individuals, in particular, are entitled to effective protection’.⁴² This would appear to offer plenty of room for argument that the duty effectively to prosecute under Article 8 of the ECHR extends to at least some cases of underage sexual intercourse, whether or not Article 3

³⁸ (1986) 8 EHRR 235.

³⁹ For further discussion of how such arguments are broken down, see J Rogers, ‘A Human Rights Perspective on the Evidential Test for Bringing Prosecutions’ [2017] *Crim LR* 680.

⁴⁰ It is important to note that positive obligations can arise independently from the text of individual Convention rights, and so it suffices that the Human Rights Act 1998 has incorporated ECHR, Art 8, and it is immaterial that it has not also incorporated Arts 1 or 13 of the ECHR.

⁴¹ (2005) 40 EHRR 20.

⁴² *ibid*, [150].

is also engaged. It might, for example, apply where the facts include some element of coercion or ongoing grooming by a much older man, such that the complainant's private life was to some extent dictated by ongoing sexual activity or might continue to be affected by it, eg, if the commission of the offence later interfered with her ability to form trusting relationships.⁴³

Even so, whether a complainant's rights are engaged under Article 8 of the ECHR would remain fact-dependent. It might also be that a complainant who was 15 years old at the time of the incident is unlikely to succeed. Within European States, the age of consent to sexual activity has typically ranged between 14 to 16 years old.⁴⁴ The ECtHR might, then, have some difficulty in declaring an obligation on the UK to effectively prosecute underage sexual intercourse with vulnerable 15 year old girls while some Member States have 15 as their legal age of consent, because the necessary import of such a decision might be thought to be that these Member States need to amend their substantive criminal law too. Conceivably, a domestic court might take into account such an anticipated objection in Strasbourg, if it were unwilling to give a purely domestic interpretation to the Human Rights Act 1998.

However, in cases where the applicant was just 13 at the time of the incident, then, assuming too some of the aggravating features mentioned above, it seems highly plausible that a positive obligation to prosecute underage sexual intercourse effectively can arise under Article 8 of the ECHR. Our confidence can be fortified by reference to the facts in *NXB v CPS*,⁴⁵ a case where the complainant argued that the Crown Prosecution Service (CPS) acted unlawfully under section 6 of the Human Rights Act 1998 when it discontinued allegations of other underage sexual offences on evidential grounds. The complainant was allegedly abused during 1991–1993 and began her statement to the police in 2010 by explaining:

Over the last 18 months I have been seeing a councillor [sic]. One of the reasons I have needed counselling is because of incidents of a sexual nature with a 40 year old man, which occurred when I was 12 years old, through until I was 15 years old. The counselling is due to end and I feel the need to get everything out in the open now that I am 30. I have decided to tell the police everything as I want closure to this so I can get along with my life.⁴⁶

Surprisingly, it seemed to be assumed without argument in *NXB* that *Bulgaria v MC* provides authority for such a case to engage Article 3 of the ECHR. But the ready acceptance that a

⁴³ We may recall the observations of Lady Hale above (text accompanying n 23).

⁴⁴ See *Bulgaria v MC*, (n 41), [89].

⁴⁵ [2015] EWHC 631 QB.

⁴⁶ *ibid*, [6].

positive obligation arises on such facts might give us confidence that at least Article 8 would be held properly to be engaged on the very similar facts as suggested above.

The second element, whether the time limit *does* create a substantial barrier to justice, seems relatively easily satisfied, as the law is presently understood. It might, however, be necessary for the evidence of the alleged abuse to be *prima facie* sufficiently plausible that the allegation might otherwise have been prosecuted, else the time bar might not be thought to be such an ‘effective’ barrier in the applicant’s case. It might also be important that the defendant is not also charged with even more serious offences (such as rape) against the same complainant. If he does face such other charges, it might then be thought that the complainant could still have ‘effective’ justice through prosecution for the alleged rape, especially since evidence of the underage seduction would likely be regarded as background evidence to the alleged rape and to some extent a conviction of rape might be seen as recognition of the fact of the other abuse too. This would not be ‘perfect’ justice, but a distinction may be thought to exist between ‘perfect’ justice and the ‘effective’ justice which Member States are required to seek by virtue of the doctrine of positive obligations.

The third element, whether the State might justify the time limit, is perhaps the simplest. We should not worry that time limits for offences may be relatively common on the continent. It is more to the point that time limits for indictable offences in England are not part of our culture, that this one is exceptional, and that it seems especially inapt for this offence to have been almost singled out in this way. Besides, by this stage of the analysis the applicant may also claim a violation of Article 8 alongside Article 14 of the ECHR (prohibition on discrimination). Article 14 provides:

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language

The effect of this is that even if the State can justify *in itself* neglecting cases of historic underage sexual intercourse against girls today, it cannot simultaneously (without showing good reason for the difference) continue to prosecute the same allegations against boys. Yet not only are there no time limits for *any* historic sexual offences against young boys,⁴⁷ but such cases are actively pursued, at least where there is evidence of exploitation or grooming.⁴⁸ It is hard to see how this discrimination could be defended. So either a court,

⁴⁷ Indeed, in the SOA 1967, s 7, the legislature enacted a 1 year time limit for buggery but specifically made an exception for an ‘offence by a man with a boy under the age of sixteen’, which remained subject to no time limit.

⁴⁸ See, eg, the case of *Chapman*, reported in *Silverwood* [2015] EWCA Crim 2401, [17].

faced with appropriate facts, should hold that the time limit in Schedule 2 to the SOA 1956 violates Article 8 by itself or, more conservatively, that it violates Article 8 together with Article 14. The difference is immaterial to complainants.

Finally, if the time limit in section 6 of the SOA 1956 (and following *J*) is thought to violate the complainant's right to effective prosecution of 'her' case under Article 8 of the ECHR, either by itself or when read with Article 14 of the ECHR, then section 3 of the Human Rights Act 1998 applies. It is submitted with some confidence that it is 'possible', even if it is otherwise not the preferred interpretation, to interpret Schedule 6 to the SOA 2003 so that it removes the time limit for all proceedings for the offence under section 6 of the SOA 1956 when commenced from 1 May 2004. Alternatively, one could reach a similar result by saying that it is 'possible' to construe the SOA 1956 so that the time limit attached to section 6 of the SOA 1956 does not have to be read into any charges under section 14 of the SOA 1956.⁴⁹

When we consider the plausibility of the argument that the time limit has already been removed, either by ordinary canons of interpretation or by invoking the Human Rights Act 1998, it may seem odd that no case has yet been brought. In theory at least, domestic law does permit a complainant to challenge the time limit. On being told by the CPS that 'her' case cannot be prosecuted under either section 6 or section 14 of the SOA 1956, she could first challenge the decision under the Victims' Right to Review, and outline the legal arguments that may be made against the application of the time limit. If unsuccessful, she might seek judicial review of that decision on the basis that it is legally flawed because the time limit does not apply.

But such an applicant must move quickly to meet the three-month time limit for commencing judicial review.⁵⁰ Many victims take years to summon up the courage to revisit this aspect of their past, and are quite knocked back to square one when belatedly told of a hitherto unmentioned legal obstacle. Three months may quickly pass in such circumstances. Further, if she wishes to avail herself of the human rights argument (and she might be advised that this would be her best chance of success) then the particular alleged facts of her case would become important. On the above account, she might need to be alleging underage sexual intercourse with some element of grooming or manipulation, and the encounters might need

⁴⁹ Far from being 'impossible', this interpretation did find favour with the dissenting Lady Hale in *J*, without any discussion of the applicability of the Human Rights Act 1998.

⁵⁰ *Civil Procedure Rules*, Part 54, rule 54.5.

to have persisted with sufficient regularity and long lasting effects for it to be accepted that Article 8 is engaged. It might also be necessary that she was 13 years old at the time of the offence, as opposed to 15 years old, at the time, and that underage sexual intercourse would have been by far the most appropriate charge that could properly be brought. Finally, there may need to be some *prima facie* plausibility to the allegation, such that one might expect the case ‘otherwise’ to be prosecuted.

In other words, even using human rights law has its limitations as a means of procuring reform by judicial means. It may be in fact for the better that no complainant has yet put the matter to the legal test, if otherwise a test case did not disclose an ideal set of facts as set out above, and then failed accordingly. Presumably, neither the CPS nor the Secretary of State for Justice would much relish spending thousands of pounds on legal fees to defend the application of such an anachronistic time limit, but they would be expected to take the legal points available to them; and were a case to be successfully defended, it might then be harder to gather momentum for reforming a time limit which had seemingly been tested and declared compatible with human rights law. From that perspective, everyone should prefer legislative reform instead.

III The Case for Legislative Reform

Legislative reform could be effectuated in one provision. For example, it might be provided that ‘proceedings for the offence under section 6 of the Sexual Offences Act 1956 (“intercourse with a girl between thirteen and sixteen”) shall not be barred only by virtue of the passage of time.’⁵¹ Such a provision could be included in legislation on a miscellany of other criminal justice matters. There should be no difficulty in the relevant Secretary of State declaring that he or she believes the provision to be compatible with the Human Rights Act 1998. As it is a purely procedural matter, there is nothing in principle to suggest that such reform would violate any rights of prospective defendants. Compliance with Article 7 of the ECHR would only require that trial judges apply the substantive law as it was at the time and observe maximum sentence of two-year imprisonment when sentencing convicted defendants; and in the latter respect, defendants charged and convicted under section 6 of the

⁵¹ Some might wish to be more explicit, and to add something like ‘and paragraph 11 in Schedule 6 to the Sexual Offences Act 2003 shall be read accordingly.’

SOA 1956 would still be considerably better off than they would have been if it were possible to charge them under the modern section 9 of the SOA 2003.

Further consequential rules could be enacted if thought appropriate, but from the legal perspective, none seems to be essential. The CPS would apply its own contemporary public interest test to the alleged facts of each case, which ought to rule out most proceedings where there was no grooming or exploitation of the girl.⁵² If necessary, however, it could be provided that prosecutions enabled by the new provision should require the consent of the Director of Public Prosecutions, a device which pre-empts private prosecutions from being instituted and which often seems to reassure Parliamentarians. At common law, prosecutors would probably not be held to any earlier assurances of non-prosecution which had been made on account of the time limit, and indeed any confessions made to the offence on that basis should be admissible.⁵³ There might be more disquiet over prosecuting offenders who have already been sentenced to prison (and since released) for other sexual activities with the same girl. But even here, no fault for the problem would normally be attributable to the prosecutor or police,⁵⁴ and it might be thought that, if it were decided that a prosecution for underage sexual intercourse might still be in the public interest, such cases could ultimately be dealt with fairly at sentencing.⁵⁵ At any rate, it is not obvious that any extra statutory provisions are needed to address these broadly familiar problems in criminal procedure.

There are several reasons to think that such a proposal, if properly understood, would be of interest to many MPs. There is today a wider acceptance that many complainants giving torrid accounts of sexual abuse in the late twentieth century, even against well-known figures and within public institutions, may have been telling the truth and that their cases should still

⁵² See CPS Legal Guidance, *Rape and Sexual Offences—Chapter 2: Sexual Offences Act 2003—Principal Offences, and Sexual Offences Act 1956—Most commonly charged offences* (CPS Website, 2017). It states: ‘where a defendant, for example, is exploitative, or coercive, or much older than the victim, the balance may be in favour of prosecution, whereas if the sexual activity is truly of the victim’s own free will the balance may not be in the public interest to prosecute. ... In addition, it is not in the public interest to prosecute children who are of the same or similar age and understanding that engage in sexual activity, where the activity is truly consensual for both parties and there are no aggravating features, such as coercion or corruption ...’.

⁵³ In *Dunlop* [2006] EWCA Crim 1354 the Court of Appeal held that it was fair to admit at retrial a person’s confession to a murder of which he had already been acquitted, which he had made at an earlier time when it was not yet possible for him to be retried.

⁵⁴ In *Connelly v DPP* [1964] AC 1254, it was held not to be an abuse of process to lay a belated charge arising out of the same facts from a previous trial if at the time of the first trial it was thought that the law did not permit that additional charge to be laid.

⁵⁵ Courts need only ‘take account’ of current sentencing guidelines in relation to offences committed before 6 April 2010.

be heard.⁵⁶ It is relevant too that, following various well publicised scandals including the prolonged sexual abuse of young teenage girls in Rotherham,⁵⁷ the political community is likely to regard grooming of young girls for sex as to be treated with comparable seriousness as rape. Indeed, it is very easy for non-lawyers to think that underage sexual intercourse following grooming *is* ‘non-consensual’ and must therefore constitute the offence of rape itself. By analogy, the Criminal Injuries Compensation Authority (CICA) has long been prepared to accept underage sexual intercourse following grooming as a ‘crime of violence’, on the questionable basis that there was no ‘factual consent’ from the girl.⁵⁸

Caution is needed at this point; for although it is important that the gravity of many such offences is recognized, campaigners should be careful to explain that in law, there is a difference between rape and underage sexual intercourse.. Both before and after the SOA 2003, an underage girl between 13 and 15 years old who agrees to sex, understanding its mechanics and feeling that she is free to make up her own mind whether to agree, gives valid consent to defeat a rape charge, just as any adult woman would.⁵⁹ The fact that many underage girls who are victims of sophisticated grooming techniques might be in denial about their own exploitation, and might wrongly consider that they take such decisions in their own interests, is precisely why offences relating to underage sexual intercourse have existed independently.⁶⁰ It is as well to explain that these cases cannot necessarily be prosecuted as rape, in order to emphasise the impact of the time limit problem. Finally, it might be urged that these cases are not necessarily of ‘historic’ importance only. Recalling the long delay in complaining that may be associated with reporting this offence,⁶¹ it is surely just as likely that

⁵⁶ Theresa May, when she was Home Secretary, said ‘Perpetrators must never be allowed to think that their horrific acts will go overlooked or go unpunished ... Victims and survivors ... deserve to be heard now, just as they should have been years ago, and they deserve justice, just as they did then’: S Laville, ‘Police expect 30,000 new child abuse reports from Goddard inquiry’ *Guardian Online* (19 May 2016).

⁵⁷ See, eg, J Halliday, ‘Rotherham: eight men jailed for sexually exploiting teenage girls’ *Guardian Online* (4 November 2016).

⁵⁸ See J Halliday, ‘Compensation body told Rotherham abuse victim she ‘consented’’ *Guardian Online* (11 September 2017).

⁵⁹ *Olugboja* [1982] QB 320.

⁶⁰ Prosecutors and the Court of Appeal alike seem to have lost sight of this in *Ali* [2015] EWCA Crim 1328, when applying the SOA 2003. On the problem of arguably overcharging rape in relation to young complainants who appeared to agree to sex following grooming, see E Freer, ‘Yes, no, maybe—recent cases on consent and freedom to choose’ [2016] 1 *Archbold Review* 6.

⁶¹ See n 24 and accompanying text.

we need to prosecute some predatory offenders who have continued offending since 2004 but against whom only a victim from before 1 May 2004 is now ready to testify.⁶²

One might imagine some disquiet from those who worry in general terms about fair trials for sexual offences after so many years.⁶³ But they would surely accept too that there is neither rhyme nor reason in leaving underage sexual intercourse as the one sexual offence which cannot be prosecuted today, and would have to concede that the current time limit is discriminatory against girls, as noted in Part II, and as such is indefensible.

So why have there been no MPs calling for such a simple reform? The most likely answer, to the author's mind, is that no one has alerted any MP to the problem; at any rate, the author knows of nothing which suggests otherwise. Today, it is the media and special interest groups who play the biggest role in alerting MPs to possible causes of law reform. But the problem is very hard to explain briefly and precisely, and even intelligent and earnest journalists have struggled to run an accessible story on it. The author has some experience here, having been contacted by Radio 4⁶⁴ and by a journalist for a national newspaper in consequence of a short article⁶⁵ that he once wrote on the subject. First, one explains that the problem 'only' arises in cases involving conduct up until 30 April 2004, and that it 'only' affects underage sexual intercourse with girls (why, they ask?). Usually it is necessary to explain the difference between rape and underage sexual intercourse (a matter which many find difficult, as alluded to above). It is then necessary to explain why it is only recently that the time limit is such a problem, ie, because before *J* it used to be thought acceptable to charge under section 14 of the SOA 1956 instead (why did the House of Lords suddenly decide otherwise, some might interject?). When one is asked why the time limit was not abolished altogether in SOA 2003, the answer, as related in Part II, is that it quite possibly *was*; but, the CPS has not properly argued the point—for reasons unknown (anticipating thereby other questions⁶⁶). For those who want to write short, but also accurate, summaries of the law for lay readers, the 'accessibility problem' that arises from these qualifications and uncertainties is considerable.

⁶² One victim, who contacted the author after her case was discontinued, explained her lengthy delay by the fact that the abuser had subsequently married her and fathered a child with her, and that she was for a long time anxious to cover up his offences. But she belatedly accepted that she was one of a string of victims of sexual offences committed by the abuser, and also became concerned for their daughter.

⁶³ It was concerns over miscarriages of Justice which initially prompted the Home Affairs Committee Report in 2002 (n 24). In the event the Committee decided against recommending any time limit after hearing evidence.

⁶⁴ A programme mainly on the problem was then aired in *The Report* in June 2013.

⁶⁵ J Rogers, 'Fundamentally Objectionable?' (2007) *New Law Journal* 1252.

⁶⁶ But see Part IV for observations on the level of CPS engagement with the time limit problem.

The author is not aware of any mainstream newspaper which has as much as adverted to the problem, while countless newspaper articles have featured discussions of historic sex cases in clear ignorance of it.⁶⁷

But there are two further reasons why interest from the media has been muted; and these bring us to our final section.

IV Two Obstacles to Media Interest

In explaining the lack of media interest, there is more than the accessibility problem in play. Just as one photograph might be thought to be worth one thousand words of text, a single statistic proclaiming a high figure of prosecutions that would have been brought, but for the time limit, would likely substitute for a detailed explanation of the legal obstacle. But this brings us to our first obstacle in this Part: it is very hard to estimate how many prosecutions have been disabled by the time limit, let alone to guess how many might now be enabled by abolishing it. Alternatively, a quote from the CPS bemoaning the time limit, or at least acknowledging that the problem may merit some attention, might serve to give the story some perceived media impact. But (the second obstacle), the CPS has shown apparent indifference to it. These problems merit special attention, not least because of their potential role in obstructing other valuable reforms.

A Difficulties in Estimating the Number of Affected Cases

The would-be reformer should expect to be asked how many allegations of underage sexual intercourse have already been abandoned on account of the time limit. The sheer frequency of underage sexual intercourse⁶⁸ suggests that the number of cases that could otherwise have been prosecuted in the public interest since the decision in *J* in 2004 ought to be substantial. One journalist for a national newspaper, who contacted the author about this problem in 2014, was sufficiently interested as to send Freedom of Information requests to all police

⁶⁷ For example, see the continuing tabloid interest in the encounters said to have taken place between rock star Bill Wyman and his underage girlfriend in the 1980s: D Pilditch, 'I went to police over my dates with Mandy at 14 says Rolling Stone Mandy Smith' *Express Online* (1 April 2013). Among the speculation, there is no hint that any charges for underage sexual intercourse would today be time barred.

⁶⁸ In 2001 it was estimated that between one quarter and one third of young people had their first heterosexual intercourse under the age of 16. K Welling et al, 'Sexual Behaviour in Britain; Early Heterosexual Experience' (2001) *Lancet* 1843.

forces, hoping in this way also to catch recorded offences which might not have been communicated to the CPS. But he found it impossible to interpret the results. Variations in data between different police areas were immense, and widespread ignorance of the time limit was evident, even though the FOI request itself identified the problem. South Wales Police reported that some 59 offenders had, between the years 2007 and 2014, been charged with the offence under section 6 of the SOA 1956. It was not always clear in some such cases whether the recording was wrong, or whether it was right and that several time-barred charges had thus been identified. It was further pointed out by Kent Police that, in April 2009, the Home Office asked police forces to record all allegations of the offence under the broad category ‘22B—Sexual activity involving a child under 16’ regardless of when the offence was alleged to have occurred. Doubtless this change served some administrative purpose but it makes it quite impossible to identify whether allegations relate to ‘SOA 1956’ offences or to ‘SOA 2003’ offences when they have been recorded from April 2009 onwards.

The journalist did not make a separate FOI request to the CPS. But there is little reason to think that the CPS would be able to assist more than the police on the matter of estimating numbers of affected cases. Whereas the police would at least record the alleged offence under the relevant code, time limit or not, the trail at the CPS, should the time problem be spotted, is apt to run off into a number of different directions. A range of alternative charges might conceivably have been brought by a prosecutor frustrated by the time limit. Thus, whenever a charge of rape against an underage girl has been preferred in relation to an incident before 1 May 2004, there is the possibility it was laid in circumstances when the case would, but for the time limit, normally have been charged as underage sexual intercourse.⁶⁹ The next place to look is the record of charges under section 14 of the SOA 1956, where defendants might have been wrongly prosecuted in ignorance of the ruling in *J*, or might instead (if *J* was observed) have been prosecuted for other indecent acts with the underage girl, which were not part and parcel of the sexual intercourse itself. Otherwise, the defendant who could not be charged with underage sexual intercourse may have been charged with inciting the underage

⁶⁹ This almost certainly happened in *Kirk* [2008] EWCA Crim 434. Indeed, there is every temptation to bring a rape charge because, if put to the jury, they (if at least satisfied that sexual intercourse took place) are then entitled to convict of indecent assault as an alternative verdict, notwithstanding the lapse in time. This was acknowledged to be a further anomaly in *Cottrell* [2007] EWCA Crim 2016. For criticism, see J Rogers, ‘Fundamentally Objectionable?’ (2007) 157 *New Law Journal* 1252. To charge rape as a mere device for getting a case of time barred underage sexual intercourse to trial would be an abuse of process, *Timmins* [2006] 1 Cr App R 18; but that is not to say that it has not happened. One rather suspects that it has.

girl to perform oral sexual intercourse.⁷⁰ Or, if, having seduced the girl, the defendant then persuaded her to have sex with others, he could have been prosecuted for procuring a third party to have sexual intercourse with a woman under 21,⁷¹ or causing prostitution of a woman (of any age).⁷² Further possibilities are easily imagined.

So, identifying cases where the time limit prevented a charge which would or might otherwise have been brought under section 6 of the SOA 1956 is an undertaking of such proportions that few would expect the CPS to do it; for to do it properly would require revisiting the full accounts of complainants in the files of almost everyone charged with, or who could have been charged with, *any* sexual offence against any underage girl committed up until 30 April 2004.

But that is not to say that the CPS cannot have been expected to have done more in other respects, which brings us to our second obstacle.

B Lack of Engagement from the CPS

Ideally, the human rights argument as outlined in Part II would have been made by the CPS at the time in *J*, since it was (and is) possible to interpret the time limit in Schedule 2 to the SOA 1956 as applicable only to charges under section 6 of the SOA 1956. But, as a new argument, it might have been made at any time since. Today, the CPS should argue that Schedule 6 to the SOA 2003 abolishes the time limit for all trials commencing after the Act came into force, and use the human rights argument in reserve. To do this, it needs only to bring a charge under section 6 of the SOA 1956 and then take an interlocutory appeal to the Court of Appeal⁷³ if or when a trial judge follows the decision in *R v J* and rules the charge to be time barred.

But it would seem that no such strategy has ever been formulated. Only in *Boyes*,⁷⁴ when the decision in *J* was belatedly (in the Court of Appeal) brought to the attention of the Crown

⁷⁰ Contrary to the Indecency with Children Act 1960, s 1(1) and charged separately in *J*, (n 6).

⁷¹ Contrary to SOA 1956, s 23.

⁷² Contrary to SOA 1956, s 22. Both these latter offences were charged in relation to underage sexual activity in *Ali* [2017] EWCA Crim 1211.

⁷³ Under the provisions of the Criminal Justice Act 2003, ss 58–61.

⁷⁴ *Boyes* [2012] EWCA 1174.

(none of the participants at the Crown Court having apparently noticed it⁷⁵) did counsel for the Crown reportedly ask for permission to draft a question for consideration by the Supreme Court. But he later declined to do so, for reasons unexplained. The chaotic background to the case, however, hardly suggests that a well thought out submission had ever been planned.

Indeed, it is more likely that the chaos that plagues the underfunded CPS results in charges relating to underage sexual intercourse *continuing* to be made under section 14 of the SOA 1956, on account of a simple oversight of *J* and its implications. The author has seen many reports of trials where defendants are charged under section 14 and where it is only the alleged fact of underage sexual intercourse which is mentioned in the report: and it is usually not easy to credit that the prosecution must instead have been leading evidence of a separate, unmentioned, indecent assault.⁷⁶ It is on account of this uninspiring pattern that when some police forces purport to have records of offenders being tried and even convicted out of time (as the law is currently understood), one wonders whether some of these records may indeed be right. It is true that the decision in *J* is noted on the CPS website,⁷⁷ but only the bare reference is given, and with little indication of its importance. It is easy to imagine that some busy prosecutors who are not already *au fait* with the problem might overlook it when affected cases happen to come their way,⁷⁸ especially since more of their caseload falls under the SOA 2003 where there are no time limits of which to be wary. We might note that the Court of Appeal has itself complained that the analogous time limit for historic cases of gross indecency between men has been overlooked on several occasions.⁷⁹

The picture which then emerges is one of a lottery where sometimes offenders are wrongly prosecuted despite the time limit, but no one knows how often it has happened. But journalists (and perhaps MPs) who may seek views or insight relating to the time limit are likely to turn to the CPS, and it is a significant frustration that the latter might be unable to

⁷⁵ It was only the single judge, who was asked to give leave to appeal on sentence for a number of sexual offences, who noticed the problem.

⁷⁶ This is so both in the law reports (eg *Ali* [2017] EWCA Crim 1211) and in media reports, even where celebrities are tried: see eg D Sapsted, 'Chris Langham 'abused girl over three years'' *Telegraph Online* (12 July 2007).

⁷⁷ CPS Legal Guidance, 'Rape and Sexual Offences—Chapter 2: Sexual Offences Act 2003—Principal Offences, and Sexual Offences Act 1956—Most commonly charged offences' (CPS Website, 2017).

⁷⁸ Or at least, the problem might not be noted until a rather late stage. See the elliptic passage in *NXB v CPS*, (n 45), [21].

⁷⁹ *Silverwood* (n 28); *Forbes* [2016] EWCA Crim 1388; *Coatman* [2017] EWCA Crim 392. A longer list can be found on Westlaw. In *Silverwood*, Lady Hallett concluded 'Problems of this kind are becoming increasingly common ... Particular care should be taken in cases involving allegations of historic sexual abuse ...'.

provide much of either. Some criticism must be made of apparent indifference here. Even if it is too much to expect the CPS to compile statistics, it could at least form an impression of the problem and its working implications by surveying police investigators, its case workers, and trial lawyers.

Thus, specialist police officers who interview complainants could usefully be asked whether they feel obliged, perhaps awkwardly, to ask whether any separate (ie non-time barred) indecent activity also took place and then to focus their questioning on any such incidents, albeit no doubt to the consternation of the complainant. CPS case workers could be asked how often they have considered alternative charges on account of the time bar, and whether they have seemed appropriate to reflect the apparent level of offending. Trial prosecutors might be asked for their impressions of such cases, where the jury hears of the sexual intercourse and yet is not asked to consider any count relating to it. It is surely possible that some juries wrongly speculate that the CPS itself does not believe the complainant on the matter of the sexual intercourse, thus causing them wrongly to doubt the complainant evidence about other allegations. Ideally, affected past complainants should also be consulted. It would be invaluable to know whether *they* feel that their cases are ineffectively prosecuted on account of the time limit. One imagines that many might feel this way, even if other indecent activities, which they may remember less well, were prosecuted instead of the vaginal sexual intercourse. For many, the vaginal intercourse may well be the most regretted incident of all (eg if it necessitated an abortion). This author recently put this point to a former Crown prosecutor who was used to applying the time limit and charging other offences instead. Did complainants have a problem with this? 'I wouldn't know', came back the answer, and then, after a moment's thought, 'but quite possibly so'.

Some senior prosecutors have said to this author that they had not even heard of the time limit, as though to suggest that, if it is a problem, indeed it cannot be a serious one. But the fact that they have not heard of the time limit is as much a symptom of the problems within the CPS as a possible indication of their absence. It is impossible, to the author's mind, to credit such bland assurances when not even the most basic research seems to have been carried out within the CPS. But journalists and MPs may yet be inclined to give them credit.

V Conclusion

It is arguable that the limit for the offence in section 6 of the SOA 1956 has already been abolished in respect of proceedings commenced since 1 May 2004 by virtue of Schedule 6 to the SOA 2003. For those complainants with suitable facts, an additional argument may be made that Schedule 6 must be so interpreted by virtue of the Human Rights Act 1998. But either way, it will be a courageous complainant who wishes to argue the point through the courts. An unambiguous legislative reform would be better.

So far, however, the indications are that starting a campaign for reform through the media is difficult. The difficulties should cause us to reflect that the police and CPS are predominantly concerned with law enforcement and not with law reform. It should not surprise us if they record offences and decisions in ways which assist them but might quite frustrate researchers who expect to find reasonably reliable statistics. The reform as proposed here would have had a better audience had the media been apprised of it shortly after the decision in *J*: for the media might then have been interested to run a story about its very potential to ruin a high number of very serious cases, and the CPS might then have obliged with a warning about the potential problems. But over ten years later, the evidence of the number of cases affected is missing and the CPS has altogether lost sight of the matter.

Admittedly, by no means all avenues of reform have been exhausted. The determined complainant with a suitable case might yet start judicial review of a decision not to prosecute on account of the time limit; or, perhaps the author, or an influential reader of this article, will prove able to bring the problem to the attention of appropriate MPs or the Ministry of Justice. Even now, it need not be too late for reform.