The Law Commission

CONSENT IN SEX OFFENCES

A Report to the Home Office Sex Offences Review

The Law Commission was set up by section 1 of the Law Commissions Act 1965 for the purpose of promoting the reform of the law.

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ABBREVIATIONS

In this paper we use the following abbreviations:

ACPO: the Association of Chief Police Officers

CLRC: Criminal Law Revision Committee

CLRC, 14th Report: Criminal Law Revision Committee, Fourteenth Report: Offences Against the Person (1980) Cmnd 7844

CLRC, 15th Report: Criminal Law Revision Committee, Fifteenth Report: Sexual Offences (1984) Cmnd 9688

CLRC, 17th Report: Criminal Law Revision Committee, Seventeenth Report: Prostitution (Off-street Activities) (1985) Cmnd 9213

Code Report: A Criminal Code for England and Wales (1989) Law Com 177

Consultation Paper No 119: Mentally Incapacitated Adults and Decision Making: An Overview (1991) Law Commission Consultation Paper No 119

Consultation Paper No 134 *or* the first consultation paper: Consent and Offences against the Person (1994) Law Commission Consultation Paper No 134

Consultation Paper No 139 *or* the second consultation paper: Consent in the Criminal Law (1995) Law Commission Consultation Paper No 139

CPS: Crown Prosecution Service

DPP: Director of Public Prosecutions

ECHR: European Convention on Human Rights

Heilbron Report: Report of the Advisory Group on Rape (1975) Cmnd 6352

HIV: human immunodeficiency virus

Law Com No 218: Legislating the Criminal Code: Offences Against the Person and General Principles (1993) Law Com No 218, Cmnd 2370

Law Com No 231: Mental Incapacity (1995) Law Com No 231

MCCOC: Model Criminal Code Officers Committee (Australia)

Making Decisions: report issued by the Lord Chancellor's Department, October 1999 (Cm 4465)

SPTL: Society of Public Teachers of Law

Strasbourg Commission: European Commission of Human Rights

Strasbourg Court: European Court of Human Rights

Who Decides? (1997) *or* the Green Paper: Who Decides? Making Decisions on Behalf of Mentally Incapacitated Adults – consultation paper issued by the Lord Chancellor's Department, December 1997 (Cm 3803)

PART I
INTRODUCTION

1.1 The genesis of this project was the Report on Offences Against the Person and General Principles,[1] in the course of preparation of which the Commission had to consider the effect of the consent of the victim on liability for the infliction of physical hurt or injury. This, in turn, gave rise to Consultation Paper No 134 on Consent and Offences Against the Person. In the context of its limited scope, Consultation Paper No 134 raised questions about a number of issues. These included: (i) the meaning of consent; (ii) whether, if consent were a defence, a defendant would have the benefit of such a defence judged on the facts as he believed them to be; and (iii) the circumstances in which consent would be rendered ineffective in law by the presence of a number of defined circumstances including fraud, mistake, force, threat (whether of force or otherwise), abuse of authority, or age.

1.2 The response to Consultation Paper No 134 was such that the Commission embarked on a wide ranging study of Consent in the Criminal Law,[2] not limited to offences against the person. That too raised questions of the meaning of consent, capacity to consent, effect on consent of fraud, mistake, force, threats, abuse of power and other pressures, and the mental element in relation to consent. Once again the response to that consultation paper was substantial. The task of analysing that response and developing policies on the multitude of difficult legal and philosophical issues which it threw up has, inevitably, been lengthy and painstaking. One particular aspect has, however, come to the fore.

1.3 In 1999, the Home Office embarked on a Review of Sex Offences. As part of its remit the Home Office is considering, in the context of sex offences, the meaning of consent, capacity to consent, the mental element of sex offences insofar as they focus on consent or the lack of it, and matters which prevent a valid consent being given such as force, threats, deceit, mistake and age. In the light of the work which had already been done by the Commission, the Home Office sought our assistance in connection with its review. The Commission was happy to assist by refocussing its ongoing work on consent to concentrate on sex offences.

1.4 What appears below is the fruit of that exercise. We have addressed: the meaning of consent; capacity to consent, whether on the ground of age, or mental disability; invalidity of consent, whether on the ground of mistake, deceit or threat; and the mental element of sex offences in relation to the presence or absence of the victim's consent.

1.5 In separating off this element of our work for the purpose of this particular review, we have been aware of the requirement for the law to develop in a

[1] (1993) Law Com No 218.

[2] (1995) Consultation Paper No 139.

systematic and consistent manner. Thus, we have sought to address the question whether any of our proposals would, or may, result in different principles applying in sex offences and in other offences such as offences against the person. Our view is that, save as may specifically be mentioned, our proposals would not be likely to lead to any such inconsistency.

1.6 We would like to take this opportunity to express our gratitude to various parties for their help in the preparation of this paper. We would like to thank Lord Justice Brooke for his assistance, especially during the early stages of the project, and Mr Justice Silber for his hard work during his tenure as Law Commissioner. Finally, we are grateful for the thorough analysis of responses by our consultant Paul Roberts of the Faculty of Law, University of Nottingham.

PART II
THE ROLE OF CONSENT IN SEXUAL OFFENCES

2.1 This part

(1) describes the existing sexual offences in which liability is conditional on the absence of consent;

(2) proposes a definition of consent, for the purpose of these offences or any further offences of non-consensual sexual behaviour which may be created; and

(3) considers the rules on the burden of proof where consent is in issue for the purpose of any such offences.

NON-CONSENSUAL SEXUAL OFFENCES

Rape

2.2 Section 1 of the Sexual Offences Act 1956[1] makes rape an offence, and states that a man commits rape if, inter alia,[2] he

> has sexual intercourse with a person (whether vaginal or anal) who at the time of the intercourse does not consent to it (section 1(2)(a)); or
>
> induces a married woman to have sexual intercourse with him by impersonating her husband (section 1(3)).

Indecent assault

2.3 It is an offence for a person to commit an indecent assault on a woman,[3] and a separate offence to commit an indecent assault on a man.[4] The phrase "indecent assault" is not accompanied by a statutory definition. "Assault" consists of an act which involves the violation of another's person, however minor:[5] and an indecent assault is one which involves conduct which "right–minded persons" would

[1] As substituted by the Criminal Justice and Public Order Act 1994, s 142. This Act (1) confirmed the decision of the House of Lords in *R v R* [1992] 1 AC 599, that a man is capable of raping his wife; (2) provided that rape may be performed by way of either vaginal or anal intercourse; and (3) allowed for both women and men to be the victims of rape. Only a man can commit rape as principal offender, although a woman can be an accessory (*R v Ram* (1893) 17 Cox CC 609 at 610N).

[2] In what follows we confine our discussion to the "conduct element" of rape.

[3] Sexual Offences Act 1956, s 14(1).

[4] Sexual Offences Act 1956, s 15(1). The maximum penalty for each is ten years' imprisonment: Sexual Offences Act 1956, s 37 and Sched 2 para 17 (as amended by Sexual Offences Act 1985, s 3(3)), s 37(3) and Sched 2 para 18.

[5] Where indecent assault is concerned the word "assault" may consist in either the application or the apprehension of force, or indeed both.

consider to be indecent according to contemporary standards of modesty and privacy.[6]

2.4 Liability for assault (including indecent assault) is normally, but not always,[7] conditional upon the fact that the victim has not consented to the conduct in question. For the purposes of *indecent* assault the consent of a child under 16 does not count.

THE MEANING OF CONSENT

2.5 In the second consultation paper, we proposed an explanation of the meaning of consent. It was intended only for non-sexual offences against the person, and much of it is not relevant to this paper. The relevant part read:

> "consent" should mean a valid subsisting consent … and consent may be express or implied …

2.6 We stressed that this was an *explanation* to aid juries. It was not intended to be a definition. Its purpose was to flesh out the distinction between consent and submission drawn in *Olugboja*.[8] Our proposal received widespread support.

2.7 We have thought carefully whether it is more appropriate to offer a *definition* of "consent", rather than merely an explanation for the illumination of the jury's consideration of the application of an ordinary English word. The latter approach could be justified on the basis that there is a two-stage process. The first stage involves the jury considering whether, as a matter of fact, there was, or may have been, consent to the act in question. If so, the jury may then go on to consider whether that consent was *vitiated* by reason of want of capacity, mistake or threat. That second stage would involve their applying rules of law, upon which they would be directed by the judge.[9]

2.8 Upon reflection, however, we have concluded that an explanation along these lines would be less helpful than a straightforward definition. It is too convoluted and artificial to ask a jury to separate out the question "did she consent?" from the question "if so, what underlay her 'consent' which may, as a matter of law, invalidate her 'consent'?" We therefore conclude that the legislation should include a *definition* of consent.

6 *Court* [1989] AC 28, 36, *per* Lord Ackner.

7 See *Boyea* [1992] Crim LR 574; *Wollaston* (1872) 12 Cox CC 80; *Brown* [1994] 1 AC 212. In *Brown,* the House of Lords held by a 3:2 majority that consent is not a defence to (indecent) assault where the conduct in question causes actual or grievous bodily harm within the meaning of ss 47, 18 and 20 of the Offences Against the Person Act 1861.

8 [1982] QB 320. Women Against Rape (London) thought it represented a retrograde step from that distinction.

9 The law on these issues is the subject of consideration and recommendation in Parts III-VI below.

2.9 We also consider that, while it may be acceptable for an *explanation* to be couched in the same terms as that which it is explaining (as in our previous suggestion, that "'consent' should mean a valid subsisting consent"), this is less satisfactory in the case of a definition. The essence of consent, we believe, is *agreement* to what is done. "Agreement" is the principal synonym for "consent" to be found in dictionaries. Accordingly, we have selected it as the word most likely to illuminate the concept for juries.

2.10 For the purposes of the criminal law of sexual offences, we further believe that an apparent agreement should not count as consent unless it is a *free and genuine* agreement. The formula "free agreement", and variations on the theme, are to be found in a number of common law jurisdictions. The word "free" signifies that an agreement secured by duress will not suffice. We believe that it conveys and illuminates for juries the essential difference between consent on the one hand and mere submission on the other. We envisage that the concept of free agreement would be further defined in the way we recommend in Part VI below. Similarly, the word "genuine" raises the issues of deception and mistake.[10] We make recommendations in Part V as to the circumstances in which these factors should preclude an agreement from being regarded as genuine.

2.11 Consistently with our proposals in the second consultation paper, we also believe that an agreement to an act should not be regarded as a consent to that act unless it is *subsisting* at the relevant time. If what is relied on is past agreement, this will mean *both* (a) that, when previously given, the agreement must have extended to the doing of the act at that later time, *and* (b) that it must not have been withdrawn in the meantime.[11] We believe that it should be made clear that consent may be express or implied.[12] Finally, we think the definition should make it clear that consent may be evidenced by either words or conduct (whether present or past).

2.12 **We recommend that, for the purpose of any non-consensual sexual offence,**

(1) "consent" should be defined as a subsisting, free and genuine agreement to the act in question; but

(2) the definition should make it clear that such agreement may be

[10] Another possible term for this purpose might be "informed"; but that is, perhaps, more appropriately contrasted with both "misinformed" and "ill-informed". Further, "genuine" more graphically draws the jury's attention to this ground of potential invalidity of consent. The use of the word "informed" may serve to complicate the issue by diverting minds to the irrelevant issue of the lack of wisdom of the consent given.

[11] See also para 4.54 below, on the effect of incapacity which commences between the giving of the agreement and the doing of the act.

[12] One respondent thought that only *express* consent should suffice, because courts are too ready to identify an implied consent in rape trials. We considered this view, but have come to the conclusion that sexual activity is frequently assented to by non-verbal conduct, and that it would be wrong to disregard such consent.

(a) express or implied, and

(b) evidenced by words or conduct, whether present or past.

THE BURDEN OF PROOF

2.13 It is convenient to deal here with the question of the burden of proof where consent is in issue. At present the prosecution must prove, to the criminal standard of proof, that the complainant did not consent.[13] In the second consultation paper, we had not formulated a firm view on whether this should be changed, but we set out the relevant arguments on both sides and invited responses.

2.14 More than two-thirds of those who responded to this issue supported the traditional view that the burden of proof should lie with the prosecution. Paul Roberts stated that it would be authoritarian to do otherwise, given that it is generally harder to prove innocence than to establish guilt, and that the prosecution has significant investigative advantages and therefore is in a better position to bear the burden of proof.

2.15 Of those who favoured reversing the burden of proof, several cited the need to protect vulnerable victims, especially females experiencing domestic violence. It was also said to be protective of the autonomy of the victim to make it harder for the defendant to rely on consent. Respondents also felt that it would not be unfair to expect the defence to prove something that is part of the defendant's own intimate knowledge, whereas it would be onerous for the prosecution to do so.

2.16 We believe that we should follow the views of the majority of respondents who were for retaining the orthodox approach. We are also aware that if we were to do otherwise we would, in the words of Paul Roberts, be saying to defendants:

> You may be convicted of a serious criminal offence which attracts a substantial maximum sentence unless you can prove on the balance of probabilities that you did something that was not wrong. If, having

[13] It is sometimes suggested that in the case of indecent assault (though not rape) consent is a defence in the strict sense, rather than its absence being an element of the offence; that the defence therefore has the *evidential* burden of raising the issue, as in the case of other defences such as self-defence; and that only if that burden is discharged does the prosecution have to discharge the *legal* burden of disproving consent. It would be surprising if there were a difference in this respect between rape and indecent assault, and we know of no clear authority for such a distinction. According to Professor Sir John Smith, the better view is that expressed by Glanville Williams in "Consent and Public Policy" [1962] Crim LR 74, 75, and emphatically endorsed by Lord Slynn in *Brown* [1994] 1 AC 212, viz that "It is …inherent in the concept of assault and battery that the victim does not consent". Since an evidential burden can be discharged by the existence of evidence from any source, the question could only arise if the prosecution fails to adduce *any evidence at all* on the issue of consent – eg where P testifies that D touched her indecently but gives no comprehensible answer to the question "Did you consent to what he did?" – yet seeks a conviction anyway. We think it clear that, in the unlikely event of such circumstances arising, a submission of no case ought to succeed.

heard all the evidence, we remain unsure whether you committed the offence or not, we will convict you anyway.

2.17 Some reverse onus provisions have been held justified by the European Court of Human Rights,[14] and the House of Lords has held in *R v DPP, ex p Kebilene*[15] that Article 6(2) of the Convention, although couched in absolute terms, is not to be regarded as imposing an absolute prohibition on reverse onus provisions. However, we believe that the thrust of the Convention is that the burden of proof should remain on the prosecution. We therefore propose preserving the traditional view. **We recommend that, for the purposes of any non-consensual sexual offence, the prosecution should bear the burden of proving the absence of consent, to the criminal standard of proof.**

14 *Salabiaku v France* A 141-A (1988), 13 EHRR 379; *Hoang v France* A 243 (1992), 16 EHRR 53.

15 [1999] 3 WLR 972.

PART III
CAPACITY TO CONSENT: MINORS

3.1 In this part we explain our approach to the general question of capacity to consent; we discuss the question of age limits for sexual offences; and we recommend a test for establishing the capacity of a child to consent.

CAPACITY TO CONSENT: GENERAL

3.2 In the second consultation paper we provisionally proposed a rule that

> For the purposes of any offence to which consent is or may be a defence, a valid consent may not be given by a person without capacity. [1]

3.3 The vast majority of respondents who specifically addressed this proposal agreed with it: 21 expressed support and two dissented. Both dissentients opined that the issue of capacity to consent should be left as a question of fact in each case.[2] Our proposed scheme does, in fact, set up an essentially factual test of capacity. Even if the existing common law approach is basically sound, there is an advantage, on grounds of clarity, transparency and for the avoidance of doubt, in codification of the relevant criteria. **We recommend that, for the purposes of any non-consensual sexual offence, a valid consent may be given only by a person who has capacity to give it.**

AGE LIMITS

3.4 Before turning to the circumstances in which a minor should be regarded as having capacity to consent to sexual conduct, we must explain the role played in the law by age limits. In respect of the present law on *sexual* offences (as opposed to other offences against the person), age limits are not, in truth, concerned with capacity to consent.

3.5 Two criminal law policy objectives operate in this area. The first is that of forbidding sexual activity with children, whether consensual or not.[3] The second is forbidding non-consensual sexual activity with anyone. The first objective is achieved in two ways. One is directly to criminalise the activity with children. The other is to use the general offence relating to non-consensual sexual activity, and *deem* children to be incapable of giving consent. The first approach is used in relation to vaginal and anal intercourse, in the form of the offences of unlawful

[1] Consultation Paper No 139, para 5.21(1).

[2] It was added that part of the proposed formulation in Proposal 14 might appropriately be used to direct juries on the meaning of genuine consent.

[3] Thus it is irrelevant *for the purpose of this objective* whether an apparent consent is effective or valid.

sexual intercourse[4] and buggery, which prohibit these acts with a person under 16 or 18 respectively. On the other hand, in relation to any other form of sexual activity, the second approach is used. For example, the offence covering adult, non-consensual activity – indecent assault – is used to criminalise consensual activity with a child by means of a provision deeming children under 16 incapable of giving consent. This does not truly address the child's capacity to consent. It is merely a device to accomplish the distinct objective of criminalising consensual sexual activity with children.[5]

3.6 The second policy objective is achieved in the case of rape, which requires the prosecution to prove absence of consent in all cases. In the case of children, however, the current law is that the prosecution may prove absence of consent on the occasion charged by proving that the victim was *incapable* of giving consent – whether through age, the consumption of drink or drugs, or mental disability.[6]

CAPACITY TO CONSENT IN MINORS: THE SECOND CONSULTATION PAPER

Our proposals

3.7 Our proposal in the second consultation paper was to codify the existing law in a single statutory test of capacity to consent, as follows:

> (2) A person should be regarded as being without capacity if when he or she gives what is alleged to be his or her consent –
>
> > (a) he or she is under the age of 18 and is unable by reason of age or immaturity to make a decision for himself or herself on the matter in question; …
>
> (3) In relation to those matters in which a person under the age of 18 may give a valid consent under our proposals, such a person should be regarded as being unable to make a decision by reason of age or immaturity if at the time the decision needs to be made he or she does not have sufficient understanding and intelligence to understand the information relevant to the decision, including information about the reasonably foreseeable consequences of deciding one way or another or of failing to make the decision.
>
> (4) In determining whether a person under the age of 18 has sufficient understanding and intelligence for these purposes, a court should take into account his or her age and maturity as well as the

4 Currently, unlawful sexual intercourse as an offence is severely hamstrung by the time limit on prosecutions and the low maximum sentence. It is assumed that the Home Office Review will remedy this.

5 An age limit *might* be used to deal with the factual issue: see the proposal at para 3.21 below.

6 *Malone* [1998] 2 Cr App R 447.

seriousness and implications of the matter to which the decision relates.[7]

3.8 The intention was that this test would apply whenever Parliament did not lay down a specific age limit relating to the activity in question. It was not proposed to change the existing structure of age limits in respect of sexual offences.[8]

Responses to our proposals

3.9 It is important in considering the weight of responses to bear in mind that much of the discussion in this area focused on non-sexual offences against the person. It is difficult to avoid the conclusion that many respondents had assaults uppermost in their minds.[9]

3.10 Nevertheless, there was significant support amongst the respondents to our proposals for a flexible *Gillick*-style test of competence. Some of those who approved of our position in principle were nevertheless critical of our attempted definition and explanation of the notion of capacity, and were concerned about our definition's possible side-effects.

3.11 Many of the respondents thought that our definition and explication of the notion of capacity to consent were too complicated for the purposes of the criminal law. The CPS, ACPO and the Justices' Clerks' Society, for instance, emphasised the practical difficulties which would be involved in an attempt to prove to a court that a particular young person was possessed of a certain level of understanding, intelligence, or maturity, pointing out that these difficulties would be compounded in the – not improbable – event of a delay between the relevant incident and the trial.

3.12 The Justices' Clerks' Society feared, moreover, that our proposal might result in the *minor's* being "on trial" on the issue of capacity, replicating the problematic situation in which rape victims, currently, often find themselves placed. ACPO shared this concern, and was worried that the law as we conceived it would offer little protection to those young people who need it most, such as teenage prostitutes. Another respondent remarked in a similar vein that a young person might very well fulfil the *Gillick*-style criteria of capacity that we had put forward, and yet have been driven to consent to the activity in question by cultural factors, bullying, a wish to conform, or some other motivation which, arguably, prevented

[7] Consultation Paper No 139, para 5.21. The test was drawn from our understanding of the law as it had developed principally in the context of consent to medical treatment, particularly in *Gillick v West Norfolk Area Health Authority* [1986] AC 112. This test is significantly more sophisticated than anything actually enunciated in the context of sexual offences.

[8] Consultation Paper No 139 para 5.20.

[9] The SPTL Criminal Justice Group, for instance, said they favoured a clear-cut single age limit, below which a child "would be deemed to be incapable of consent to injury or sexual acts involving indecency". Did they really mean that what is now unlawful sexual intercourse should become rape, regardless of actual consent? If they did, one would expect such a far-reaching implication to be specifically spelt out.

him or her from exercising a genuinely free choice. Finally, the Magistrates' Association appeared to concur with our proposal that the law should take a flexible approach to the issue of consent, but to regard the definition of "capacity" which we put forward as superfluous; for, in their view, "Magistrates are well able to determine whether a particular minor … lacked capacity to consent" without such a definition.

3.13 It is difficult to avoid the conclusion, however, that much of this can only be sensibly related to the debate on non-sexual offences against the person. In rape trials where a child is the alleged victim, the courts are inevitably asked to decide if a particular child on a particular occasion was consenting – or, if apparently so, was *capable* of consenting. In such a case, capacity to consent is now an issue upon which the judge directs the jury as best he or she can. Our proposal merely seeks to identify the proper approach to capacity in such a case. It seems that the concerns of, for instance, the Justices' Clerks' Society and ACPO were based on the misapprehension (in the case of sexual offences) that we were proposing an *additional* requirement of capacity. We did not, and do not, propose disturbing the way in which capacity becomes relevant – as proof of an absence of consent on the occasion charged. The first question will still be "did the complainant consent?", to which one answer might be "no, because she was not capable of consenting".

RECOMMENDATIONS

3.14 We adhere to the view that there should be an explicit statutory test for capacity. We accept, however, that our earlier draft was too complicated for the purposes of the criminal law, not least because couched in negative form. The test we propose below is simpler.

3.15 Our original proposal related to anyone under the statutory age of majority, 18. Clearly, this would not be appropriate for sexual offences. The general age at which the law ceases to prohibit sexual activity with children is 16 (except for male homosexual acts, which is currently 18 but seems likely to become 16). The law allows that young people over that age should be able to take their own decisions in sexual matters. That must include the giving and withholding of consent. The test of capacity should, therefore, apply only to those below that age.

3.16 Our revised version of the test is as follows. **We recommend that, for the purposes of any non-consensual sexual offence, a person under the age of 16 should be regarded as having the capacity to consent to an act only if he or she is capable of understanding**

(1) the nature and reasonably foreseeable consequences of the act, and

(2) the implications of the act and of its reasonably foreseeable consequences.

3.17 This test is considerably more straightforward than the test which we proposed in the second consultation paper. To begin with, whereas our previous test took the negative form of a test of *lack of capacity* to consent, the test we now propose is a

test of the positive concept of *capacity* to consent. We believe that a positive test is easier to grasp than a negative test. Secondly, we have not, as we did previously, supplemented the primary test of (lack of) capacity, which we define in terms of understanding, with a *further* test aimed at determining whether or not the conditions implicit in that definition are satisfied. To this extent, we agree with the response made by the Magistrates' Association, that magistrates are capable of gauging the intelligence and maturity of minors without having the constituents of these latter characteristics spelled out to them. On the other hand, we have kept to our original view that *some* statutory guidance as to what capacity to consent consists in is both desirable and necessary; and our modified test reflects this fact.

An additional proposal: a conclusive low age limit for rape

3.18 As we said above, the current structure of age limits in respect of sexual offences is a means of achieving criminalisation, rather than a way of addressing capacity to consent. It is, however, possible to use an age limit as a way of dealing with the real, factual issue of capacity. A principal justification for the current requirement in rape for actual consent is that non-consensual sexual intercourse with a child is more serious than consensual sexual intercourse, and so should be both marked by a more serious offence-label, and sentenced more severely. However, below a certain age, capacity to consent to sexual conduct cannot possibly arise as a live issue. Below this age, there is really no difference, in either labelling or sentencing terms, between sexual intercourse with and without some apparent but ineffective consent. There is, therefore, an argument for a provision stating that, below such an age, the prosecution need not prove lack of consent or incapacity to consent. There should be an irrebuttable presumption that the child did not have the capacity to consent. What that age should be is a matter for those expert in child development and those with a wider social policy remit. We note that the Sexual Offences Act 1956 recognises, for various purposes, a watershed at the age of 13.[10] We suspect that, given the changes over time in rates of child development, 13 would now be too old. The aim would be for an age at which no or virtually no individual is likely, as a matter of fact, to be able to give an effective consent to sexual intercourse.[11] We are aware, for instance, of recent notorious cases in which 12-year-old girls have given birth to the offspring of child fathers, in, or after, what would appear to be consensual relationships.

3.19 If an age were set below which a significant number of girls would have real capacity to consent, it would introduce two tiers of rape: non-consensual rape and consensual, or statutory, rape. That would detract from the seriousness of rape as a labelling offence. It would also present serious sentencing difficulties. The issue of real, as opposed to presumed, presence or absence of consent would have to be determined, to allow the judge to sentence appropriately (one would not, for instance, expect the child partner of the 12-year-old mother to be

[10] Eg in respect of unlawful sexual intercourse (ss 5 and 6), incest (ss 10, 11).

[11] Illustratively, we suggest that it is likely to be something between 9 and 11.

sentenced as though the mother had not consented), but it is difficult to see how. The question would not be determined during the trial itself, because it would be irrelevant. And it would be intolerable to require the complainant to give evidence at a *Newton* hearing for the purpose.

3.20 It might be objected that our low age limit would have little practical effect, in that a defendant charged with raping a girl of such an age would be unlikely to advance a defence of consent. While it is true that such a defendant would be *unwise* to do so, because (ex hypothesi) it is highly unlikely that a jury would ever believe him, he might nonetheless insist on running such a defence for reasons of his own, resulting in all the trauma of an unnecessary trial for the complainant.

3.21 **We therefore further recommend that there should be an age limit below which there is an irrebuttable presumption that a child does not have the capacity to consent to sexual intercourse for the purposes of a charge of rape. This limit should be set at an age below which virtually no child would in fact be capable of consenting to sexual intercourse.**

PART IV
CAPACITY TO CONSENT: MENTAL INCAPACITY

4.1 The law presumes that persons who have attained the age of 18[1] have sufficient intelligence and maturity to make their own decisions; but such a person cannot give a valid consent to an act if he or she is incapable of understanding the nature of the act. In this part we examine the position relating to the capacity of the mentally disabled to consent to sexual activity. We begin by setting out the present law, both in our own jurisdiction and in certain others. We outline the relevant proposals in our second consultation paper[2] – proposals that were strongly influenced by our report on Mental Incapacity,[3] and in particular by clause 2 of the draft Mental Incapacity Bill. We briefly consider the recommendations of the earlier report, and the Government's response to them, before examining the responses received to our second consultation paper, and making recommendations.

STATUTE LAW

4.2 Section 7 of the Sexual Offences Act 1956[4] provides that it is an offence for a man to have unlawful sexual intercourse[5] with a woman who is a "defective", except in the case where he does not know and has no reason to suspect that she is a defective. Section 45[6] defines a "defective" as "a person suffering from a state of arrested or incomplete development of mind which includes severe impairment of intelligence and social functioning".[7] Section 14(4) prevents a woman who is a defective from being capable in law of giving a consent to an act which, in the absence of consent, constitutes an indecent assault; and section 15(3) makes the same provision in respect of defective men. Section 9 makes it an offence for a person to procure a woman who is a defective to have sexual intercourse in any part of the world, unless he does not know and has no reason to suspect her to be a defective.

4.3 The Sexual Offences Act 1967 provides that a man who is suffering from a "severe mental handicap" cannot in law give a consent to a *homosexual* act which

[1] "Full age" under the Family Law Reform Act 1969, s 1(1). For the capacity of minors to consent, see Part III above.

[2] Consultation Paper No 139, proposals 12, 13(2), 17 and 18.

[3] Law Com No 231, published in February 1995, after a five year study. This related to mental incapacity and the *civil* law.

[4] As substituted by the Mental Health Act 1959, s 127(1)(a).

[5] The House of Lords, in *R* [1992] AC 599 treated the word "unlawful" in the definition of rape as mere surplusage (see Lord Keith at 622H-623A), for reasons that seem equally applicable to s 7 of the Sexual Offences Act 1956.

[6] As substituted by the Mental Health Act 1959, s 127(1)(b).

[7] As substituted by the Mental Health (Amendment) Act 1982, s 65(1), Sched 3, Pt I, para 29.

would have the effect of preventing such an act from being an offence,[8] and defines "severe mental handicap" in the same way as "defective" in the 1956 Act.[9]

4.4 Finally, under section 128 of the Mental Health Act 1959,[10] it is an offence for a man who is employed in, or is a manager of, a hospital or mental nursing home to have "unlawful sexual intercourse" with a woman, or to commit buggery upon or an act of gross indecency with a man, who is receiving treatment for a mental disorder at the hospital or at home.[11]

COMMON LAW PRINCIPLES

4.5 At common law, no specific criteria are identified as material for determination of whether or not a person has the capacity to consent to a sexual act: this is a question of fact, to be determined in accordance with the ordinary meaning of the word "consent" on the basis of common sense and experience.[12] Recent examples given in the Court of Appeal include incapacity by reason of age, or lack of understanding due to mental handicap, and incapacity by reason of drink or drugs.[13]

THE APPROPRIATE BALANCE BETWEEN PATERNALISM AND THE RIGHT TO RESPECT FOR PRIVATE LIFE

The role of the law

4.6 There are competing goals in need of reconciliation when issues of mental capacity and consent are considered: the need to respect choices made by those who are mentally disabled, and the need to ensure that such people are protected

[8] Sexual Offences Act 1967, s 1(3).

[9] Sexual Offences Act 1967, s 1(3A).

[10] As amended by s 1(4) of the Sexual Offences Act 1967.

[11] Note the wider scope of this provision, which protects those with mental *disorder* as defined in s 1(2) of the Mental Health Act 1983: "mental illness, arrested or incomplete development of mind, psychopathic disorder and any other disorder or disability of mind". A recent review of the Mental Health Act 1983 (dated November 1999) suggests redefinition of mental disorder as the diagnostic trigger for compulsory detention. A broad definition is favoured in the terms described by us in Law Com No 231 for "mental disability", viz "*any disability or disorder of mind or brain, whether permanent or temporary, which results in an impairment or disturbance of mental functioning*" (paras 4.5 – 4.8) – subject to further consultation with Scottish colleagues.

[12] See *Fletcher* (1859) Bell CC 63; 169 ER 1168, in which a conviction for rape was upheld in respect of sexual intercourse with a girl of weak intellect. The jury found that she was incapable of giving consent due to her defect of reasoning. See also *Lang* (1976) 62 Cr App R 50, *per* Scarman LJ: "the critical question is … whether she understood her situation and was capable of making up her mind". The cases of *Lang* and *Howard* [1966] 1 WLR 13 were recently distinguished by the Court of Appeal in *Malone* [1998] 2 Cr App R 447, but this was not in respect of the meaning of *capacity* to consent. See also *Olugboja* [1982] QB 320, *Linekar* [1995] QB 250 and *McAllister* [1997] Crim LR 233.

[13] *Malone* [1998] 2 Cr App R 447.

from abuse and exploitation.[14] These principles are recognised in Article 7 of the United Nations Declaration on the Rights of Mentally Retarded Persons.[15] In our 1995 report on mental incapacity in the *civil* law[16] we noted an increasing emphasis on the rights of mentally incapacitated people, marking a shift away from a purely paternalistic approach to vulnerable populations.

4.7 In our Consultation Paper No 119, Mentally Incapacitated Adults and Decision Making: An Overview, we recognised a problem with the provisions in the Sexual Offences Acts 1956 and 1967 which provide that as a matter of law a "defective" cannot give a valid consent to sexual activity:

> … they may cover people who are in fact capable of giving a real consent to intercourse or other sexual activity, but have a statutory incapacity imposed upon them by the criminal law. The men involved in these cases may often be handicapped themselves, and it seems unfair that they should automatically be at risk of prosecution if there has been no exploitation involved.[17] In some circumstances, these provisions of the criminal law could be seen as imposing an unwarranted fetter upon the freedom of mentally incapacitated

[14] A report of the Scottish Society for the Mentally Handicapped of a workshop on Sexual Abuse and HIV/AIDS in the field of mental handicap (1991) pp 8–9 states that those with learning disabilities are vulnerable to exploitation and likely to be regarded as "safe victims, due to a lack of emotional and behavioural maturity". Societal attitudes create a risk that they are seen as child-like. Environmental settings may offer opportunities for abuse without detection. There may be a lack of victim resistance (due to the "pervasive atmosphere of compliance" in which many with learning disabilities live, being "trained to obey"), an inability to communicate well, lack of sexual language, no-one to whom disclosure can be made, and a lack of normative behaviour reference points. Victims may be disbelieved, or their comments interpreted as part of their disability. They are vulnerable to pregnancy and its associated risks, sexually transmitted disease, and emotional distress (which might develop independently of any exploitative element in the relationship).

[15] "Whenever mentally retarded persons are unable, because of the severity of their handicap, to exercise all their rights in a meaningful way or it should become necessary to restrict or deny some or all of these rights, the procedure used for that restriction or denial of rights must contain proper legal safeguards against every form of abuse. This procedure must be based on an evaluation of the social capability of the mentally retarded person by qualified experts and must be subject to periodic review and to the right of appeal to higher authorities." Declaration on the Rights of Mentally Retarded Persons, 1971 UN General Assembly 26th Session, Resolution 2856.

[16] Law Com No 231.

[17] The effect of *Tyrrell* [1894] 1 QB 710, in which it was held that a person for whose protection an offence has been created cannot be convicted of aiding and abetting a person who commits the offence against her, is that a "defective" victim cannot be convicted of aiding and abetting any of the Sexual Offences Act offences committed *against* him or her. The ratio of this case is limited to that principle. Whilst it may be argued that a natural extension of this principle would be to say that a male defective who is protected from indecent assaults by s 15(3) should not himself be convicted of committing an indecent assault on a woman contrary to s 14(4), this would be an extension of the principle and is not what the statute says. Whilst the intention of the legislature might be argued about, it is not clear that sexual activity between defectives would necessarily be excused from criminality by an extension of the principle in *Tyrrell.* [Footnote supplied]

people.[18] They can also pose problems for staff who may fear, even if they do not risk, prosecution for aiding and abetting.[19]

4.8 It is of crucial importance that any provision intended to give recognition to sexual autonomy does not operate to deny vulnerable people adequate legal protection from exploitation.[20]

4.9 A comparison of the approach taken to these issues in Ireland and in Australia is illuminating. The former ultimately chose a high level of paternalism; in the latter, recommendations for a Model Criminal Code favour greater individual autonomy.

4.10 A report by the Law Reform Commission of Ireland has addressed the public interest in discouraging the exploitation of people with mental handicap. Where a competent man has sexual intercourse with an incompetent person, it argues, there is

> an intrusion on the dignity of the human personality in circumstances of gross inequality which, we are satisfied, the law should condemn … [I]t should be an offence to engage in sexual intercourse with persons suffering from mental handicap to such a degree as to render them susceptible to exploitation.[21]

4.11 The Commission was conscious of the fact that proscription of sexual intercourse with a person who is mentally impaired left open the possibility that "a criminal offence may be committed although there was no element of exploitation in the particular case".[22] It considered the inclusion of a requirement of proof that the defendant "*actually* intended to exploit the complainant", but rejected this because "in an area where convictions are notoriously difficult to obtain, yet another obstacle would confront the prosecution".[23]

[18] M J Gunn, "Sexual Rights of the Mentally Handicapped", in E Alves (ed), *Issues in Criminological and Legal Psychology No 10: Mental Handicap and the Law* (1987) p 31.

[19] Consultation Paper No 119, para 2.27.

[20] See Carol Jenkins, "Abuse of Trust" (October 1998) Police Review, p 22, and MENCAP's study "Barriers to Justice" (in respect of which, see now the Youth Justice and Criminal Evidence Act 1999). The charity VOICE UK has published "Competent to Tell the Truth" (1998), a report of the Working Party on People with Learning Disabilities as Witnesses (chaired by Professor Michael Gunn).

[21] "Sexual Offences against the Mentally Handicapped" (1990) paras 29–30.

[22] *Ibid.*

[23] "[T]he arguments are finely balanced … [I]f our proposals are accepted, we will be relying heavily on prosecutorial discretion to prevent the trial and conviction of a person who is engaged in a loving, rather than exploitative, sexual relationship with a person with mental handicap. We have, however, concluded that such risks as there are in thus relying on prosecutorial discretion are, on the whole, outweighed by the risk inherent in creating further difficulties in the prosecution of such cases." *Ibid,* para 31.

4.12 A recommendation aimed at avoiding the criminalising of *consensual* sexual activity between two mentally handicapped or mentally ill people provided as follows:

> None of the acts of vaginal sexual intercourse, or anal penetration or other proscribed sexual activity should constitute an offence where both participants are suffering from mental handicap or mental illness as defined unless the acts in question constitute a criminal offence by virtue of some other provision of the law.[24] [ie sexual activity will not be regarded as criminal merely because of the mentally handicapped or mentally ill status of such participants.]

This was not however included in subsequent legislation.[25]

4.13 More recently, in Australia, MCCOC,[26] reporting on Sexual Offences Against the Person,[27] took a narrow view of the legitimate scope of legal paternalism:

> In the discussion paper, the Committee expressed the view that a general blanket prohibition in the Model Criminal Code on all sexual contact would not properly allow for the sexual rights of persons with impaired mental functioning.

4.14 The Committee was attracted by offences in New South Wales and Victoria which prohibit sexual contact between a carer and a person with impaired mental functioning, and believed that the scope of such offences should be limited to such persons.[28] This is against the background of a statutory definition of consent which deems there to be no consent where "the person is incapable of understanding the essential nature of the act."[29] Thus,

> consent would not necessarily be lacking if a person has sufficient knowledge or ability to comprehend the physical nature of the sexual act, and to understand the difference between that act and an act of

[24] *Ibid,* para 35 and Recommendation 4.

[25] The Criminal Law (Sexual Offences) Act 1993 enacted the majority of the proposals of this report. Section 5 (Mental Incapacity), passed without any amendments, prohibits sexual intercourse with a person who is "mentally impaired", meaning "suffering from a disorder of the mind, whether through mental handicap or mental illness, which is of such a nature or degree as to render a person incapable of living an independent life or of guarding against exploitation" (s 5(5)). It is a defence where the accused shows that at the time of the alleged commission of the offence he did not know and had no reason to suspect that the person in respect of whom he is charged was mentally impaired.

[26] The Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General.

[27] May 1999, at p 177.

[28] With a defence where the giving of consent was not unduly influenced by the care relationship. This aims to distinguish between truly exploitative sexual contact from free and voluntary consent. "Otherwise, the Code will arbitrarily restrict the sexual autonomy of mentally impaired persons when it comes to their carers" (para 5.2.32). In addition there is a marriage and "de facto partner" defence, because the wide definition of a carer would include a mentally impaired person's spouse.

[29] Section 5.2.3(2)(d).

> another character, such as bathing of the body or a medical examination.
>
> There is an argument that this test is too narrow … A person should be deemed to be not consenting, it is argued, if he or she does not understand concepts such as virginity, pregnancy, and the social significance of intercourse.

4.15 MCCOC however agreed with the view of the Victorian Law Reform Commission that "Enabling those with impaired mental functioning to understand completely the consequences of their actions is a wider social responsibility that needs to be met through education", and recommended the narrow test of capacity.[30]

United Nations Declaration on the Rights of Mentally Retarded Persons, Articles 1, 6 and 7

4.16 Article 1 of the United Nations Declaration on the Rights of Mentally Retarded Persons provides that "The mentally retarded person has, to the maximum degree of feasibility, the same rights as other human beings". Article 6 provides, inter alia, that "The mentally retarded person has a right to protection from exploitation, abuse and degrading treatment". Article 7 has been set out earlier, in footnote 15 to paragraph 4.6.

European Convention on Human Rights, Articles 1, 3, 7 and 8, and the Human Rights Act 1998

4.17 Article 1 of the European Convention on Human Rights provides:

> The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section 1 of this Convention.

4.18 Article 3 provides:

> No one shall be subjected to torture or inhuman or degrading treatment or punishment.

4.19 Article 7 of the Convention enshrines the principle of certainty in the criminal law. The Commission has stated that it

> confirms the general principle that legal provisions which interfere with individual rights must be adequately accessible, and formulated

[30] Model Criminal Code, Chapter 5, Sexual Offences against the Person Report (May 1999) p 183, and discussion in the Report of the Law Reform Commission of Victoria (1988) at pp 18–20. This reflects the position in all jurisdictions except South Australia, where the provision refers to "an understanding by the complainant of the 'nature or consequences' of sexual intercourse": Criminal Law and Consolidation Act, s 49(6).

with sufficient precision to enable the citizen to regulate his conduct.[31]

4.20 Article 8 of the Convention provides, in part:

> (1) Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> (2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society … for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

4.21 The recent unanimous decision of the Strasbourg Court against the United Kingdom in *A v UK*[32] shows that Articles 1 and 3 of the Convention, together, impose a positive obligation on the state to make provision through the criminal law for the protection of children and other vulnerable people against abuse that amounts to torture, inhuman or degrading treatment.[33] When the Human Rights Act 1998 comes into force, these Convention rights will be justiciable in domestic courts.

Impact of the European Convention on Human Rights and the Human Rights Act 1998

4.22 Legislative interference with the right to respect for private and family life guaranteed under Article 8 is permissible, inter alia, if it can be said to be "necessary in a democratic society … for the protection of health or morals, or for the protection of the rights and freedoms of others"[34] and *proportionate* to the need which it seeks to address. Although under Articles 1 and 3 there is an obligation on the state to create an effective deterrent and to protect the vulnerable, to the extent that such provision *disproportionately* interferes with a person's right to respect for private and family life it would be contrary to Article 8.

[31] *G v Germany* (1989) 60 DR 252, 262. The Court elaborated in *SW v UK*, A 335-B (1995) para 35: "an offence must be clearly defined in the law. … [T]his requirement is satisfied where the individual can know from the wording of the relevant provision and, if need be, with the assistance of the courts' interpretation of it, what acts and omissions will make him criminally liable".

[32] 1998-VI p 2692, (1999) 27 EHRR 611, where a child aged 9 had, on more than one occasion, been beaten by his stepfather using a garden cane, with considerable force. At trial on a charge of assault occasioning actual bodily harm the defence of reasonable chastisement was accepted by a majority of the jury and the stepfather was acquitted.

[33] The factors to be taken into account in determining whether ill treatment was of a level of severity to fall within Article 3 were the nature and context of the ill-treatment, its duration, its physical and mental effects, and, in some cases, the victim's age, sex and state of health. *Costello-Roberts v UK* A 247-C (1993), (1995) 19 EHRR 112 was considered.

[34] Within the limits of interference permitted by Art 8(2). See also M J Gunn, *Medical Law* (1980) 255 and 257.

4.23 Current legislative provision denies "defective"[35] people any capacity *at all* to consent to sexual intercourse or to other sexual activity that would, in the absence of consent, constitute an indecent assault.[36] In determining questions of proportionality, the Strasbourg jurisdiction allows a margin of appreciation for the domestic law of the State under consideration. In recent cases involving the United Kingdom, although a wide margin of appreciation has been conferred on the state where physical harm is in issue,[37] the *Commission* has held[38] that the margin of appreciation must be relatively narrow in relation to sexual activity. It is not yet known whether the Court will agree with this.[39]

4.24 It remains an open question what approach British courts will take to the concept of the margin of appreciation when interpreting the Human Rights Act 1998. Under section 2, the courts must take into account any relevant Strasbourg jurisprudence. The doctrine of the margin of appreciation was developed for the purpose of an international court dealing with cases from widely varying jurisdictions. That factor will not exist when domestic courts exercise powers under the Human Rights Act. The function currently served by the margin of appreciation might remain to some extent, and be served by the giving of a margin of deference to the decision-making authority – Parliament, in this

[35] This expression, which we find offensive, replaced the words "imbecile" and "idiot" in 1956. It is defined in s 45 of the Sexual Offences Act 1956, as amended, as "a person suffering from a state of arrested or incomplete development of mind which includes severe impairment of intelligence and social functioning". The words "suffering from" are also inappropriate: see the comments of Lord Rix (Chairman of MENCAP) when debating clause 16 of the Youth Justice and Criminal Evidence Bill (*Hansard* 15 December 1998, vol 595, col 1294).

[36] An *indecent* assault involves conduct that a jury finds "right-minded persons would consider" indecent. The elements of this offence are set out in *Court* [1989] AC 28. Where the conduct is *capable* of constituting an indecent assault, but that is not the only possible explanation, the defendant's relationship to the victim (relative, friend, stranger) and reason for the behaviour are relevant.

[37] In *Laskey, Jaggard and Brown* 1997-I p 120, 24 EHRR 39 (concerning sado-masochistic activities) the Court held (para 44) that the level of harm that could be consented to was a question for the state to decide, thereby conferring a wide margin of appreciation. Pettiti J stated that "the margin of appreciation has been used by the Court mainly in dealing with issues of morals or problems of civil society, but above all so as to afford better protection to others".

[38] In *Euan Sutherland v UK* [1998] EHRLR 117, concerning an alleged breach of Article 8 in the setting of different ages of consent for heterosexual and homosexual acts. Given that this difference impinges on a most intimate aspect of affected individuals' private lives, the margin of appreciation must be relatively narrow (para 57). Note that, under Protocol No 11, the Commission no longer exists.

[39] Lord Lester has argued that the decision given by the Commission is virtually certain to be followed by the Court if proposed remedial legislation (the Sexual Offences (Amendment) Bill) is not enacted. A great majority of the Commission found a clear breach of Article 8, read with Article 14. The Commission comprised "not merely a very large number of distinguished jurists from the rest of Europe, but also Judge Sir Nicholas Bratza, as he now is, the British judge and vice-president of the European Court of Human Rights": *Hansard* (HL) 13 April 1999, vol 599, col 680. The Court hearing has been postponed until later in the year 2000.

instance. It is hard (if not impossible) to see how this could be *wider* than any existing approach taken with the margin of appreciation.[40]

4.25 Whilst the difficult question of what form protective, deterrent legislation should take is outside the scope of this paper,[41] the Convention requirements are equally important to any recommendation we may make regarding a statutory definition of capacity.

The Home Office Sex Offences Review

4.26 The terms of reference of the current Sex Offences Review require a review of sex offences in the common and statute law of England and Wales, and the making of recommendations that will

> provide coherent and clear sex offences which protect individuals, especially children and the more vulnerable, from abuse and exploitation;
>
> enable abusers to be appropriately punished; and
>
> be fair and non-discriminatory in accordance with the ECHR and Human Rights Act.[42]

4.27 Any protective criminal legislation aimed at discharging the responsibilities of the state under Articles 1 and 3 will need to recognise the right to private life under Article 8, and to limit any interference with this right to that which is "necessary in a democratic society … for the protection of health or morals, or for the protection of the rights and freedoms of others". This raises the question of what it is that this vulnerable category of people needs to be protected from. A sexual relationship between a person of full mental capability and one with severe learning disabilities may well involve an element of abuse that the criminal law should proscribe, particularly where there is a "care" relationship.[43] A sexual

[40] For discussion of this issue see, eg, Lord Irvine of Lairg LC, "The Development of Human Rights in Britain under an Incorporated Convention on Human Rights"[1998] PL 221; the Hon Sir John Laws, "The Limitations of Human Rights" [1998] PL 254; David Pannick QC, "The Human Rights Bill and the Margin of Appreciation" Aug 1998 Government Legal Service Journal 1; Timothy Jones, "The Devaluation of Human Rights under the European Convention" [1995] PL 430, 447; Rabinder Singh, Murray Hunt and Marie Demetriou, "Is there a Role for the 'Margin of Appreciation' in National Law after the Human Rights Act?" [1999] EHRLR 15.

[41] This paper is concerned only with the issues that arise in sexual offences which are defined as non-consensual – not with the separate question of when such offences are appropriate.

[42] We note also the announcement in the Lord Chancellor's Department consultation paper, "Who decides" (Dec 1997) Cm 3803 (relating to mental incapacity and the civil law), at para 1.15, that

> Once responses to the Green Paper have been considered and the issues have been taken further forward, detailed consideration will be given to the interrelationship with the criminal law [of the Law Commission's recommended statutory decision-making processes on behalf of mentally incapacitated adults]. The Government's conclusions will be set out as part of a more general policy statement at that stage.

[43] See n 14 above.

relationship between two people, *both* of whom have such disabilities, may not intrinsically involve any abuse – although, depending upon the circumstances, a particular relationship might be abusive.[44]

THE SECOND CONSULTATION PAPER

4.28 In the second consultation paper, we noted the principles expressed in Article 7 of the UN Declaration on the Rights of Mentally Retarded Persons,[45] the statutory limitations upon the capacity of people who are "defective" to give a valid consent, the common law principles in *Re C*[46] and the terms of clause 2 of the draft Mental Incapacity Bill.[47] We proposed that our recent recommendations for the mentally disabled in the *civil* law should be adapted to fit criminal law requirements.[48]

Definition of "persons without capacity" (Proposal 13)

4.29 Our proposed definition read as follows:

> … a person should be regarded as being without capacity if when he or she gives what is alleged to be his or her consent –
>
> (1) [relates to minors and is dealt with in Part III above];
>
> (2) he or she is unable by reason of mental disability to make a decision for himself or herself on the matter in question; or
>
> (3) he or she is unable to communicate his or her decision on that matter because he or she is unconscious or for any other reason.[49]

Definition of "unable by reason of mental disability to make a decision" (Proposal 17)

4.30 Our proposed definition of "unable to make a decision by reason of mental disability", modelled on the recommendation in Law Com No 231, took a functional approach.[50] It included a diagnostic threshold of "mental disability", and turned upon *either* an inability to *understand or retain* relevant information, *or* an inability to *use* that information:

[44] V Sinason, *Mental Handicap and the Human Condition: New approaches from the Tavistock* (1992) pp 281–282.

[45] Consultation Paper No 139, para 5.13. For the text of Article 7, see n 15 above.

[46] *Re C (Adult: Refusal of Treatment)* [1994] 1 WLR 290, 292 and 295. The test for capacity turned on whether the patient sufficiently understood the nature, purpose and effects of the proposed treatment. The answer to this question was affected by his capacity to comprehend, retain and believe the treatment information, and to weigh it up and balance risks and needs.

[47] See paras 4.32 – 4.38 below.

[48] Consultation Paper No 139, paras 5.16 – 5.19 and Mental Incapacity (1995) Law Com 231. The material recommendations are outlined below at paras 4.34 – 4.38.

[49] Consultation Paper No 139, para 5.21 (proposal 13).

[50] See paras 4.45 – 4.49 below.

(1) A person should be regarded as being at the material time unable to make a decision by reason of mental disability if the disability is such that, at the time when the decision needs to be made –

(a) he or she is unable to understand or retain the information relevant to the decision, including information about the reasonably foreseeable consequences of deciding one way or another or of failing to make the decision; or

(b) he or she is unable to make a decision based on that information; and

(2) in this context "mental disability" should mean a disability or disorder of the mind or brain, whether permanent or temporary, which results in an impairment or disturbance of mental functioning.[51]

Capacity to understand in broad terms (Proposal 18)

4.31 Finally we proposed that

> a person should not be regarded as being unable to understand the information referred to … if he or she is able to understand an explanation of that information in broad terms and simple language.[52]

LAW COMMISSION REPORT NO 231: MENTAL INCAPACITY (1995)

4.32 Law Com No 231, our report on mental incapacity and the *civil* law, addresses *substitute* decision-making on behalf of those unable to make decisions for themselves. The definition of persons without capacity in clause 2 of the Draft Bill in this report strongly influenced our thinking in the second consultation paper, which deals with the making of decisions *in person*.

4.33 Clause 2 provides, in part:

(1) … a person is without capacity if at the material time –

(a) he is unable by reason of mental disability to make a decision for himself on the matter in question; or

(b) he is unable to communicate a decision on the matter because he is unconscious or for any other reason …

(2) … a person is at the material time unable to make a decision by reason of mental disability if the disability is such that at the time when the decision needs to be made –

(a) he is unable to understand or retain the information relevant to the decision, including information about the reasonably

[51] Para 5.21(5) (proposal 17). The recent review of the Mental Health Act (1999) recommends retention of the term "mental disorder" as a basic diagnostic criterion, and suggests defining this according to our proposed definition of mental disability, adding that further consultation with Scottish colleagues would be valued due to the desirability of a common definition.

[52] Adopted from Law Com No 231, recommendation 10.

foreseeable consequences of deciding one way or another or of failing to make the decision; or

(b) he is unable to make a decision based on that information,

and in this Act "mental disability" means a disability or disorder of the mind or brain, whether permanent or temporary, which results in an impairment or disturbance of mental functioning.

(3) A person shall not be regarded as unable to understand the information referred to in subsection (2)(a) above if he is able to understand an explanation of that information in broad terms and in simple language.

Notable features of clause 2

"At the material time"

4.34 The phrase "at the material time" shows a "functional approach" to assessment, accommodating both partial and fluctuating capacity. This was favoured by most respondents.[53]

"Unable ... to make a decision"

4.35 On consultation there was broad agreement that incapacity cannot in every case be ascribed to an inability *to understand* information. It may arise from an inability *to use or negotiate* information which has been understood, a point emphasised in *Re C (Adult: Refusal of Treatment)*.[54] To add clarity, clause 2(2) makes express reference to each of these aspects of the ability to make a decision.

"By reason of mental disability": a diagnostic threshold

4.36 Except in cases of inability to communicate, we recommended a diagnostic threshold of *mental disability* as part of the test for incapacity.[55] On consultation the expression we used was "mental disorder". While most respondents favoured a diagnostic hurdle to ensure that the test would not catch large numbers of people who make unusual or unwise decisions,[56] there were misgivings about use of the expression "mental disorder",[57] as defined in the Mental Health Act

[53] Law Com No 231, paras 3.5 – 3.6. This was preferred to a "status test" (eg that anyone under 18 is excluded from voting), which we believed was out of tune with our policy aim of enabling and encouraging people to take any decision which they have the capacity to take for themselves (para 3.3). It was also preferred to the "outcome method", which focuses on the final content of an individual's decision. If that is inconsistent with conventional values, or with an assessor's view, the decision-maker might be classified as incompetent. This penalises individuality and demands conformity at the expense of personal autonomy (para 3.4).

[54] [1994] 1 WLR 290; see n 46 above.

[55] The arguments for and against a diagnostic hurdle are set out in Consultation Paper No 128, paras 3.10 – 3.14.

[56] Law Com No 231, para 3.8.

[57] Equated by many with psychiatric illness. Many respondents to Consultation Paper No 128 considered that *all* conditions which could result in incapacity to take medical decisions should be included, some of which (eg confusional states arising from drugs, alcohol or other toxins, and neurological disorders) had little in common with those

1983.[58] To avoid difficulties with that expression, we recommended "mental disability" instead.

Unable to communicate his decision ... because he is unconscious or for any other reason

4.37 This residual category was included as a fall-back[59] for cases where an assessor cannot say whether or not any decision has been made, but is able to say that the person concerned could not *communicate* any such decision.

Ability to understand in broad terms

4.38 With a view to ensuring that relevant information would be suitably explained before a person was found to lack capacity to make his or her own decision, clause 2(3) provides that a person should not be regarded as "unable to understand the information relevant to a decision" if he or she is able to understand an explanation of that information in *broad terms* and *simple language.*[60]

Making Decisions (1999): The Government response

4.39 The report "Making Decisions",[61] the Government response to Law Com No 231, recommends, as a result of strong support from respondents to the Government's consultation paper,[62] that our proposed test of incapacity be enacted.[63]

addressed in the 1983 Act and might not qualify as disorders "of mind" at all: Law Com No 231, para 3.11. See also B M Hoggett, *Mental Health Law* (4th ed 1996) p 27:

> A disorder of the "mind" is not the same thing as a disorder of the "brain", although the former may be caused by the latter. The Oxford English Dictionary definition of mind includes "the seat of consciousness, thoughts, volitions and feelings".

[58] Consultation Paper No 128, paras 3.10 – 3.14. Section 1(2) of the Mental Health Act 1983 defines "mental disorder" as "mental illness, arrested or incomplete development of mind, psychopathic disorder and any other disorder or disability of mind".

[59] See para 3.20 of the report.

[60] See para 3.18 of the report.

[61] (Oct 1999) Cm 4465.

[62] "Who Decides?" (Dec 1997) Cm 3803.

[63] Cm 4465, para 1.6.

ANALYSIS OF RESPONSES TO THE PROPOSALS IN THE SECOND CONSULTATION PAPER,[64] AND OUR RECOMMENDATIONS

Definition of persons without capacity (Proposal 13)[65]

4.40 A substantial number of respondents supported this proposal, most by way of a bare expression of assent. The only concerns related to proposal 13(1), which deals with the capacity of minors. This is addressed in Part III above.

Analysis and views relating to proposal 13(3) (Inability to communicate a decision)

4.41 Proposal 13(3) (which relates to the capacity of those unable to communicate their decision)[66] is closely associated with the issue of capacity to consent and mental disability. It will be discussed briefly here, although none of the responses dealt with this.

4.42 A person may have the capacity to make a decision but be unable to communicate this fact. Alternatively, one who is unable to communicate a decision may also be mentally incapable of arriving at a decision. In order to provide the necessary legal protection to those unable (as opposed to choosing not) to communicate their decision (if any), such a person needs to be treated as if he or she lacked the capacity to *make* a decision.

4.43 We recognise the distinction highlighted recently in *Malone*[67] (an appeal against conviction for rape) between the absence of consent and any *communication* of the absence of consent.[68] We do not however consider this to inhibit us from endorsing our earlier proposal (13(3)).

Recommendation

4.44 **We recommend that, for the purposes of any non-consensual sexual offence, a person should be regarded as lacking capacity to consent to an act if at the material time**

(1) he or she is unable by reason of mental disability to make a decision for himself or herself on whether to consent to the act; or

(2) he or she is unable to communicate his or her decision on that matter because he or she is unconscious or for any other reason.

[64] Our proposals are set out at paragraphs 4.29 – 4.31 above.

[65] This is set out above at para 4.29.

[66] See para 4.29 above. This proposal was derived from cl 2(1)(b) of the Draft Mental Incapacity Bill (Law Com 231): see para 4.33 above.

[67] [1998] 2 Cr App R 447.

[68] The Court of Appeal stressed that the actus reus of rape (sexual intercourse with another who at the time of the intercourse does not consent to it) did not include a requirement that the absence of consent has to be *communicated* to the defendant; the mens rea requires proof that at the time of the intercourse, the defendant either knew that the victim was not consenting or was reckless as to whether or not the victim was consenting (Sexual Offences Act 1956, s 1(2)(b)).

Capacity and the mentally disabled (Proposal 17)[69]

4.45 Thirteen respondents agreed with our proposed definition of "unable by reason of mental disability to make a decision" without additional comment.[70] Two others considered that no special provision should be made for adult mental disability; and six posed queries or expressed concerns about our proposed definition. The most significant of these concerns relate to a problem of over-extension (by which we mean the risk that our specified criteria might result in some people who are *truly* capable of consenting being deemed incapable).

Dissentients

4.46 The two outright critics of this proposal feared that it would prove unacceptably paternalistic and possibly discriminatory. Women Against Rape, London, wanted substitution of a general requirement of free and informed consent. They said that to define some people as legally incapable effectively encouraged abuse and exploitation by allowing abusers to escape prosecution.[71] Their concern is of a secondary effect of categorising certain people as incapable of giving consent. Police officers investigating a complaint might consider that such a person would be equally incapable of giving testimony against an abuser. As a result, a provision aimed at protecting a class of people might produce the opposite result.

4.47 On the other hand, a provision that deems certain people to lack the capacity to consent should *reduce* the scope of evidential issues, particularly for example in respect of rape where a lack of capacity to consent removes any issue about consent. In addition, some of the practical problems for those with learning disabilities or a mental illness in giving evidence have been addressed in the Youth Justice and Criminal Evidence Act 1999. Vulnerable witnesses[72] will be permitted to give unsworn evidence,[73] provided that they are able to give intelligible testimony.[74] Special measures[75] may be authorised by the court to

[69] This is set out above at para 4.30.

[70] Presumably because they saw it as a natural extension of their responses to proposals 12 (Persons without capacity), 13 (Definition of persons without capacity) and 14 (Capacity of minors).

[71] Their concern stems from the complaints made to them by women with a "mental health label" to the effect that complaints of rape in a psychiatric hospital have been routinely dismissed because they were "on the scrap-heap". Copies of published correspondence lodged with this response refers to "the rape law which makes all sex with so-called mental defectives illegal outside marriage. Instead of protecting any of us from rape, this increases the vulnerability of people who are defined by it as less than human and therefore incapable of giving or refusing consent to sex, or of testifying about it".

[72] A term which includes persons with a mental disorder within the meaning of the Mental Health Act 1983, or with other significant impairment of intelligence and social functioning.

[73] Section 50.

[74] Section 55(3). The ability to give intelligible testimony requires the ability to understand questions put to the person as a witness, and an ability to give answers which can be understood, as with the test of competence in s 50(1).

assist such witnesses if the court considers that the quality of evidence given is likely to be diminished by reason of their mental impairment or other significant impairment of intelligence and social functioning.[76]

4.48 The other dissentient was concerned that disabled people could suffer further disadvantage and discrimination through unwarranted legal restriction of their sexual expression. He questioned whether special rules were really necessary, and urged that "a case by case approach" would be preferable. Our proposed test would require assessment of capacity on the material occasion. We recognise the vital importance of this test not including criteria that could result in some truly capable people being adjudged incapable. This is considered further below.

Other concerns

4.49 These fall under the following four sub-heads:

SHORT–TERM MEMORY PROBLEMS

4.50 JUSTICE expressed concern that our proposal included a requirement that the person should be able to *retain* relevant information in order to have the capacity to consent. Such a requirement would deny someone the right to give a lawful consent to physical or sexual acts where, although capable of *understanding* the issues involved and all relevant information, the person had some limited short-term memory problems. They asked what we envisaged to be the qualifying period of time.[77]

4.51 We share this concern. By way of illustration, consider the position of a married couple who throughout their marriage have enjoyed a sexual relationship. Is it right that a wife in such a marriage should be regarded in law as incapable of giving consent to sexual intercourse if in consequence of a drastic deterioration in her mental health she becomes incapable of retaining relevant information, notwithstanding the fact that her physical health and normal behaviour demonstrate that she does in fact wish to continue engaging in sexual intercourse? Similarly, why should a husband in such circumstances who is aware of this deteriorated mental condition be restricted in respect of his sexual expression?

INTOXICATION

4.52 The CPS and ACPO asked whether the proposal was intended to extend to voluntary intoxication through drink or drugs. It is. That is one of the reasons

[75] The measures that the court can authorise are set out in s 22, and include allowing the use of screens, the removal of wigs and gowns, and the admission of video evidence and evidence by live link.

[76] Sections 16 and 19.

[77] JUSTICE recommended to us that the requirement regarding retention of information be further defined with the aid of expert medical assistance.

why we used "mental disability", not mental disorder, as the diagnostic threshold.[78]

4.53 The issue of *capacity* to consent will only become a live one where the prosecution relies on a lack of capacity, rather than simply seeking to establish that the victim did not *in fact* consent. We believe that if a person is so drunk or drugged as to be incapable of giving a valid consent, and the fact-finding tribunal is sure that the defendant was aware of this (or was reckless as to the matter) at the relevant time, then there is no reason why the criminal law should not extend its protection to that person; and such incapacity would be recognised under our definition.[79]

4.54 There is a possible difficulty where consent is given but then overtaken by incapacity through drink or drugs. For example, at 8 pm P makes it clear that she is looking forward to having intercourse with D that night. By 11 pm she is too drunk to know what she is doing, but D has intercourse with her anyway. Can it be said that she does not (because she cannot) consent to the intercourse at the material time, namely the time of the intercourse? In our view it cannot. Consent is not a *state of mind* which must invariably exist at the time of the act consented to, but an expression of *agreement* to that act – the *granting of permission* for it.[80] In the ordinary course of events, consent to the doing of an act at some future time remains effective unless it is withdrawn. There is therefore no *conceptual* problem with P giving consent well in advance of the act to which she consents, at a time when she has capacity to do so. It would be for the jury to consider in a particular case whether, in all the circumstances, as a matter of fact the consent had been withdrawn.

MENTAL STATES SUCH AS DEPRESSION, STRESS, BATTERED WOMEN SYNDROME OR PRE-MENSTRUAL TENSION

4.55 The CPS asked what was to be the effect of such mental states as depression, stress, battered women syndrome[81] or pre-menstrual tension.[82] Our views about this are similar to those regarding intoxication. If the condition renders a person truly *incapable* of giving a valid consent, and the fact-finding tribunal is sure that the defendant was aware of this (or was reckless as to the matter) at the relevant

[78] See para 4.36 above.

[79] This is made clear in Law Com No 231: see para 4.36 above.

[80] See para 2.11 above.

[81] *Ahluwalia* (1992) 96 Cr App R 133 and *Thornton (Sarah) (No 2)* [1996] 1 WLR 1174 address the significance of battered women syndrome to the defence of provocation.

[82] The CPS linked its remarks about the uncertain boundaries of this proposal to concerns about the practical difficulty of proving mental disability as defined. ACPO effectively reinforced the CPS point by suggesting that this proposal might turn criminal proceedings into a trial of V's capacity, a development which would be undesirable on a number of grounds. Our view is that V's incapacity to consent would only become an issue in the trial if the prosecution chose to make it so, by relying on it. Alternatively, as now, the prosecution could simply allege that V did not *in fact* consent. It is difficult to see how its position, or that of V herself, can be adversely affected by providing an alternative line of argument (incapacity) which the prosecution may or may not choose to use.

time, then there is no reason why the criminal law should not extend its protection to that person. Again, it is crucial that the criteria for assessing capacity should not operate too widely, so that one who does have the capacity to consent is not classified otherwise. The position of battered women might, more typically, be a point of concern when looking at the *validity* of any consent given, and, in particular, the effect of *threats* upon the validity of consent.[83]

LACK OF COMPREHENSION OF FORESEEABLE CONSEQUENCES

4.56 JUSTICE was also concerned that our proposed requirement of capacity to understand information about the reasonably foreseeable *consequences* of deciding one way or another could operate to deny a large number of mentally disabled people a sexual relationship with the person of their choice, purely because they are unable to comprehend the foreseeable consequences – for example, pregnancy. JUSTICE says that its concerns are not answered by the provision that the person in question has only to understand the relevant information in broad terms and simple language.

4.57 We also recognise this concern. We have already drawn attention to the difficulty of balancing the need to protect vulnerable people from exploitation against the need to avoid unnecessary interference with their right to respect for private life.[84]

Reconsideration of proposal 17

4.58 We do not believe that it is possible simply to transfer the existing tests, recommended for the assessment of mental incapacity for the purpose of *substitute* decision-making in the *civil* law, without change, into the criminal law. First, the civil law is not administered, so far as the fact-finding process is concerned, largely by lay people – juries and lay magistrates, for whose benefit the relevant tests need to be made clear and simple. Second, in the civil law, some of the issues which a person requires the capacity to understand may be very complicated,[85] and we were anxious to protect those who might appear to understand but could not retain the necessary information for long enough to make a proper decision.[86] Third, the obligations under the European Convention on Human Rights associated with sexual autonomy[87] have an impact on our recommendation.

[83] See Part VI below.

[84] See paras 4.17 – 4.25 above.

[85] Such as the consequences of making a will and of investing or disposing of money or real property.

[86] For a summary of the range of issues that may need to be understood and the different levels of capacity required for different activities in existing law, primarily in the civil law context, see British Medical Association *Assessment of Mental Capacity: Guidance for doctors and lawyers* (1995) pp 20–85.

[87] See paras 4.17 – 4.25 above.

TERMINOLOGY

4.59 The first issue concerns the appropriateness of the structure of the definition and the language used. We recognise that this is more suited to the civil law issues with which Law Com No 231 was concerned, and accept that it is too complicated for the purposes of the criminal law. We propose simplifying the language used in this test, in a similar manner to that recommended in relation to the capacity of minors.[88] The language thus employed would be more apt to describe the process of deciding to consent to sexual activity, as opposed to deciding upon a course of conduct with civil legal consequences. Essentially this is because it is perceived to be a visceral, rather than a cerebral, process of decision-making.

RETENTION OF INFORMATION - RECONSIDERED

4.60 The criminal law is concerned with whether or not a valid consent *has been* given. If A, who is unable to retain much information, decides to consent, on the basis of so much of the relevant information as he or she is capable of remembering, why should A be deemed incapable to make that decision if, when making it, he or she understood (for example) with whom sexual intercourse would take place, and wanted this to occur? In the *substitute* decision-making structure designed for the civil law, there are good reasons why, in the interests of that person's financial, property, domestic and other affairs, he or she should have the benefit of a substitute decision-maker's assistance. In the criminal law, however, rather than being of benefit to A, by providing a substitute decision-maker, the effect of such a requirement may be *harmful* to A, by denying him or her the autonomy to give consent to something about which he or she may properly be recognised as having sufficient information and understanding to make a choice.[89]

4.61 It is crucial that the criteria for determining whether or not a person is *capable* of giving a valid consent should operate accurately, so that there is no question of someone who is in fact capable of giving consent being deemed to be incapable. The requirement of an ability to *retain* information relevant to the decision *could*, we believe, result in a person being inaccurately deemed incapable of giving

[88] See Part III above.

[89] Eg to have sexual contact with A's husband, although their mental state is such that they are, at times, unable to remember much.

consent when under the influence of alcohol *but not incapable,*[90] or when suffering from short-term memory problems not associated with intoxication.[91]

4.62 We believe that the words "or retain" should be removed from proposal 17. **We conclude that the test of whether a person should be regarded as unable to make a decision should not include reference to being unable to "retain the information relevant to a decision".**

UNDERSTANDING THE REASONABLY FORESEEABLE CONSEQUENCES – RECONSIDERED

4.63 The understanding of whether an act is likely to cause pain or injury, how serious that would be, and whether the effect is transient, long lasting or permanent is fundamental to the concept of "capacity" to consent. This is why the proposal refers to the need to understand the foreseeable consequences of a decision. Inclusion of this criterion should promote a consistent approach to this issue by jurors.

Problem created by this criterion

4.64 A serious problem with this approach, raised by JUSTICE, concerns mentally disabled people who are unable to understand the consequences of pregnancy resulting from the act of sexual intercourse. The following two cases illustrate how, on the one hand, it may be thought that the law should not be too demanding in its requirements of capacity so as to avoid over-restricting the choice of people with learning disabilities,[92] and, on the other, it would be wrong to distort the meaning of capacity in order to facilitate that choice. The latter could result in legal recognition of capacity where a victim was, in the circumstances, incapable of consenting.

4.65 *F v West Berkshire Health Authority (Mental Health Act Commission intervening),*[93] in the House of Lords, concerned the appropriate procedure to be adopted when sterilisation of a woman with a serious mental disability was proposed. The sexually active woman, aged 36, had the verbal capacity of a child aged two and the general mental capacity of a child aged four or five. Since the age of 14 she had been a voluntary in-patient at a mental hospital where she had formed a

90 Eg, V's level of intoxication might result in an inability to *retain* relevant information, but not be so great as to deny V the ability to convey an overt desire to engage in sexual intercourse, and to understand what is taking place. The criteria we proposed could lead to V in such a case being classified as *unable* to make a decision by reason of mental disability. V would thus be *without capacity*, and unable to give a valid consent to sexual intercourse. If sexual intercourse did take place, the actus reus of rape would have been committed. While D may contend a lack of mens rea on the basis of a genuine belief that V had consented to sexual intercourse, the prosecution could argue that, as D was aware of V's intoxicated state, D knew that V lacked the capacity to *retain* the information relevant to the decision, and consequently knew that V lacked the capacity to give a valid consent.

91 See paras 4.50 – 4.51 above.

92 The approach recently taken in Australia in the Report on Sexual Offences for a Model Criminal Code. This is outlined above in paras 4.13 – 4.15.

93 [1989] 2 All ER 545. See also the illustration considered at para 4.51 above.

sexual relationship with a male patient. In these proceedings the woman's capacity to consent to the sexual intercourse that she chose to engage in was not questioned, although "she was disabled by her mental capacity from giving her consent to the operation". Hence, to a degree, her sexual autonomy was recognised.

4.66 On the other hand, *Jenkins*[94] concerned a young woman with a verbal mental age of two or three who did not understand sexual relationships, pregnancy or sexually transmitted diseases. She became pregnant. She was deemed unable to understand what had happened to her, to care for a child or to give consent to an abortion. That decision was made for her. A DNA test of the aborted foetus showed the identity of the father to be a male member of her residential staff. He was charged with rape. The trial judge[95] ruled that this young woman with severe learning disabilities had properly consented to the sexual relationship, as she simply had to submit to her animal instincts to be deemed to have consented.[96]

An option rejected

4.67 The serious question raised by *Jenkins* concerns the conclusion that a person with such limited capacity to understand can be regarded as capable of giving consent in those circumstances. If we were to adopt a test of capacity similar to that recommended by the MCCOC,[97] it is possible that a similar conclusion would result. We do not believe that this would offer sufficient protection to this group of vulnerable people. The law should be such that it recognises that there is no capacity to consent in such a situation.

4.68 The argument in favour of the Australian approach is that it preserves the sexual autonomy of the mentally disabled. However, because consent is a defence to a number of sexual offences, it may be to the advantage of a defendant to try to enlarge the scope of a mentally disabled person's capacity, thus enabling him to invade her limited autonomy. As a result, the victim's autonomy would in fact be diminished, not enhanced.

4.69 Sexual autonomy includes a right to refuse unwanted sexual attention (a negative aspect of this concept) as well as the right to choose to engage in sexual activity (a positive aspect). The difficulty is that a person's mental disability may render them unable to refuse that attention as effectively as those without such disability. In cases such as those with severe learning disabilities, this risk is likely to continue throughout their lifetime. This vulnerability may be a result of:

(a) an inability to remove themselves from the risk;

[94] Heard at the Central Criminal Court, 10–12 January 2000.

[95] His Hon Judge Coltart.

[96] In addition, an application to amend the indictment to add a count under section 7 of the Sexual Offences Act 1956 was rejected.

[97] See paras 4.13 – 4.15 above. A non-exhaustive list of circumstances in which a person does not consent to an act includes the case where "the person is incapable of understanding the essential nature of the act".

(b) an inability to conceptualise or verbalise the abuse;

(c) lack of sex education, without which they may not have sufficient knowledge or understanding about sex and sexual relationships to make an informed choice; or

(d) low self-esteem, which results in a lack of belief that they have the right to refuse sex or a particular sexual partner.[98]

4.70 If this negative aspect of sexual autonomy is to have any real meaning for those to whom these factors are material, the criminal law needs to provide protection for them. The positive aspect of sexual autonomy (freedom to engage in sexual activity) may be met by specific provision in the substantive criminal law, in the manner suggested below.

Solution

4.71 The difficulties that arise from the inability of some mentally disabled persons to understand pregnancy, and the need to respect their rights under Article 8 of the European Convention on Human Rights,[99] can be addressed in a way that does not involve manipulating the meaning of *capacity* and thus removing important protection for the vulnerable. The concern is that, under our proposal, a lack of understanding of pregnancy would render a person unable to consent to sexual intercourse at all, so that any sexual intercourse engaged in would necessarily be non-consensual – irrespective of the relationship between the parties, their respective mental capacities and the absence of any circumstances of exploitation.

4.72 In our view, the autonomy of those with mental disabilities to engage in sexual activity in non-exploitative relationships could be recognised by provision in the substantive criminal law of exemptions which recognise that, in certain circumstances, no offence would be committed *despite* a lack of capacity to consent. Such exemption might relate to apparently consensual sexual activity that takes place between two people, each with want of capacity, in non-exploitative circumstances; or where only one party to such activity lacks capacity, and this occurs in non-exploitative circumstances.

4.73 We believe that ultimately the question of where the appropriate balance should be struck, between the need to provide mentally disabled people with protection from abuse and the need to give recognition to their right to sexual or physical expression, must be for Parliament to decide, after wide consultation with those concerned with the mentally disabled. While it is not for us to specify the precise scope of exemption, we set out below the type of provision that we envisage.

[98] Factors identified by the Ann Craft Trust (formerly National Association for the Protection from Abuse of Adults and Children with Learning Disabilities) in a letter of response to us.

[99] See paras 4.17 – 4.25 above.

Apparently consensual sexual activity between two people with want of capacity

4.74 Apparently consensual activity may take place between two people whose mental disability is such that they do not understand enough about the potential consequences in order to have the capacity to give consent. It is our view that such activity *between two people with want of capacity* should not constitute an offence unless there is oppression or exploitation. This would evidence that what otherwise might have appeared to be consensual activity is non-consensual.

4.75 The defendant should bear an *evidential* burden of showing, through the evidence of assessment from people such as the social worker, relevant carer, psychologist, home manager etc, that the activity constitutes "apparently consensual sexual activity" and that the parties are each lacking in mental capacity.

4.76 The Crown would then bear the *persuasive* burden of proving that the alleged apparently consensual activity was non-consensual because compliance was obtained, for example, by oppression, threats, deception, force or other exploitation of the victim's disability.

Apparently consensual sexual activity with a person who lacks capacity due to mental disability, in non-exploitative circumstances

4.77 Should Parliament choose to recognise that lawful sexual activity may take place between a person who lacks capacity to consent due to mental disability and one who does not, a limited exemption to criminal liability will be needed. This exemption would be potentially wider in scope than the first because it would not require that *both* parties lack mental capacity. So that this does not establish an "abuser's charter", it would be essential that the *persuasive* burden of proving that the apparently consensual sexual activity took place in non-exploitative circumstances should lie with the defendant. To do otherwise would seriously undermine the protection that the law gives to the mentally disabled from offences of rape and other non-consensual sexual activity. Under existing domestic law, in respect of those with severe learning disabilities,[100] any sexual activity constitutes an offence,[101] and the absence of exploitative circumstances is not a defence. Our proposal would be for a less far-reaching offence. It would permit a defence *where a defendant is able to establish that* the victim was willing and there were no circumstances of oppression.

Non-exploitative circumstances

4.78 The views of experts will be of great importance in the choice of the criteria for determining whether activity is "non-consensual", in these circumstances. It is our view that the criteria should make it clear that where a defendant takes deliberate advantage either of a complainant's weakness or of the complainant's

[100] At present labelled "defectives" in the Sexual Offences Act 1956.

[101] Sexual Offences Act 1956, s 7, as substituted by Mental Health Act 1959, s 127(1)(a); Sexual Offences Act 1956, ss 14(4) and 15(3); Sexual Offences Act 1967, s 1(3); Mental Health Act 1959, s 128, as amended by Sexual Offences Act 1967, s 1(4).

dependence on the defendant, the activity should be regarded as non-consensual. An example of conduct that we would regard as taking deliberate advantage of the weakness of a person under a mental disability would be where one of full capacity persuades a person who lacks capacity to have sexual intercourse by giving her a cigarette and telling her that this is what boyfriends and girlfriends do, or saying that otherwise they will not be friends.[102]

Reverse burdens of proof

4.79 When contemplating a reverse burden of proof provision it is necessary to consider compatibility with Article 6(2) of the European Convention on Human Rights. In *R v DPP, ex p Kebilene*[103] Lord Hope of Craighead referred to three kinds of statutory presumptions which transfer the persuasive burden to the accused. First is the *mandatory* presumption of guilt as to an essential element of the offence; this is inconsistent with the presumption of innocence. Second is a presumption as to an essential element which is *discretionary*, in that the tribunal of fact may choose whether or not to rely on the presumption, depending on their view of the cogency or weight of the evidence. The compatibility of such a provision can only be determined after the trial. Third, there are reverse onus clauses which relate to an *exemption or proviso* which the accused must establish in order to avoid conviction, but is not an essential element of the offence. This third type may or may not be compatible, depending on the circumstances.[104] The reverse burden provision we envisage here is of the third type.

4.80 Under existing domestic law, in respect of those with severe learning disabilities, any sexual activity constitutes an offence. This proposal would reduce the scope of that offence by allowing a defence *where a defendant is able to establish that* the victim was willing and there were no circumstances of oppression or exploitation. The terms and scope of any reverse burden provision of the type envisaged here would need to be drawn with great care, having regard to the relevant Strasbourg jurisprudence on Article 6. We believe that, in principle, it should be possible to define it so as to comply with ECHR requirements.

4.81 **We conclude that the need to understand the reasonably foreseeable consequences of sexual activity is fundamental to any capacity to consent to such activity. The autonomy of those with mental disabilities to engage in sexual activity in non-exploitative relationships could be recognised by provision in the substantive criminal law that restricts the operation of material sexual offences in particular circumstances. Ultimately the question of where the appropriate balance should be struck is a matter for Parliament after wide consultation.**

[102] Examples given by the Ann Craft Trust, formerly the National Association for the Protection from Abuse of Adults and Children with learning Disabilities.

[103] [1999] 3 WLR 972, 992.

[104] *Ibid*, 992F-993C.

ADEQUACY OF FUNCTIONAL TEST

4.82 The advantages of a functional approach to the assessment of capacity have been recognised by respondents, but this approach is not without its problems. The test may be criticised both for being over-protective[105] and under-protective.[106] We have suggested that the former difficulty can be overcome by provision in the substantive law restricting the operation of material sexual offences in certain circumstances.[107] Similarly, the "under-protective" criticism may be met by substantive criminal law providing that certain sexual activity will constitute an offence *irrespective* of consent.[108]

4.83 We have considered integrating some such provisions into the general test of capacity. However, this would make the law cumbersome and complex; and we think it is unnecessary, provided that adequate provision is made in the substantive criminal law.

Recommendation

4.84 **For the purpose of our recommendation at paragraph 4.44(1) above (that a person should be regarded as lacking capacity if unable by reason of mental disability to make a decision), we recommend that**

(1) a person should be regarded as being unable to make a decision on whether to consent to an act if

(a) he or she is unable to understand

(i) the nature and reasonably foreseeable consequences of the act, and

(ii) the implications of the act and its reasonably foreseeable consequences; or

(b) being able so to understand, he or she is nonetheless unable to make such a decision; and

(2) "mental disability" should mean a disability or disorder of the mind or brain, whether permanent or temporary, which results in an impairment or disturbance of mental functioning.

[105] Because the criterion "able to understand the foreseeable consequences" means that those who cannot understand the implications of pregnancy necessarily lack capacity, irrespective of the circumstances.

[106] Because a flexible test may not go far enough to meet the requirements of Articles 1 and 3 of the ECHR to protect vulnerable people from degrading or inhuman treatment: see paras 4.17 – 4.25 above.

[107] See para 4.71 above.

[108] Eg sexual activity by a care worker with the disabled person in his or her care.

Capacity to understand in broad terms (Proposal 18)[109]

4.85 Most respondents agreed that "a person should not be regarded as being unable to understand the information referred to … if he or she is able to understand an explanation of that information in broad terms and simple language", but one respondent found this proposal superfluous. We now agree. The source of this, clause 2(3) of the Draft Mental Incapacity Bill in Law Com No 231,[110] was designed to address the possibility that a person might be wrongly classified as incapable of understanding some complexity involved in a civil law decision when, if someone had taken the trouble to explain the matter appropriately, an understanding of the issues would have been achieved.

4.86 The criminal law perspective is different. Here it is the validity of *actual* decisions that is in issue. We are endeavouring to identify criteria that will assist the fact-finding tribunal to decide whether a person *had* the capacity needed to consent to sexual activity. We conclude that it is not appropriate in the criminal context to elaborate upon the meaning of capacity to understand, by providing that a person should not be regarded as being unable to understand information if he or she is able to understand an explanation of it in broad terms and simple language; and **we make no such recommendation**.

[109] This proposal is set out above at para 4.38 above.

[110] Para 4.18.

PART V
DECEPTION AND MISTAKE

5.1 We recommended in Part II that consent be defined as "subsisting, free and genuine agreement". An agreement may not be *genuine* because it is obtained by deception, or given under a mistake. In this part we consider

(1) the circumstances (if any) in which the complainant's consent to a sexual act should be wholly disregarded on the ground that it was obtained by deception, so that the defendant will be guilty of a non-consensual offence such as rape or indecent assault;

(2) whether, if the deception does not invalidate the consent altogether, it should render the defendant liable for some lesser offence of procuring consent by deception; and

(3) whether it should make any difference, to either of these questions, that the complainant's mistake was not brought about by deception but the defendant was aware of it.

THE COMMON LAW

5.2 For a brief period in the mid-nineteenth century, *any* deception (it would seem) which had had the effect of inducing the victim to consent to the act vitiated the consent thus given.[1] In *Sinclair*,[2] which concerned a man suffering from gonorrhoea who persuaded a 12-year-old girl to have intercourse with him without informing her of his condition (of which he was fully aware), thereby infecting her, Shee J instructed the jury that if they were satisfied that the girl had consented to intercourse in ignorance of the defendant's disease, and that she would not have consented had she known of its existence, it must follow that "her consent [was] vitiated by the deceit practised upon her, and the prisoner would be guilty of an assault".[3] *Bennett*[4] concerned similar facts and a conviction for indecent assault.[5]

[1] *Bennett* (1866) 4 F & F 1105; *Sinclair* (1867) 13 Cox CC 28.

[2] (1867) 13 Cox CC 28.

[3] (1867) 13 Cox CC 28, 29.

[4] (1866) 4 F & F 1105.

[5] Willes J held:

> Although the girl may have consented to sleep, and therefore to have connection, with her uncle, yet if she did not consent to the aggravated circumstances, ie to connection with a diseased man, and a fraud was committed on her, the prisoner's act would be an assault by reason of such fraud. An assault is within the rule that fraud vitiates consent, and therefore if the prisoner, knowing that he had a foul disease, induced his niece to sleep with him, intending to possess her, and infected her, she being ignorant of his condition, any consent which she may have given would be vitiated, and the prisoner would be guilty of an indecent assault.

5.3 *Clarence*[6] established that the only types of deception or mistake which would vitiate consent were those relating to *the nature of the act* which was being consented to, on the one hand, and *the identity of the perpetrator of the act*, on the other.[7] Clarence infected his wife with gonorrhoea, and she said that she would not have consented to sexual intercourse with him had she been aware of his disease.[8] On a charge of assault contrary to sections 20 and 47 of the Offences Against the Person Act 1861, the prosecution argued that in concealing his illness from his wife the defendant was guilty of fraud and that consent obtained by fraud was "no consent at all". On appeal the convictions were quashed (by a majority of 9:4). Wills J said that the statement that "consent obtained by fraud is no consent at all is not true as a general proposition either in fact or in law":

> If a man meets a woman in the street and knowingly gives her bad money in order to procure her consent to intercourse with him, he obtains her consent by fraud, but it would be childish to say she did not consent.[9]

5.4 Wills J added that it could not be said that *Clarence* involved a mistake of the same order as those involving "consent to a supposed surgical operation, or to a connection erroneously supposed to be the woman's husband" – which, by the time *Clarence* was decided, were well-established[10] as cases in which consent to

[6] (1888) 22 QBD 23.

[7] See also the judgment of Stephen J, (1888) 22 QBD 23 at pp 38–46, who said at p 44:

> ... the only sorts of fraud which so far destroy a woman's consent as to convert a connection consented to in fact into a rape are frauds as to the nature of the act itself, or as to the identity of the person who does the act. There is abundant authority to show that such frauds as these vitiate the consent both in the case of rape and in the case of indecent assault. I should myself prefer to say that consent in such cases does not exist at all, because the act consented to is not the act done. Consent to a surgical operation or examination is not a consent to a sexual connection or indecent behaviour. Consent to a connection with a husband is not consent to adultery.
>
> I do not think that the maxim that fraud vitiates consent can be carried further than this in criminal matters.

[8] This is complicated by the purported rule that a wife was bound by marriage to consent to intercourse with her husband. Several of the judges expressed doubt that such a rule in fact existed at common law, and stated that, even if it did, it did not extend to the case where the husband was suffering from a disease like gonorrhoea. The "rule" in question was overruled by the House of Lords in *R v R* [1992] 1 AC 599.

[9] (1888) 22 QBD 23, 27.

[10] See *Flattery* (1877) 2 QBD 410; and *Williams* [1923] 1 KB 340, in which the defendant informed his victim that he was performing an operation to help her breathing. For the question whether the fraud of impersonating a husband nullified consent, contrast *Jackson* (1822) Russ & Ry 487, 168 ER 911, *Saunders* (1838) 8 Car & P 265, 173 ER 488, and *Barrow* (1868) LR 1 CCR 156 with *Flattery* (1877) 2 QBD 410, *Young* (1878) 38 LT 540 and the Irish case of *Dee* (1884) 15 Cox CC 579, where the court refused to follow *Jackson* and *Barrow*. Parliament finally intervened, passing the Criminal Law Amendment Act 1885, s 4 of which defined as rape the act of fraudulently impersonating the husband of a woman and thereby successfully obtaining her consent to intercourse.

intercourse was vitiated, and the man involved guilty of rape.[11] If the defendant's conduct with respect to his wife constituted an assault, then it must be an assault which amounted to rape.[12]

The nature of the act

5.5 It is now well settled that deception as to the nature of the act invalidates consent; but no clear guidelines have emerged as to what constitutes such a deception.[13]

5.6 A recent example of deception which did *not* relate to "the nature of the act" is *Linekar.*[14] This concerned a prostitute who agreed to have sexual intercourse with a man for an agreed sum of £25, which he failed to pay. He was convicted of rape. The jury had been directed that if they found that the victim had consented to intercourse in the belief that she would be paid, and the defendant had never intended to pay, then that fraud would vitiate her consent. Quashing the conviction, Morland J said:

> … an essential ingredient of the offence of rape is proof that the woman did not consent to the actual act of sexual intercourse with the particular man who penetrated her … The importance of … *Clarence*, in our judgment, is that it exposes the fallacy of the submission that there can be rape by fraud or false pretences.[15]

The identity of the actor

5.7 In *Elbekkay*,[16] a man who induced a woman to have sexual intercourse with him by impersonating her lover was convicted of rape. The Court of Appeal held that her consent was invalid because it was obtained by fraud, thus extending the rule (now recognised by statute)[17] that it is rape to procure intercourse by impersonating the woman's *husband*.

5.8 The courts have, however, placed restrictions upon the scope of this rule. Thus in an Australian case, *Papadimitropoulos*[18] (described by Morland J in *Linekar*[19] as

[11] (1888) 22 QBD 23, 29–30.

[12] (1888) 22 QBD 23, 33–34.

[13] In the Canadian case of *Harms* [1944] 2 DLR 61, the court upheld the conviction for rape of a man who posed as a doctor and obtained consent to sexual intercourse by falsely representing it as a necessary medical treatment for a condition he falsely diagnosed. Cf *Bolduc and Bird* (1967) 63 DLR (2d) 82, another Canadian case, where a woman's consent to the presence at a vaginal examination of a person other than her doctor, who falsely represented himself to be a medical student, was held to be valid.

[14] [1995] QB 251.

[15] [1995] QB 251, 255.

[16] [1995] Crim LR 163.

[17] Sexual Offences Act 1956 s 1(3), as amended.

[18] (1957) 98 CLR 249.

[19] [1995] QB 251, 259.

"very high authority"), in which a man went through a bogus ceremony of marriage with a woman and thereby induced her to have sexual intercourse with him, the High Court refused to find that the deception invalidated consent.

> … rape is carnal knowledge of a woman without her consent; carnal knowledge is the physical fact of penetration; it is the consent to that which is in question; such consent demands a perception as to what is about to take place, as to the identity of the man and the character of what he is doing. But once the consent is comprehending and actual the inducing causes cannot destroy its reality and leave the man guilty of rape.[20]

5.9 Recently the question of whether consent was invalidated by deception as to "the identity of the person" arose in respect of a *non*-sexual assault, in *Diana Richardson*.[21] The defendant, a dentist who had been suspended, continued to practise. Upon being discovered, she was charged with assault, after patients asserted that they would not have allowed her to treat them if they had known of her status. She pleaded guilty, after the judge accepted the Crown's submission that the defendant's fraud vitiated consent and ruled against a defence submission that the patients had consented to the treatment despite their ignorance of the circumstances. The Crown argued that "the concept of the 'identity of the person' should be extended to cover the qualifications or attributes of the dentist on the basis that the patients consented to treatment by a qualified dentist and not a suspended one". The Court of Appeal rejected this argument.

> In all the charges brought against the appellant the complainants were fully aware of the identity of the appellant. To accede to the submission would be to strain or distort the every day meaning of the word "identity", the dictionary definition of which is "the condition of being the same".[22]

THE ISSUES

5.10 At common law, therefore, an apparent consent to a sexual act does not count as a true consent if it is given under a mistake as to the identity of the person or the nature of the act. The basis for this is that "consent in such cases does not exist at all, because the act consented to is not the act done".[23] If, however, the complainant is aware of what is being done and who is doing it, and consents to

[20] (1957) 98 CLR 249, 261.

[21] [1998] 2 Cr App R 200.

[22] [1998] 2 Cr App R 200, 206.

[23] Stephen J in *Clarence* [1888] QBD 13, 44. Thus in *Case* (1850) 1 Den 580, 169 ER 381, a 14-year-old girl believed that she was submitting to medical treatment and made no resistance when her medical practitioner had sexual intercourse with her. Wilde CJ said: "She consented to one thing, he did another materially different, on which she had been prevented by his fraud from exercising her judgment and will."

its being done by that person, that consent counts as a valid consent, even if it is given under some other mistake. This rule has the following consequences.

5.11 First, a man who has sexual intercourse with another person, with that person's consent, does not commit rape merely because the consent is procured by deception going neither to the nature of the act nor to the man's identity. In the case of intercourse with a woman, there is an offence of procuring intercourse by false pretences or false representations, contrary to section 3 of the Sexual Offences Act 1956. The issue here is whether a consent procured by such a deception should be *wholly disregarded*, so that the man[24] is guilty not merely of the lesser offence but of rape.

5.12 Secondly, there is no offence[25] where the act done

(1) is a sexual act, other than [vaginal] intercourse with a woman,[26] which, in the absence of the passive party's consent, would be an indecent assault, but

(2) is done with the passive party's consent – *even if that consent is procured by a deception* going neither to the nature of the act nor to the actor's identity.

The issue here is whether such an act should amount to an offence – either one of non-consensual conduct (rape or indecent assault, as the case may be) or one of procuring consent by deception.

5.13 Thirdly, there is no offence[27] where a person's consent to any sexual act (including intercourse) is given under a mistake (going neither to the nature of the act nor to the actor's identity) and is not induced by deception, *even if the actor is aware of the mistake*, and knows that, but for the mistake, the other person would not have consented. Again the issue is whether such an act should amount to any offence – either one of non-consensual conduct or some lesser offence.

SHOULD A CONSENT PROCURED BY DECEPTION BE WHOLLY DISREGARDED?

5.14 The CLRC's proposals in its Working Paper on Sexual Offences (1980) were essentially in line with the common law rules set out above. They are now reflected, in relation to rape and sexual intercourse procured by deception, in clauses 89(2)(b) and 91 of this Commission's draft Criminal Code.[28]

[24] In the case of anal intercourse with a male, the active party.

[25] Assuming that there is no liability on any other ground, eg that the "consenting" party lacks capacity to consent, or that the act amounts to gross indecency between males and is not done in private.

[26] It is not clear whether the offence under Sexual Offences Act 1956, s 3, extends to *anal* intercourse with a woman: see Consultation Paper No 139, para 6.4, n 9. It clearly does not extend to anal intercourse with a man.

[27] Again assuming that there is no liability on any other ground.

[28] (1989) Law Com No 177.

5.15 In the first consultation paper this approach was said to involve "complicated and indeed metaphysical discussion in cases where there ought to be a simpler answer".[29] It was proposed that, for the purposes of *non*-sexual offences against the person (with which the first consultation paper was solely concerned), consent should be *deemed* absent if, though in fact present, it is procured by fraud or misrepresentation.[30] This suggestion would abolish the distinction between "fraud in the inducement", which does not abolish the reality of the apparent consent, and "fraud in the factum", which does.[31] We expressed dissatisfaction with a decision of the Supreme Court in Canada[32] in which a doctor had fraudulently obtained a woman's consent to a vaginal examination at which another man was present by pretending that the other man was a medical student, and the woman's consent was held to be valid.

5.16 In the second consultation paper we tried to clarify the meaning and effect of consent in relation to *all* non-consensual offences against the person, whether sexual or non-sexual. We expressed concern that it would make things extremely difficult for those who have to enforce the law if two quite separate regimes for consent existed in relation to sexual and non-sexual offences against the person.[33] We therefore concluded that it would be wrong to recommend the fundamental change suggested in the first consultation paper "in the absence of any major new fundamental review of the law relating to sexual offences". The Home Office is now undertaking such a review, and this argument would obviously lose its force if it were decided that the approach proposed in the first consultation paper is appropriate for sexual offences too.[34]

5.17 The question for consideration in the present context, therefore, is whether such a rule is acceptable in principle. In the second consultation paper we pointed out that, under the proposals in the first consultation paper, "consent would be nullified by fraud in cases where the complainant knew exactly what she was consenting to, although she would never have consented if she had not been deceived about some ancillary matter".[35] Some respondents to the first

[29] Para 25.4.

[30] Para 26.1. For present purposes the terms "fraud" and "misrepresentation" appear to be synonymous both with one another and with the more modern term "deception", preferred in the second consultation paper. "False pretences", used in Sexual Offences Act 1956, s 3, is arguably narrower in that, in the context of the now-superseded offence of obtaining property by false pretences, it was held not to extend to a misrepresentation as to the defendant's own state of mind: *Dent* [1955] 2 QB 590.

[31] See *Harms* [1944] 2 DLR 61, n 13 above. In *Papadimitropoulos* (1957) 98 CLR 249, para 5.8 above, the High Court of Australia referred to "the consent to that which is in question", whose "reality", if the consent is "comprehending and actual," cannot be destroyed by the "inducing causes".

[32] *Bolduc and Bird* (1967) 63 DLR (2d) 82.

[33] Consultation Paper No 139, paras 1.7 – 1.8 and 6.18.

[34] The current draft of the Home Office's consultation paper does not include such a proposal.

[35] Para 6.16.

consultation paper pointed out, and the second consultation paper recognised,[36] that in some cases this would produce surprising results. For example, a prostitute paid with a forged banknote would be deemed not to consent to the acts (eg sexual intercourse – or, in the context of the first consultation paper, the infliction of bodily harm by spanking) to which her consent is thus bought.[37]

5.18 In the second consultation paper we concluded that the approach taken by the present law, the CLRC and the draft Code was preferable to that proposed in the first consultation paper.

> Although there is a powerful argument that the law should protect people who are ignorant or naively trusting,[38] in our view, this protection should be achieved through the criminal law of deception. … We will therefore be provisionally proposing that there should be a general offence (analogous to that under section 3 of the Sexual Offences Act 1956) of procuring by deception another person's consent to an act which would be an offence if done without that person's consent; … but, provided that the law makes it clear that consent may be withdrawn at any time, the circumstances in which fraud may nullify consent completely should in general be restricted to fraud as to the nature of the act and the identity of the other person(s) involved.

5.19 Although the majority of respondents to the second consultation paper who commented on this proposal supported it, a substantial minority preferred the approach taken in the first consultation paper, arguing that there is no logical basis for distinguishing those deceptions that do vitiate consent from those that do not. The Cardiff Crime Study Group, for example, said:

> Either the law should say that *all* consents which are obtained in circumstances such that they would not have occurred had the person giving the consent known the truth [are vitiated], or none of them are. The nature/identity test … does not provide a satisfactory general guide.

5.20 In our view this is a distortion of the proposal. As the first consultation paper made clear (but the second arguably did not), the traditional approach does not involve saying that a consent procured by deception may or may not be valid, depending on the nature of the deception. Rather, it focuses solely on whether the complainant *did in fact* consent to the doing of the act by the person who in fact did it. If D does *x* to V, the question is whether V consented to D's doing of *x*. If V consented to D's doing of *y*, and thought that D was doing *y* when he was in fact doing *x*, then she did not in fact consent to his doing *x*. Similarly, if V

[36] Para 6.17.

[37] Some respondents to the second consultation paper (eg Nicola Padfield) expressly argued that such conduct is indeed non-consensual, and that the defrauded prostitute is a victim of rape.

[38] See J Feinberg, *Moral Limits of the Criminal Law* (1985) vol 3, p 296. (Footnote supplied)

consented to E's doing of *x*, and thought that the person doing it was E when in fact it was D, then she did not consent to D's doing it. The traditional approach does not draw an irrational distinction between deceptions of different kinds, some of which are deemed to nullify consent although consent was in fact given. It simply recognises that in certain circumstances an *apparent* consent is not a true consent to what is in fact done.

5.21 We are not persuaded that it would be right to extend the scope of rape and indecent assault so as to include all cases where the complainant's consent is obtained by deception. There are, however, several special cases which arguably call for special treatment in this respect.

Professional qualifications

5.22 One case where a consent obtained by deception should arguably be disregarded is that in which the actor falsely claims, expressly or by implication, to possess some relevant professional qualification. In *Richardson* it was held that this is not a mistake of identity.[39] We must consider whether this rule is satisfactory.

5.23 The question is not likely to arise in the context of *rape*. Where, however, a man induces a woman to submit to what would otherwise be an *indecent assault* by pretending to be (for example) a gynaecologist, it is arguable that her apparent consent is illusory: she consents to the examination being carried out *only* by a gynaecologist, which the defendant is not.[40]

5.24 In our view, the concept of identity can properly be given a more flexible meaning than *Richardson* gives it. It should not be assumed that everyone has a single, fixed identity, consisting solely in his or her name or appearance. People can have different identities for different purposes. For the purposes of a particular kind of transaction, a person's identity may consist in some attribute which has a particular bearing on whether it is appropriate for that person to undertake that transaction. For the purposes of what is believed by the patient to be a gynaecological examination, the identity of the examiner may consist primarily, or solely, in his or her status as a gynaecologist. We think it should be open to a jury to conclude that the patient did not consent to that act being carried out by a non-gynaecologist such as the defendant.

5.25 It follows that we believe the decision in *Richardson* should be reversed. **We conclude that it should be open to a jury to decide that, for the purposes of a particular act, the "identity" of the actor included the possession of a professional qualification or other authority to do the act in question, and that if the defendant had no such authority then he or she did it without consent.**

[39] [1998] 2 Cr App R 200; see para 5.9 above.

[40] It might alternatively be said that what she consents to is a proper gynaecological examination, which is not what the defendant is doing; but we think it simpler to approach the issue in terms of the identity of the actor, rather than the nature of the act done.

HIV and other sexually transmissible diseases

5.26 In the second consultation paper we acknowledged that there is a case for treating a deception as to a person's HIV status, or freedom from other sexually transmissible diseases, as of such fundamental importance to his or her sexual partner that it should be treated as nullifying consent altogether.[41] This would mean that a man who induces another person to have sexual intercourse with him by falsely claiming to be HIV-negative would be guilty of rape.

5.27 The question whether such a rule should be introduced raises very difficult issues. In terms of the narrow issue of the proper extent of criminal liability, it requires the striking of a balance between protecting people from reckless transmission of HIV by those who know themselves to be HIV-positive, and protecting them from unwitting transmission by those who do not know their HIV status because the law discourages them from finding out. It also raises the wider public health issue of the need to avoid discouraging people from being tested. The right approach to these issues is a delicate matter, requiring expertise in public health and social policy rather than law. We do not feel qualified to express a view, and **we make no recommendation on this issue.**[42]

5.28 We are supported in this conclusion by recent developments on the question of whether a person who knowingly subjects another to the risk of HIV should be guilty of an offence of *causing injury* if HIV is in fact transferred. This question was considered by the Home Office in its 1998 consultation paper on non-sexual offences against the person, which put forward proposals based on our 1993 report Legislating the Criminal Code: Offences Against the Person and General Principles.[43] In our report we had expressed the view that causing injury by passing on a disease is in principle no different from doing so in any other way.

5.29 The Home Office paper, however, for the reasons of social policy mentioned in paragraph 5.27 above, proposed that disease should not count as "injury" for the purpose of the proposed offences of causing injury, except for the offence of *intentionally* causing *serious* injury. While expressing no view on this conclusion, we think that for the purposes of the present exercise it is sensible to proceed on the assumption that any forthcoming legislation on non-sexual offences against the person will avoid imposing criminal liability for recklessly communicating HIV or other disease. This assumption obviously has implications for our policy on consent in sexual offences. It would be anomalous if a man who misrepresents his HIV status to a prospective sexual partner were immune from liability for transmitting HIV, which is the gravamen of what he does, but were guilty of rape.

[41] Para 6.19.

[42] Since there would be a valid consent under the present law, the enactment of our recommendations *and no others* would have the effect of preserving that position. But this seems academic, since we expect the Home Office review to make a substantive recommendation, one way or the other.

[43] Law Com No 218.

Transsexuals

5.30 A further possibility is that a person's consent to sexual conduct by another person might be procured by a deception as to that other person's sex. This will normally (though perhaps not invariably) be because the other person is a transsexual – that is, he or she has undergone sex re-assignment surgery. It is arguable that a person who consents to sexual acts by a particular person, believing that person to be female, should not be regarded as consenting to those same acts being done by a person who is in law male; and vice versa. But here too such a rule would be at odds with our general approach, namely that consent should not be deemed to be absent when it is in fact present. We believe that most people would think it unacceptable for the transsexual to be convicted of indecent assault (or even rape).

5.31 Even if we did not take that view, the creation of a special rule for transsexuals would risk infringing Article 8 of the European Convention on Human Rights. The recent case of *Sheffield and Horsham v UK*[44] concerned two male-to-female transsexuals who complained of the British authorities' refusal to amend or update the register of births so as to record their post-operative sex. It was submitted that this failure to recognise in law that they were now female constituted an interference with their right to respect for private life. In both cases, the Commission held that there were violations of Article 8. The Court (by a majority of 11 to 9) held otherwise, stating that there was, as yet, insufficient consensus between the member states on this matter. However, the Court considered that the UK had not fulfilled its duty to keep the law in this area under review. In the light of this reasoning we do not think that a rule effectively forcing transsexuals to disclose their original sex to prospective sexual partners could safely be certified as compatible with the Convention, under section 19 of the Human Rights Act 1998.

5.32 At present, on the facts of a particular case, a jury might take the view that, as a result of the transsexual's failure to disclose his or her original sex, the other person was consenting to something other than what was in fact done. Our general approach would suggest that in such a case it should be open to them to convict the transsexual of indecent assault.[45] However, it seems likely that a court permitting a jury to convict on such grounds would be held to have infringed the transsexual's rights under Article 8, and the possibility should therefore be eliminated.

5.33 **We conclude that an apparent agreement to a sexual act by another should not be disregarded merely because it is given under the impression that the other is male whereas the other is in fact female, or vice versa, where the other has undergone sex-reassignment surgery.**

[44] 1998-V p 2011, (1999) 27 EHRR 163.

[45] Or, perhaps, rape; but it surely would be inconsistent for the law to treat a female-to-male transsexual as committing a deception by purporting to be male, while being capable of committing the offence of rape.

5.34 We make no such recommendation for the situation where one party deceives the other as to his or her sex, but is not a transsexual. The argument for exempting transsexuals is, at least in part, based on a recognition of the fact that, for practical purposes as distinct from legal theory, such a person *has* changed sex. If there is a deception it is arguably not as to the transsexual's *present* sex. This consideration does not apply to persons who are not transsexuals.

Our recommendation

5.35 The conclusions we have reached in this section can be brought together as a recommended definition of "genuine agreement". **We recommend that, for the purposes of our recommendation that only a "subsisting, free and genuine agreement" should count as consent to a sexual act by another,**[46] **an apparent agreement to such an act**

(1) should not be regarded as "genuine" if it is obtained by a deception as to the other's identity (which, where appropriate, may include or consist in the possession of a professional qualification or other authority to do the act) or the nature of the act; but

(2) may be so regarded despite being given under the impression that the other is male whereas the other is in fact female, or vice versa, where the other has undergone sex-reassignment surgery.

A LESSER OFFENCE OF PROCURING CONSENT BY DECEPTION?

5.36 In the second consultation paper we proposed that

> a person should be guilty of an offence, punishable on conviction on indictment with five years' imprisonment, if he or she does any act which, if done without the consent of another, would be an offence so punishable, and he or she has procured that other's consent by deception.[47]

5.37 Some respondents objected that the scope of this proposal was too wide.[48] It should be noted, however, that in the present context we are concerned only with the situation where the act done, if done without the other's consent, would be an indecent assault. Where the act in question is sexual intercourse, so that if done without consent it would be rape, there is already an offence under section 3 of the Sexual Offences Act 1956. The question is: should it be an offence for one person to induce another to permit sexual contact falling short of sexual intercourse, by a deception which does not have the effect of negativing the other's consent altogether?

46 See para 2.12 above.

47 Para 6.81.

48 Eg the Criminal Bar Association, which supported the proposal for the purpose of sexual offences only.

5.38 The responses to the second consultation paper included a number of objections to this proposal. One argument raised was that the proposed offence was otiose, because the conduct in question is already covered by other offences, such as obtaining services by deception under section 1 of the Theft Act 1978. This offence might apply where a prostitute accepts a forged banknote in payment,[49] but not where (for example) a married man claims to be single.

5.39 Another objection is that the concept of deception is too wide to justify the imposition of criminal liability for its use as a way of obtaining sexual gratification. Arguably it is undesirable that liability for a sexual offence should depend on whether (for example) a declaration of love is true or false. One possible answer to this is that it is already an offence to procure consent to sexual *intercourse* by misrepresentation, and it is not suggested that that offence should be repealed. It may indeed be arguable that that offence requires a misrepresentation of some external fact, and that a lie as to the defendant's own state of mind (for example, whether his intentions are honourable) will not suffice. If it is thought appropriate that the offence under section 3 should exclude such deceptions, clearly the same would apply to any wider offence of procuring consent to other sexual acts. But we do not think this would be appropriate. Obtaining *property* by misrepresenting one's own state of mind is an offence, and we see no reason why bodily integrity should be less well protected than property. If such deceptions are (and continue to be) sufficient for liability in the case of sexual intercourse, it is hard to see how the possibility of prosecutions for such deceptions can militate against the creation of an analogous offence for other sexual conduct.

5.40 A related argument is that such an offence might result in a proliferation of petty prosecutions. We have, however, recently examined, and rejected, the argument that an offence which is otherwise justified should not be created merely because some examples of trivial misconduct might fall within it.[50] If the offence is otherwise justified but it is feared that it may be inappropriately used in trivial cases, this risk can to some extent be averted by a requirement that the DPP's consent be required before a prosecution can be brought.[51] It seems unlikely, however, that a new offence would be too freely used, since the offence under section 3 is rarely used.

5.41 This fact in turn suggests the opposite objection, and the one that seems to us to be the strongest: namely that, if the offence under section 3 is rarely used, there is no need to extend it. We have expressed the view that conduct should in general be made criminal only where it is necessary to do so.[52] There are, however,

[49] Though this is a moot point, since the contract is illegal and unenforceable.

[50] Legislating the Criminal Code: Fraud and Deception (1999) Consultation Paper No 155, para 7.42.

[51] But in our report Consents to Prosecution (1998) Law Com No 255, we concluded that it is not appropriate for consent to be required on this ground alone: para 6.12.

[52] We made this point in our consultation paper on Misuse of Trade Secrets (1997) Consultation Paper No 150.

different senses in which criminalisation may be said to be "unnecessary". In some cases, conduct of a particular kind may be quite common, but never does any great harm and so there is no need to criminalise it. Alternatively, there may be conduct which rarely occurs, but which is serious enough to justify the imposition of criminal liability when it does. In this latter case the argument against criminalisation seems weaker. In the present context it is not difficult to imagine circumstances in which the law would be widely regarded as unsatisfactory if the practitioner of the deception were guilty of no offence at all. If such a case were to arise, there would be a temptation to bring an inappropriate charge of indecent assault, and a jury would be tempted to convict of such a charge.

5.42 It should also be borne in mind that, under our recommendations on the circumstances in which an apparent consent should be disregarded, there may be cases of flagrant deception in which a jury may be of the view that the complainant in fact consented but would not have done so but for the deception. One such case might be that in which the defendant falsely claimed to have some attribute rendering him or her particularly qualified to carry out the act, but (despite our recommendation that it should be open to them to do so)[53] the jury do not accept that the complainant did not consent at all; or where the defendant claimed to be, or to be related to, a public figure. An offence of procuring consent by deception would be a useful alternative in such a case.

5.43 We note in this connection that the Home Office's draft paper regards certain kinds of indecent assault, namely non-consensual penetration of the anus or genitalia with an object or a part of the body other than the penis, as being almost (but not quite) serious enough to qualify as rape, and proposes a new offence to differentiate such conduct from non-penetrative indecent assaults. It is arguable that the obtaining by deception of consent even to *non*-penetrative sexual contact might in certain circumstances be sufficiently serious to justify criminal liability, eg where the deception is as to the defendant's possession of professional qualifications but it is not regarded as negativing consent altogether. However, the case for extending the offence under section 3 to conduct other than sexual intercourse is clearly at its strongest in the case of other forms of penetration. This is a matter of fine judgment. On balance we are inclined to accept that it is only in the case of such serious conduct that a new offence of obtaining consent by deception would be justified.

5.44 Penetration of the *mouth* is a special case. Under the Home Office's proposals, non-consensual fellatio would count as rape. It would seem to follow that the obtaining of consent to fellatio by deception should be treated as sufficiently serious to fall within the new offence that we propose.

5.45 **We recommend that section 3 of the Sexual Offences Act 1956 should be extended, so that it would be an offence *not only* for a man to procure sexual intercourse with a woman by deception *but also* for**

[53] See para 5.25 above.

(1) any person to penetrate another's anus or genitalia with any part of the body or any object, or

(2) a man to penetrate another's mouth with his penis,

having obtained the other's consent to such penetration by deception.

5.46 The considerations mentioned at paragraph 5.27 above might suggest not only that a man who has intercourse *without disclosing* that he is HIV-positive should be protected from a charge of rape, but also that a person who obtains another's consent to sexual penetration by *positively misrepresenting* his or her HIV status should equally be protected from liability under section 3, or under the wider offence that we propose. In the absence of a special rule, a deception as to HIV status would have the same effect as a deception as to any other matter. As in the context of rape, we believe that we are not the appropriate body to come to a conclusion as to whether such a special rule would be justified, and we make no recommendation on the point.

MISTAKE WITHOUT DECEPTION

5.47 It remains to consider what the position should be where the complainant's mistake is not brought about by the defendant's deception, but the defendant is aware of the mistake.

5.48 The common law recognises that it is the complainant's perception of what is being done, and with whom, that is relevant to the question of whether or not consent is given, rather than what *caused* that perception. In *Papadimitropoulos*, for instance, the court observed:

> It must be noted that in considering whether an apparent consent is invalid it is the mistake or misapprehension that makes it so. It is not the fraud producing the mistake which is material so much as the mistake itself.[54]

5.49 In *Diana Richardson*, Otton LJ quoted this statement with approval, and added:

> The common law is not concerned with the question whether the mistaken consent has been induced by fraud on the part of the accused or has been self-induced. It is the nature of the mistake that is relevant, and not the reason why the mistake has been made.[55]

5.50 Where the mistake is one as to the identity of the defendant or the nature of the act, so that the complainant does not consent at all, we see no reason why it should make any difference that the defendant is not *responsible* for the mistake, provided that he is *aware* of it. If, for example, a man has sexual intercourse with a woman, knowing that for some reason she has mistaken him for her husband or lover, or being aware of the possibility that she may have done so, we believe this

[54] (1957) 98 CLR 249, 260.

[55] [1998] 2 Cr App R 200, 206.

should be rape. Since we believe that this is the existing law, we recommend no change.

5.51 In the case of deceptions which do not negative consent altogether, different considerations apply. We acknowledge that in some circumstances the deliberate non-disclosure of an important fact can be reprehensible – for example, where, knowing that a prospective sexual partner is looking for a long-term relationship and believes him to be single, a man fails to disclose that he is married. Non-disclosure of such a fact may perhaps be *morally* deserving of a criminal sanction. English law has, however, traditionally distinguished between positive deception and non-disclosure; and this is particularly true of the criminal law, which rarely imposes duties of disclosure except in specialised areas of commercial activity such as financial services. There is a clear distinction between rules which enable parties to unscramble voluntarily made arrangements and those by which the state imposes criminal sanctions. We see no reason to create a further exception to the general rule in this context.

5.52 We therefore do not think it would be right for the law to require that, before engaging in sexual activity with another, a person must take positive steps to correct *any* mistake under which he or she knows the other person to be labouring – even if he or she knows that, but for that mistake, the other party would not consent. This applies both to the existing offence of procuring intercourse with a woman by false representations and to our proposed, wider offence of procuring consent to penetration by deception. Both offences would in our view be too wide if they extended to a case where the complainant consents under an impression which the defendant has done nothing to foster – even if he or she is aware of the mistake. **We recommend that, for the purposes of our recommended definition of "genuine agreement"[56] (but *not* our recommendation for a separate offence of obtaining consent to penetration by deception),[57] a person's apparent agreement to a sexual act by another should be regarded as having been obtained by a deception as to a particular matter if the other is aware that it has or may have been given under a mistake as to that matter.**

[56] See para 5.35 above.

[57] See para 5.46 above.

PART VI
THREATS

6.1 We recommended in Part II that consent be defined as "subsisting, free and genuine agreement". An agreement may not be *free* because it is obtained by threats. This issue is comparable to that of the effect of mistake (with or without deception), in the sense that a threat can (a) nullify an apparent consent altogether, (b) render the defendant liable for a lesser offence without rendering his or her conduct completely non-consensual, or (c) have no legal effect at all.

6.2 However, on closer analysis the analogy breaks down. Where mistake negatives consent altogether, it is because the complainant *does not consent* – either to the act that is in fact done, or to its being done by the person who in fact does it. Where the complainant does consent to both of these, it would be possible for the law to *deem* that consent invalid on the ground that it was given under a mistake of fact; but we have decided against recommending such a rule.

6.3 In the case of threats, however, a similar approach does not seem helpful. This is because a threat will rarely deprive the complainant of *all* choice, and thus prevent her from consenting at all.[1] Rather, she is faced with a choice between the sexual act in question and the execution of the threat, and chooses the former.[2] But, in the case of certain kinds of threat at least, it is widely accepted that such a choice should not be regarded as a *valid* consent. In this case, the law does disregard a consent which is in fact given, because it is not a *free* consent.

THE PRESENT LAW

6.4 It is clearly established that threats of violence or force, directed at the complainant, may negative consent;[3] and it is possible that such threats directed at a third party may also do so.[4] Moreover, the Court of Appeal, in *Olugboja*,[5] held that threats of force are not the *only* kinds of threat that may negative consent. It drew a distinction between consent, on the one hand, and

[1] The exception is the case where the defendant shows an intention to have intercourse in any event, by force if necessary. The complainant's "choice" then lies between intercourse with violence or intercourse without it. See J Temkin, "Towards a Modern Law of Rape" (1982) 45 MLR 399, 406.

[2] "[A] woman who gives in to threats does in fact consent, however reluctantly": Smith & Hogan, *Criminal Law* (9th ed 1999) p 459; *DPP of Northern Ireland v Lynch* [1975] AC 653, *per* Lord Simon of Glaisdale at pp 690–691. See also the discussion in *Chitty on Contracts* (28th ed 1999) para 7-002. Lord Wilberforce specifically stated in *Lynch* at p 680A, making comparisons with the law of contract, that "duress does not destroy the will, for example, to enter into a contract, but prevents the law from accepting what has happened as a contract valid in law".

[3] *Lang* (1976) 62 Cr App R 50, 51.

[4] See *Wilson* (1974) 58 Cr App R 304, 307.

[5] [1982] QB 320.

"submission" or "reluctant acquiescence" on the other, but left unresolved the ambiguous issue of how the two states of mind were to be demarcated.[6]

6.5 It certainly cannot be the case that *all* cases of intercourse in which one party engages only reluctantly constitute rape.[7] As Professor Sir John Smith has pointed out, "The prospect of a dissatisfied and disgruntled husband, denied his 'marital rights', is one thing; the prospect of being imprisoned, beaten, or even killed, quite another". The difference between an act which constitutes rape and one which does not must be in "the degree of reluctance and the nature of the forces which compel the acquiescence".[8]

6.6 In civil law, as illustrated by *Re T,*[9] it has been held that for a refusal to consent to medical treatment to be an effective refusal, the court has to be satisfied that the will of the patient had not been overborne by another's influence.[10] However, the criminal law has not been concerned with subtle analyses of the extent to which consent was voluntary or free in situations in which there is no force or intimidation. Some of the complexities have been illustrated by the late Professor Griew:

> In what circumstances does a wife (or any other woman) who has sexual intercourse *not* consent to do so? … We are not talking about the (surely very common) case of disgruntled capitulation to persistent importunity. The circumstances may well constrain the wife's choice – because of her need for sleep and for freedom from stress in the quotidian relationship, because of her dependence on her husband's affection and his purse, because of the balance between their competing personalities and the sheer unremitting pressure of cohabitation with him, she may feel she has no real alternative. Yet when she gives in, it cannot be doubted that she does "consent" within the meaning of the Act. Nor, despite the wide language of the surprising judgment in *Olugboja*,[11] should a finding of non-consent

[6] Two inconclusive cases are referred to in *Olugboja*. The first, an unreported decision (mentioned at [1982] QB 320, 328F), concerns a police constable who Winn J had held had no case to answer where he induced the complainant to consent to sexual intercourse by threatening to report her for an offence. The second is *Wellard* (1978) Cr App R 364, in which the defendant was said to have a previous conviction for rape by masquerading as a security officer and inducing a girl to consent by threatening to report to her parents and the police that she had been seen having intercourse in a public place.

[7] Or even an offence under s 2(1) of the Sexual Offences Act 1956, of procuring sexual intercourse by threats or intimidation.

[8] Commentary on *McAllister* [1997] Crim LR 233, 234.

[9] *Re T (Adult: refusal of medical treatment)* [1993] Fam 95.

[10] A Jehovah's Witness mother persuaded her 20-year-old daughter to refuse a blood transfusion in connection with the delivery of her baby by Caesarean section. On the facts the Court of Appeal held that the decision was nullified by the undue influence of her mother.

[11] See para 6.39 above (footnote supplied).

> be based on "fear" of no matter what consequences of her refusal or on the operation of no matter what "threats".[12]

THREATS OF FORCE

6.7 In the second consultation paper, drawing on the CLRC's Fifteenth Report on Sexual Offences, we proposed that a threat of non-consensual force should continue to have the effect of negativing any consent thus obtained, *provided* that the complainant believes that, if she does not consent, the threat will be carried out immediately or before she can free herself from it.[13]

6.8 This proposal received general support. However, some respondents objected to the requirement of immediacy, on the grounds that

> it is wrong to impose norms on victims in these circumstances; … the proposed rule would suggest to defendants that it is permissible to use threats of force which fall short of the immediacy requirement … It is not good enough to say that if the threat cannot be fulfilled immediately she should refuse to comply with the assailant, and should then get help to prevent the man carrying out what he has threatened. Many women try desperately to get protection from the police and the courts, but do not get any …

6.9 In the light of these arguments we agree that a threat of any non-consensual force should negative consent, without any requirement of immediacy. But should any *other* threats have the same effect?

OTHER THREATS

6.10 The present law does not make clear precisely which types of threat vitiate consent. The Court of Appeal in *Olugboja*[14] envisaged the possibility of a conviction for rape even where the threat that procured the consent was not a threat of force. It was said that consent should be given its ordinary meaning, but that there is a difference between consent and submission. A threat of something other than force *may*, it seems, have the effect of turning an apparent consent into mere submission. But the two concepts are not mutually exclusive. Many people enjoy adopting a submissive role in sexual relationships; it cannot be said that they therefore do not consent to what is done.

6.11 In our view the point is rather that submission does not *in itself* amount to consent, though they may co-exist. A jury should certainly be warned not to reason that, because the complainant submitted, *therefore* she consented. But such a warning is not enough, because it provides no help in drawing the distinction between a submission which includes consent and one which does not. The

[12] (1992) 11 Archbold News 5. Professor Griew points out that procuring intercourse by threats is catered for by the offence in s 2 of the Sexual Offences Act 1956.

[13] Consultation Paper No 139, paras 6.34 – 6.37 and 6.87, proposal 27.

[14] [1982] QB 320.

question is, what (if any) kinds of threat, other than threats of force, should be regarded as having secured submission *but not consent*?

6.12 The Canadian Criminal Code, we note, provides that consent is *not* obtained where the complainant submits or does not resist by reason of … "threats or fear of the application of force to the complainant or to a person other than the complainant";[15] but it has been held that this is not exhaustive of the circumstances in which consent may be invalidated.[16] Similarly, the Australian MCCOC report on Sexual Offences Against the Person recommends that "consent" be defined as "free and voluntary agreement", and that *examples* be given of circumstances in which such agreement does not exist. Again, these examples would not be exhaustive.

Option 1: threats of force only

6.13 Only a handful of respondents to the second consultation exercise thought that *no* threat other than a threat of force should suffice, and little explanation was offered for this view. The only reasoned argument relates to difficulties in defining the boundaries on any other basis.[17] Whilst there is obvious attraction in having a clearly identifiable boundary, capable of easy recognition by juries, we do not believe that that alone should be sufficient reason for setting the boundary, first, in a more restrictive place than at present under *Olugboja*; and second, in a place that would compel juries to find a valid consent where a grave threat has left a victim with no practical choice.

Option 2: all threats

6.14 There is practically no support for a rule that consent should be disregarded if it is obtained by *any* threat. Those who favoured allowing threats of any *kind* to be capable of vitiating consent would limit this by concepts such as triviality, negligibility, impropriety or unwarrantedness, or by reference to the likely influence of such a threat on persons of normal stability: see option 4 below.

Option 3: threats of certain kinds

6.15 Women Against Rape London expressed concern about threats to abuse one's authority:

> Rape by police officers, immigration officials, doctors, landlords, employers, heads of children's homes and others in positions of power, is particularly hard to report. If the rapist can then successfully defend himself on the grounds that the victim "consented," the door is wide open for further abuse … Threats to the welfare or security of a child are frequently used against women

[15] Section 265(3).

[16] *Caskanette* (1993) 80 CCC (3d) 439 (BCCA).

[17] This stance is also taken by Glanville Williams in his *Textbook on Criminal Law* (2nd ed 1983) pp 551–552.

> by partners or ex-partners … Women – and children – must not be left vulnerable to such threats. Financial duress is also commonly used where there are children involved.

6.16 One possible solution would be to include other specific *types* of threat – such as a threat to cause financial harm, or harm to the security or welfare of children, or harm to social standing or economic well-being. The difficulty with that route is that it would almost certainly require the introduction of another test to determine whether, in any particular case, a threat of such a kind was in fact *serious* enough to invalidate consent. This would practically defeat the purpose of listing additional types of threat.

Option 4: the effect of the threat

6.17 There was substantial support for a flexible and incremental approach, not unlike that advanced in *Olugboja*, which would focus on the actual effect of the threat on the individual complainant. One respondent said that a jury, on the direction of the judge, were in the best position to decide if the "threat" was serious enough to induce sufficient fear in the victim to make her consent. Another thought that any threat that could have a material effect *on a person's social standing or economic well-being* (including threats to expose one as gay, or as a drug-user) should vitiate consent.

6.18 The advantage of a test which looks at the *effect* of a threat on the victim is that, where the effect is utterly overwhelming, it allows this to be recognised, so that consent is vitiated even though the threat is of something other than force against the person. A disadvantage of this approach concerns the risk that an indeterminate class of threat might emerge, so that too broad an array of circumstances may or may not be considered to vitiate consent, depending on the mood of a jury. It is essential that the relevant criteria are expressed sufficiently clearly to prevent this disadvantage from arising.

6.19 It is certainly arguable that the common sense of the jury can safely deal with such matters, but we consider that some criteria, at least, should be set out in legislation. If, for example, it is believed that there should be no criminal liability where a man tells his girlfriend that if she does not consent to sex with him then he will never take her to the cinema again, it ought to be possible for a judge to explain to a jury the *basis* on which the law permits them to acquit.

6.20 David Ormerod proposed doing this by asking whether in the circumstances the victim *could reasonably be expected to have resisted the threat.* Such a test would effectively take into account the factors of triviality, eligibility, and the likely influence of such a threat on an ordinary person, raised by respondents discussed under option 2. But, as we said in the first consultation paper:

> … the careful limitations placed on the *defence* of duress (for instance, that the accused could not reasonably have reacted

> otherwise to the duress)[18] are not appropriate here. It does not lie in the mouth of someone who has obtained another's consent to violence by a threat of force to say that the consenting person could or should have resisted the threat.[19]

Nor, we think, does it lie in the defendant's mouth to say this where the apparent consent is to a sexual act rather than violence, or where the threat is of serious harm other than physical force.

6.21 Moreover, if the complainant would not have consented but for the threat, it follows that, *from her perspective*, the execution of the threat seemed a greater evil than submission to the act proposed. We do not think it would be right to invite the jury to determine whether she *should* have regarded it as a lesser evil. That is a judgment that only she can make, because it depends not only on the seriousness of the threat but also on the degree of her reluctance to submit.

6.22 In our view the right approach is to focus on the *seriousness* of the threat, from the point of view of the individual complainant. The jury should be able to conclude that the threat made, whatever *kind* of threat it was, was so serious that it would not be right to treat the complainant as having consented at all. Conversely, if they do not think it was serious enough to have this effect, they should be able to acquit.

A further requirement that the threat be *illegitimate*?

6.23 We have considered whether it would be right to impose a further requirement, that an apparent consent is not invalidated by a threat unless it was *illegitimate* to obtain the consent by means of the threat.[20] Such a requirement would be somewhat analogous to the requirement in the offence of blackmail that the demand with menaces be "unwarranted". This requirement is not satisfied if the defendant believed that there were reasonable grounds for making the demand and that the use of the menaces was a proper means of reinforcing the demand.[21]

6.24 Blackmail, however, extends to *any* demand with menaces which is made with a view to gain or an intent to cause loss. It is often legitimate to obtain money or other property by a threat of serious harm – for example, a threat, made in good faith, to bring legal proceedings for substantial damages, combined with an offer to accept a comparatively small sum in full settlement. We cannot imagine circumstances in which it would be legitimate to obtain *sex* by such a threat. The strongest case we can devise is that of a man who threatens to leave his wife destitute if she does not consent. Even here, however, we do not think the threat

[18] See Law Com No 218, at paras 29.11 – 29.14. (Footnote in original)

[19] Consultation Paper No 134, para 28.2.

[20] The possibility of such a requirement was discussed at paras 6.59 – 6.64 of the second consultation paper – but in relation to a possible separate offence of obtaining a valid consent by threats (see para 6.26 below), rather than whether an apparent consent obtained by threats should be invalidated altogether.

[21] Theft Act 1968, s 21(1).

could fairly be regarded as a *legitimate* way of securing consent. In our view, therefore, a requirement of illegitimacy would be nugatory, and we include no such requirement in our recommendation.

Our recommendation

6.25 **We recommend that, for the purposes of our recommendation that only a "subsisting, free and genuine agreement" should count as consent to a sexual act,[22] a person's apparent agreement to such an act should not be regarded as "free" if it would not have been given but for a threat, express or implied,**

(1) to use non-consensual force against that person or another, or

(2) to cause serious harm or detriment to that person or another.

A LESSER OFFENCE OF PROCURING CONSENT BY THREATS?

6.26 Where consent is procured by a threat falling outside this test, it would be possible to impose liability for some offence less serious than rape or indecent assault. This already happens in relation to sexual *intercourse*. Under section 2 of the Sexual Offences Act 1956, procuring a woman, by threats or intimidation, to have sexual intercourse in any part of the world is an offence punishable with up to two years' imprisonment.[23]

6.27 In the second consultation paper we asked for views on the suggestion that, if a consent is to be treated as valid when it is procured by a threat other than one of force,

(1) it should be an offence, punishable on conviction on indictment with five years' imprisonment, for a person to do any act which, if done without the consent of another, would be an offence so punishable, having procured the other's consent by threats; but

(2) a person should not be guilty of the suggested offence if –

(a) in all the circumstances the threat is (or, perhaps, the defendant believes that it is) a proper way of inducing the other person to consent to the act in question; or

(b) the threat is to withhold a benefit which the other person could not reasonably expect to receive.[24]

6.28 Responses to this proposal were almost equally divided. It certainly raises difficult issues, comparable to those raised by the notoriously paradoxical offence of blackmail (which is equally open to some of the criticisms that were made of our proposal).

[22] See para 2.12 above.

[23] Sexual Offences Act 1956, ss 2(1) and 37(3), and Sched. 2, paras 7(a),(b) and 8; Criminal Justice and Public Order Act 1994 s 168(1), (3), Sched 9 para 2 and Sched 11.

[24] Para 6.89.

6.29 Moreover, the wider the category of threats that can negative consent, the less need there is for an offence of making threats which fall short of this category. In view of our recommendation at paragraph 6.25 above, it is only in the case of a threat of *non-serious* harm or detriment that the question of liability for a lesser offence might arise. We do not believe that the case for imposing criminal liability in such a case is made out. For the same reason, if our recommendation at paragraph 6.25 above were implemented there would in our view be no purpose in retaining the offence under section 2 of the Sexual Offences Act 1956. It is very rarely used, and, under our proposals, the few cases where it *is* used could almost certainly be charged as rape. **We do not recommend the creation of a general offence of procuring consent by threats, and we recommend the repeal of section 2 of the Sexual Offences Act 1956.**

THE MEANING OF "THREATS"

6.30 However, what we said in the second consultation paper about the *concept* of a threat is equally applicable to our recommendation on the invalidation of consent by threats. We were concerned that "coercive offers" ought not be caught by our proposals on threats, since, rather than threatening to worsen the other's position, they constitute an offer to improve it.[25] To this end we proposed that a person should not be guilty of the procuring offence if the threat is to withhold a benefit which the other person could not reasonably expect to receive. A difficulty with this approach is that something described as a threat may, on analysis, arguably be a coercive offer, so that the provision could create uncertainty.

6.31 Consider the Rhodesian case of *McCoy*,[26] where an air hostess, who had committed a disciplinary offence, agreed to accept a caning from the airline manager rather than undergo disciplinary action. The manager was subsequently convicted of assault, the court finding that the complainant's consent was not real because she did not give it freely and voluntarily.[27] We cited this case in the first consultation paper as an example of a threat, but now recognise that it may arguably be better described as a coercive offer.

6.32 We discussed further factors that might be relevant to the question of consent in relation to coercive offers, and asked whether it should make a difference, in the situation where an employee is denied a rise unless she sleeps with the employer, whether she had *earned* a rise. No respondents directly addressed this. Under our proposal, however, a threat to withhold a rise which the employee has *not* earned would arguably be a threat to withhold a benefit which she "could not reasonably expect to receive", and therefore insufficient.[28]

[25] A "carrot" rather than a "stick".

[26] 1953 (2) SA 4.

[27] 1953 (2) SA 4, 10H.

[28] Or suppose that B commits a disciplinary offence, and A (her boss) has a discretion as to whether or not he sacks her. He tells B that if she sleeps with him he will make sure things go her way. It is not known whether B would have been sacked if this offer had never been

6.33 We are not now persuaded that any definition of a threat which we might propose would be of substantial help in clarifying that concept. "Threat" is an ordinary word, and we think it can safely be left to a jury to decide whether what has been done can properly be so described. **We make no recommendation on this issue.**

made. B knows that if she refuses she will lose her job, so arguably the offer is more coercive than in the example in the text. If, however, it is regarded as a threat to withhold from B a benefit which she could not reasonably expect to receive – viz a favourable decision regarding her future employment – no offence would have been committed.

PART VII
BELIEF IN CONSENT: THE MENTAL ELEMENT

7.1 Once it is established that the act required for the commission of rape has occurred –that is, that the defendant has had sexual intercourse with a person who, at the time of the intercourse, did not, in fact, consent – the next question is whether the defendant had the necessary mental element for the commission of the offence.

THE PRESENT LAW

7.2 Statute presently defines the mental element as follows:

> … at the time he knows that the person does not consent to the intercourse or is reckless as to whether that person consents to it.[1]

7.3 The focus of the mental element of the crime of rape, therefore, is the defendant's state of knowledge of the absence of consent on the part of the victim. It is couched on two bases, namely (a) actual knowledge of absence of consent, and (b) recklessness as to absence of consent.

7.4 The courts have construed this provision as meaning that a defendant has a defence if, in fact, he believes that the other person consented, even though such belief was mistaken and even though he had no reasonable grounds for so believing.[2]

7.5 Whether the defendant did have, or may have had, such a belief is a matter of fact for the jury to decide on the evidence. The prosecution bears the burden of making the jury sure that there was no belief in consent.

7.6 Statute further provides, however, that if, at a trial for rape, the jury has to consider whether a man may have believed that a victim was consenting to sexual intercourse, the presence or absence of reasonable grounds for such a belief is a matter to which the jury is to have regard, in conjunction with any other relevant matters, in considering whether he so believed.[3]

7.7 On the question whether the defendant *knew* that the other person did not consent there is no difficulty. That is a question of fact for the jury to decide on the evidence.

[1] Sexual Offences Act 1956, s 1(2)(b).

[2] *DPP v Morgan* [1976] AC 182. The House of Lords has recently applied *Morgan* in *B (a Minor) v DPP* [2000] 2 WLR 452.

[3] Sexual Offences (Amendment) Act 1976, s 1(2).

7.8 On the question of *recklessness*, case law is that, in rape and other sex offences, the defendant is reckless if he does not have a belief that the other person is consenting, in circumstances in which he *either* knows there is a risk she does not consent *or* his attitude is one of indifference whether she consents or not. Thus it covers the situation where he knows that there is a risk that she does not consent and carries on regardless. It also appears to apply where the defendant has not specifically considered whether she consents, could not care less whether or not she is consenting, but presses on regardless.[4] To put it another way, if a jury is sure that the defendant was indifferent to the wishes and feelings of the victim, aptly described as "couldn't care less," then, in law, he is "reckless" for the purpose of sex offences.[5]

7.9 There may be a very narrow marginal area of theoretical uncertainty as to the precise reach of recklessness as thus described. On one view, the precise meaning of "indifferent" and "could not care less" denotes that some thought has been given to the issue. The question is whether it is possible to be indifferent to a possibility without being aware that that possibility exists. Thus the person who gave it no thought at all would not be reckless.[6] With due respect to this view, we think it is clear that a person may be unaware of a possibility precisely *because* he is indifferent to it. Furthermore, the wording of the judgment of the Lord Chief Justice in *Taylor* specifically equates the description of the person who gave no thought to the possibility that the victim was not consenting to the description in *Morgan*[7] of the person who was reckless as intending to have intercourse "willy-nilly, not caring whether the woman consented or not". We assume, therefore, that this, more coarse-grained, approach to the question represents the law and that, in terms of authority, there is no uncertainty.

7.10 Where a defendant does have, or may have, a genuine belief in consent but the jury is sure that it has been brought about as a consequence of voluntary intoxication, then that person is "reckless" for this purpose. The reasoning supporting this conclusion is that it follows from such a finding that the jury is sure that, but for the intoxication, the defendant would either have known or been aware of the risk that the victim did not consent. Voluntary intoxication cannot provide a defence where there would be none in the absence of intoxication. Thus, in those circumstances, the law is that the jury can be sure that the defendant has been reckless so as to convict on that basis.[8]

[4] *Taylor (Robert)* (1985) 80 Cr App R 327.

[5] *Kimber* (1983) 77 Cr App R 225 (a case of indecent assault), approved in *Satnam and Kewal* (1984) 78 Cr App R 149.

[6] Smith & Hogan, *Criminal Law* (9th ed 1999) p 460.

[7] At p 215.

[8] *Woods (W)* (1982) 74 Cr App R 312.

THE LAW COMMISSION CONSULTATION PAPERS

7.11 The first consultation paper concerned only non-sexual offences against the person. It briefly addressed the question of a mistaken belief in consent. It concluded that a person who believed that the other party was giving their consent should have the benefit of any defence of consent that there was in law. That involved judging the defendant on the facts as he believed them to be, even though mistaken.[9]

7.12 In the second consultation paper, which concerned consent in the criminal law generally, the issue was addressed in the sexual context as well as in relation to non-sexual offences against the person.[10] In particular, consideration was given to the question whether a positive belief that the victim was giving consent should be a defence in every case. The view was expressed that there was a respectable case for considering that even a positive belief in the woman's consent should not necessarily be a defence in every case. This was on the footing that the reasons for such a belief may be so illegitimate (for example that he was irresistible to women whatever they might say, and/or that women really mean "yes" when they say "no") that, as a matter of law, the person holding such views should be denied a defence to such a charge. On the other hand it was acknowledged that mere negligence – that is, failing to realise what a reasonable person would have realised – could not possibly suffice to found criminal liability for such a serious offence. The suggestion tentatively put forward was that it would have to be proved that the woman's lack of consent was not just perceptible to the reasonable man but *obvious*, and that the defendant himself was capable of understanding that she did not consent.

7.13 This analysis led to consideration of a possible gradation of offence between

(a) a person who had sexual intercourse *knowing* that the other did not or may not consent, thus overriding her lack of consent;

(b) a person who had sexual intercourse where he *ought* to have known that the other did not consent, where

(i) that want of knowledge was brought about by a failure to consider whether she was consenting (which we assume is rape on the basis of indifference) or

(ii) that want of knowledge was based on a wholly unreasonably held belief that she did consent (presently no offence at all).

7.14 The possibility was floated that insofar as category (b)(i) and/or (ii) might not amount to rape, they might constitute a new offence of "gross sexual invasion". Concern was expressed that this separate offence might involve the risk of juries opting to convict of the lesser offence where the facts really were of a rape, so weakening rather than strengthening the law. For that reason no proposal was

9 Para 20.2, and Question III.5.

10 Part VII.

made on that possibility. Rather it was suggested that any distinction between the categories of rape ought to be dealt with at the stage of sentence. Thus there was consultation on the question whether it should in itself be a defence to a sexual offence that, at the time of the act, the defendant believed that the other person consented to the act; or whether such a belief should be a defence only if, in addition, either (a) it would not have been obvious to a reasonable person in his position that the other person did not consent, or (b) he was not capable of appreciating that that person did not consent.[11]

7.15 The consultation on this subject brought forth no unanimity whatever but a deeply divided response. The main bodies of protagonists were, respectively, those who favoured a wholly subjective approach and those who favoured a more or less objective approach.

THE FATE OF *MORGAN* IN COMMON LAW JURISDICTIONS

7.16 The Criminal Law Revision Committee in its 15th Report in 1984 adopted the position in *Morgan* as refined by the 1976 Act. It did so on the basis that otherwise it would turn rape into an offence of negligence.

7.17 Our Code Report[12] adopted the CLRC recommendation on this issue without giving it separate consideration.

7.18 Some common law jurisdictions have adopted the subjective *Morgan* test. In Australia they are the common law states – Australian Capital Territory, Victoria, New South Wales and South Australia. In Victoria and New South Wales,[13] however, the jury, in deciding whether the belief was genuinely held, can take into account whether it was reasonable in all the circumstances.[14] Those states which adopted their own codes in the 1920s (Northern Territory, Tasmania, Queensland and Western Australia)[15] require the defendant's honest belief to be reasonable before it will exculpate him. The Model Criminal Code proposals favour retaining the subjective test of honest belief. In New Zealand, the effect of *Morgan* was reversed by statute, by opening the "honest belief" to an objective test of reasonableness.[16] In Canada the statute provides that the defendant can have a defence of honest but mistaken belief, but not where (a) his belief arises from (i) his self-induced intoxication, or (ii) his recklessness or wilful blindness, or (b) he did not take reasonable steps, in the circumstances known to him at the time, to ascertain that the complainant was consenting.[17] Case law has established

[11] Paras 7.31 – 7.32; consultation issues 9 and 10.

[12] (1989) Law Com No 177, vol 1, para 3.34.

[13] See Halsbury's Laws of Australia, para 130-2025.

[14] (Vic) Crimes Act 1958, s 37(c); *Saragozza* [1984] VR 187; *McEwan* [1979] 2 NSWLR 926.

[15] (NT) Criminal Code, s 32; (Qld) Criminal Code, s 24.

[16] Crimes Act 1961, s 128, as amended by Crimes Amendment Act (No 3) 1985, s 2.

[17] Canadian Criminal Code, s 273.2.

that, before the defence can be put to the jury, there must be an "air of reality" to the consent; the totality of the evidence must be reasonably and realistically capable of supporting the defence. This is not, strictly speaking, a requirement that there be corroboration, but the evidence must amount to more than a bare assertion; there must be some support for it in the circumstances.[18]

THE ARGUMENTS FOR AND AGAINST A SUBJECTIVE TEST

7.19 We set out below the thrust of the main lines of argument which arose in response to our second consultation paper, and which the Home Office have identified in their work thus far on their Review of Sex Offences.

Arguments in support of an objective element

7.20 Arguments in favour of a more objective test include the following:

(1) Belief in consent is an easy defence to raise but hard to disprove.

(2) It encourages defences to be run which pander to outmoded and offensive assumptions about the nature of sexual relationships. The more stupid and sexist the man and his attitudes, the better chance he has of being acquitted on this basis.

(3) The damage is done to the woman by the act of rape. She is entitled to expect the protection of the criminal law where, on any view, the man has acted on an unreasonably held assumption about her consent.

(4) The mistaken belief arises in a situation where the price of the man's (gross) neglect is very high, and paid by the woman, whereas the cost to him in time and effort of informing himself of the true position is minimal by comparison.

(5) Under new provisions in section 41 of the Youth Justice and Criminal Evidence Act 1999, a complainant will be substantially better protected from intrusive cross-examination where the issue is *actual* consent (that is, whether she is lying when she says she did not consent) than where the issue is *belief* in consent (where it may be conceded that her evidence is truthful). The complainant ought not to have less protection from such cross-examination merely because the defendant runs a defence of honest but unreasonable mistake in tandem with a defence of actual consent. Therefore the retention of the defence of honest but unreasonable mistake would serve to undermine this enhanced protection for the witness.

Arguments in favour of retention of the subjective test

7.21 Arguments in favour of retention of the subjective test include the following:

[18] *Park* [1995] 2 SCR 836.

(1) A person should not be guilty of a serious criminal offence on the basis of strict liability or on the basis of negligence. Liability at this level of seriousness should be based only on intent or recklessness.

(2) The burden is on those who argue for a change to an objective basis to demonstrate that persons are being inappropriately acquitted by running a bogus "unreasonable belief" defence. No such evidence has been produced. It appears that *Morgan* is not, in practice, a problem.

(3) If the availability of the defence is based in law on "reasonableness", then whose reasonableness is being applied? Is it that of the defendant, the members of the jury, the person on the Clapham omnibus? The concept of "reasonableness" has been the source of endless, and continuing, difficulty in relation to provocation in homicide. Many cases in which provocation is raised occupy the same type of contested space as is occupied by rape, namely intimate relations between the genders in extremis. There is no reason, therefore, to suppose that the same difficulties would not be encountered if the same concept were introduced in this context. Any proposal to reform the law should not lightly be made which carries the risk of making it more complex and unpredictable.

(4) This difficulty would be even more pronounced if, instead of a test of reasonableness, the test were to be one akin to "gross negligence", as a further level of complexity would be involved.

(5) A modern jury, properly directed on the question whether the person did or did not have such a belief, will be well able to root out the true from the bogus defence of belief in consent. Anyway it is seldom, if ever, that a defendant would put forward a defence that he had such a belief for which he acknowledged there were no reasonable grounds.

(6) The rate of conviction for rape is already alarmingly low. Juries appear already to be uncomfortable in convicting men of a very serious offence in circumstances which appear to them to be ambiguous. If there were a rule of law that, however honest a belief, the jury had no option but to convict in the absence of reasonable grounds for it, a perception of unfairness might arise, which might result in fewer convictions than were the jury left themselves to judge whether an assertion of belief is genuine or just a fanciful story unworthy of belief.

OUR VIEW ON THIS ISSUE

7.22 There are very strong arguments either way on principle. In addressing this question we assume that there is not going to be any structural change to the offence of rape – that is, we assume that there will not be any lesser alternative offence such as was posited in the second consultation paper.

Our views on the arguments for an objective element

7.23 Of the arguments in favour of an objective approach, 1, 2, and 5 rely for their force on the assumption that this is a defence which is likely to succeed even in

the absence of reasonable grounds for the belief. In turn this assumes that juries have been susceptible to persuasion by this defence. We are unaware of any evidence which suggests that this is the case. If it is felt that the present law tends to result in juries not being pointed sufficiently clearly in the right direction, then the 1976 Act could be amended by adding to the matters to which the jury is to have regard in assessing whether the defence is true or bogus.

7.24 Argument 5 could be met by amending section 42(1)(b) of the 1999 Act, which gives a complainant greater protection where the issue is *actual* consent than where it is *belief* in consent. In any event, its impact depends upon the assumption that defence counsel habitually seek to question complainants about their sexual history. The experience of the bench, certainly as expressed informally at seminars on serious sex offences, is that these days no competent defence counsel would dream of alienating the jury by seeking to ask offensive and intrusive questions about the complainant's previous sexual history. It is simply not worth the candle.

7.25 Arguments 3 and 4 raise fundamental matters of principle concerning the balance between the interests of the person who has suffered the act of rape and the person who is at risk of being held criminally responsible for it. In effect, the argument is that the balance of interests between the victim and the defendant should be in favour of the defendant being held criminally responsible for the rape of the victim where his belief in her consent is held (grossly) negligently. This is because the wrong that he does the victim is so severe, by comparison with the inconvenience to him of taking the measures which would enable him to avoid the wrong, that he should be held criminally liable for his act. Thus, her legitimate demand for retribution outweighs any injustice of visiting upon him an extremely severe penalty for his negligence. We can see that there is great merit in this as a purely theoretical argument. Its force in the real world, however, ultimately must depend on the actual incidence of acquittals of rape where the defence is of honest but unreasonable belief. There is no evidence whatsoever that it is a significant number. In the case of *Morgan* itself, the appeal was dismissed despite the erroneous direction to the jury pursuant to the then "proviso".

Our views on the arguments for a subjective test

7.26 On the "subjective" side of the argument, arguments 3 and 4 raise important practical questions on the efficacy of a reform which itself may cause confusion and legal difficulty. The evidence of such difficulty in the case of provocation is considerable. Before recommending a reform which ran the risk of similar difficulty we would need to be satisfied that such reform was necessary to overcome a present and serious deficiency in the present law as applied in the courts. There is no evidence to that effect of which we are aware.

7.27 Argument 5 is really the mirror image of "objective" arguments 1, 2 and 5. The question in issue is the ability of the jury properly to assess the truth, or otherwise, of the assertion of belief in consent in the absence of any, or any good, reason for it.

7.28 Arguments 1, 2 and 6 address the same argument of principle which informs arguments 3 and 4 on the other side, namely where the criminal law should hold the balance between the competing interests of, respectively: the victim who has suffered the act of rape; and the defendant who, though he has performed the act, did believe, though without good reason, that he was not committing that act.

Our reasoning

7.29 The question of principle where the balance ought to be held is not a matter of law reform but of jurisprudential principle applied to a highly contentious area of social relations and political debate. It is, therefore, not a question upon which it would be appropriate for us to express a view. These are matters, ultimately, for consideration on a much wider political and social stage.

7.30 It is, however, proper for us to express a view on the question of reform of the law from a practical standpoint.

7.31 First, it seems to us that, from a practical point of view, if there is to be a departure from the general rule that liability for a serious crime should be based on intention or recklessness but not (gross) negligence, then the burden should be on those seeking to depart from that rule to show that the application of the standard rule is failing to deliver the convictions of those who ought to be convicted. There is no such evidence.

7.32 Second, the Home Office review of sex offences is taking place against the background of an apparently unacceptably low rate of conviction for, inter alia, rape. If it be the case that persons are being wrongly acquitted, then it must be that juries are already declining to convict on the evidence placed before them. There is no research evidence on what influences juries to acquit those who may in fact be guilty of the offence. It may well be, however, that juries would react against being told what to do, but nonetheless welcome being assisted by appropriate and measured directions on how to approach their task whilst being left to perform their proper role. We suspect that a change in the law which, in effect, requires a judge to say to the jury:

> You have no choice: you must convict this defendant of rape even if you believe him when he tells you that he thought she was consenting because he was too stupid or boorish to recognise that there were no reasonable grounds to form such a view

might enhance the risk of perverse acquittals.

7.33 The present law already makes provision, in the 1976 Act, for the jury to be given assistance in assessing the truthfulness or otherwise of the assertion of belief in consent. The judge directs them to have regard to the presence or absence of reasonable grounds for such a belief. In our opinion this provision could be usefully expanded so as to give the jury more pointed assistance. Other matters which might assist focus the minds of the jury on whether the defendant may have held an honest belief in the victim's consent and, if so, whether it gives him a defence to the charge of rape, are whether the defendant availed himself of any

opportunity to ascertain whether the victim consented, and whether his asserted belief in consent was caused solely by reason of his voluntarily intoxicated state whether through drink or drugs.

CONCLUSIONS

7.34 In our view, the mental element of rape as presently developed in statute and the case law correctly identifies the essence of the offence, which is the act of sexual intercourse with someone who does not consent in circumstances where there is an absence of belief in consent.

7.35 That absence of belief is correctly identified as manifest by: knowledge of lack of consent; knowledge of the risk of lack of consent; and indifference to the absence of consent.

7.36 The last two instances are correctly named as recklessness. The law correctly identifies as recklessness circumstances where the sole reason for the belief in consent is the voluntary intoxication of the defendant.

7.37 The propositions set out in paragraphs 7.34 – 7.36 above are established by statute and case law. It would be useful for the systematic development of the law for each of these matters to be put in statutory form. Accordingly we so recommend.

7.38 A defendant who, in fact, has a belief in consent has a defence to rape, even where there is no reasonable basis for such belief, save where the sole reason for the belief is his state of voluntary intoxication.

7.39 The jury is, presently, given some assistance in deciding upon this defence in the form of a direction that they are to have regard to the presence or absence of reasonable grounds for such asserted belief.

7.40 It has been suggested that a defendant should only have a defence to rape if his belief in the victim's consent is based on reasonable grounds. This raises the issue where society should hold the balance between the interests of the victim of sexual intercourse without her consent and the man's criminal liability for that act where he did believe that she was consenting. This is not a debate upon which it is appropriate for this Commission to have a view.

7.41 The law, as stated in paragraphs 7.34 – 7.39 above, accords with the principles upon which criminal liability for serious crimes has habitually been fixed in England and Wales ("the Golden Thread").

7.42 Where it is sought to derogate from this principle and to seek to establish criminal liability for rape on some or other degree of negligence, our view, as a principle of law reform, is that it must be demonstrated by the proponents of such a departure that it is necessary to remove a serious shortcoming in the way the law is applied in the courts.

7.43 There is no such evidence. Accordingly, on that ground, we do not support that proposed change.

7.44 **We recommend that the present law, designed to assist juries decide whether they believe the defendant's asserted belief in consent may be true, and if so whether it gives him a defence, should be strengthened by adding to the 1976 Act a provision requiring judges to give additional directions. Those directions would be**

(1) that the jury should, in addressing these issues, have regard to whether the defendant availed himself of any opportunity to ascertain whether the victim consented; and

(2) that, if his asserted belief in consent was caused solely by reason of his voluntarily intoxicated state, whether through drink or drugs, then his failure to appreciate that she might not consent is no defence.

PART VIII
SUMMARY OF RECOMMENDATIONS

The definition of consent

1. We recommend that, for the purpose of any non-consensual sexual offence,

    (1) "consent" should be defined as a subsisting, free and genuine agreement to the act in question; but

    (2) the definition should make it clear that such agreement may be

        (a) express or implied, and

        (b) evidenced by words or conduct, whether present or past.[1]

The burden of proof

2. We recommend that, for the purposes of any non-consensual sexual offence, the prosecution should bear the burden of proving the absence of consent, to the criminal standard of proof.[2]

Capacity to consent: general

3. We recommend that, for the purposes of any non-consensual sexual offence, a valid consent may be given only by a person who has capacity to give it.[3]

Minors

4. We recommend that

    (1) for the purposes of any non-consensual sexual offence, a person under the age of 16 should be regarded as having the capacity to consent to an act only if he or she is capable of understanding

        (a) the nature and reasonably foreseeable consequences of the act, and

        (b) the implications of the act and of its reasonably foreseeable consequences;[4] and

    (2) there should be an age limit below which there is an irrebuttable presumption that a child does not have the capacity to consent to sexual intercourse for the purposes of a charge of rape. This limit should be set at an age below which virtually no child would in fact be capable of consenting to sexual intercourse.[5]

[1] Para 2.8 above.

[2] Para 2.15 above.

[3] Para 3.3 above.

[4] Para 3.16 above.

[5] Para 3.21 above.

Mental incapacity

5. We recommend that, for the purposes of any non-consensual sexual offence,

   (1) a person should be regarded as lacking capacity to consent to an act if at the material time

      (a) he or she is unable by reason of mental disability to make a decision for himself or herself on whether to consent to the act; or

      (b) he or she is unable to communicate his or her decision on that matter because he or she is unconscious or for any other reason;[6]

   (2) a person should be regarded as being unable to make a decision on whether to consent to an act if

      (a) he or she is unable to understand

         (i) the nature and reasonably foreseeable consequences of the act, and

         (ii) the implications of the act and its reasonably foreseeable consequences; or

      (b) being able so to understand, he or she is nonetheless unable to make such a decision; and

   (3) "mental disability" should mean a disability or disorder of the mind or brain, whether permanent or temporary, which results in an impairment or disturbance of mental functioning.[7]

Deception and mistake

"GENUINE" AGREEMENT

6. We recommend that, for the purposes of our recommendation that only a "subsisting, free and genuine agreement" should count as consent to a sexual act by another,[8] an apparent agreement to such an act

   (1) should not be regarded as "genuine" if it is obtained by a deception as to the other's identity (which, where appropriate, may include or consist in the possession of a professional qualification or other authority to do the act) or the nature of the act; but

   (2) may be so regarded despite being given under the impression that the other is male whereas the other is in fact female, or vice versa, where the other has undergone sex-reassignment surgery.[9]

[6] Para 4.44 above.

[7] Para 4.84 above.

[8] See para 1 above.

[9] Para 5.35 above.

OBTAINING CONSENT TO PENETRATION BY DECEPTION

7. We recommend that section 3 of the Sexual Offences Act 1956 should be extended, so that it would be an offence *not only* for a man to procure sexual intercourse with a woman by deception *but also* for

   (1) any person to penetrate another's anus or genitalia with any part of the body or any object, or

   (2) a man to penetrate another's mouth with his penis,

   having obtained the other's consent to such penetration by deception.[10]

MISTAKE WITHOUT DECEPTION

8. We recommend that, for the purposes of our recommended definition of "genuine agreement"[11] (but *not* our recommendation for a separate offence of obtaining consent to penetration by deception),[12] a person's apparent agreement to a sexual act by another should be regarded as having been obtained by a deception as to a particular matter if the other is aware that it has or may have been given under a mistake as to that matter.

Threats

"FREE" AGREEMENT

9. We recommend that, for the purposes of our recommendation that only a "subsisting, free and genuine agreement" should count as consent to a sexual act,[13] a person's apparent agreement to such an act should not be regarded as "free" if it would not have been given but for a threat, express or implied,

   (1) to use non-consensual force against that person or another, or

   (2) to cause serious harm or detriment to that person or another.[14]

PROCURING CONSENT BY THREATS

10. We do not recommend the creation of a general offence of procuring consent by threats, and we recommend the repeal of section 2 of the Sexual Offences Act 1956.[15]

Belief in consent: the mental element

11. We recommend that the present law, designed to assist juries decide whether they believe the defendant's asserted belief in consent may be true, and if so whether it gives him a defence, should be strengthened by adding to the 1976 Act a

[10] Para 5.46 above.

[11] See para 6 above.

[12] See para 7 above.

[13] See para 1 above.

[14] Para 6.25 above.

[15] Para 6.29 above.

provision requiring judges to give additional directions. Those directions would be

(1) that the jury should, in addressing these issues, have regard to whether the defendant availed himself of any opportunity to ascertain whether the victim consented; and

(2) that, if his asserted belief in consent was caused solely by reason of his voluntarily intoxicated state, whether through drink or drugs, then his failure to appreciate that she might not consent is no defence.[16]

[16] Para 7.44 above.