



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-established¹⁰ as cases in which consent to 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

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.

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.



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 “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.

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.

²⁰ (1957) 98 CLR 249, 261.

²¹ [1998] 2 Cr App R 200.

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 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 man²⁴ is guilty not merely of the lesser offence but of rape.

5.12 Secondly, there is no offence²⁵ 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 offence²⁷ 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.

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.”

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.



Should a consent procured by deception be wholly disregarded?

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

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 Canada³² 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 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

²⁸ (1989) Law Com No 177.

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.

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.

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 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.

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

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



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.**

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.

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.

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.

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.

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

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 negating the other’s consent altogether?

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.

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.

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

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, 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.

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.

⁵³ See para 5.25 above.



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 negating 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

(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

⁵⁴ (1957) 98 CLR 249, 260.

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 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.**

⁵⁵ [1998] 2 Cr App R 200, 206.

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 “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

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.

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.

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 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 negating 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

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).

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.



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 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

¹⁴ [1982] QB 320.

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.

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 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 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.

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).

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).

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.**

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.



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

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.**

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 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.

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

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).

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.



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

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.

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

⁷ At p 215.

⁸ *Woods (W)* (1982) 74 Cr App R 312.

⁹ Para 20.2, and Question III.5.

¹⁰ Part VII.

- 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 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 Report¹² 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

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.



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 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.

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

¹⁷ Canadian Criminal Code, s 273.2.

¹⁸ *Park* [1995] 2 SCR 836.

Arguments in favour of retention of the subjective test

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

- (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

Mental incapacity

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

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.



- (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

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

⁶ Para 4.44 above.

⁷ Para 4.84 above.

⁸ See para 1 above.

⁹ Para 5.35 above.

- (2) a man to penetrate another’s mouth with his penis,
- (3) having obtained the other’s consent to such penetration by deception.¹⁰

Mistake without deception

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

8. 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

9. 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

10. 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.¹⁶

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.

¹⁶ Para 7.44 above.

